IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0155

TRIPLE 7 COMMODITIES, INC.,

Petitioner,

v.

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

Respondents.

TRIPLE 7 COMMODITIES, INC.'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The Respondents' rebuttal arguments are not supported by fact, law or logic. First, it must be noted that almost all of the Respondents' sixteen-page Statement of the Case is comprised of purported facts that are either incorrect, not in the Appendix, not cited to the Appendix, or self-serving opinions of counsel disguised as expert testimony. This Court should take notice of just how little of Respondents' Statement of the Case is actually supported by citation to the Appendix.

Substantively, Respondents admit they breached the settlement agreement first, but they otherwise fail to address the majority of Triple 7's arguments regarding the "materiality" of that breach. Instead, Respondents rely upon the circular argument that their breach was not material because it was insignificant or of little consequence. In other words, the breach was not material because it was immaterial. Respondents likewise rely on this same argument in trying to oppose the unconscionability of the settlement agreement and extensions, while ignoring evidence that dispels their positions. Finally, Respondents offer no significant rebuttal to the improper dismissal of Triple 7's counterclaims. Respondents simply state that they do not understand the argument while overlooking the fact that the dismissal of those counterclaims was contingent on the unfulfilled condition precedent of the settlement amount being paid in full.

ARGUMENT

I. Respondents' Statement of the Case relies on allegations that are not in record, arguments that already have been refuted by uncontroverted testimony, and their own unsupported opinions on matters that would be expert testimony. Accordingly, the Court should disregard the bulk of Respondents' Statement of the Case.

Triple 7 typically would not spend the Court's time to address a Statement of the Case in a reply brief. However, it feels compelled to do so in this appeal. The Statement of the Case in

Respondents' response brief represents as established facts (1) allegations that do not appear anywhere in the record, (2) arguments that already have been refuted by the uncontroverted testimony of Triple 7, and (3) their own unsupported opinions on matters that would be expert testimony. Triple 7 is concerned that it must address these issues lest the Court be misled into believing as facts things that are not so.[1]

When preparing their briefs for this Court, the parties are not permitted to state whatever alleged "facts" they want in order to support their arguments. Rule 10 of the West Virginia Rules of Appellate Procedure governs the parties' briefs and the contents thereof. Rule 10(d) prescribes "[t]he respondent's brief must conform to the requirements of subsection (c) of this Rule [setting forth the requirements for "Petitioner's brief"], except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission

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[1]In addition to those issues, Respondents' response brief confirms Triple 7's position that their many representations to the trial court that the "specific terms" of the Joint Venture Agreement "as expressed in the four corners of the document" require them to be listed as a co-grantee on the deed for the property at issue are, in fact, misrepresentations. Respondents repeatedly represented to the trial court that the express terms of the Joint Venture Agreement required them to be listed as co-grantees on that deed. There, they represented that their right to be co-grantees was found in "the terms of the Joint Venture Agreement as expressed within the four corners of the document," (R. 70), and "it was expressly stated in paragraph no. 3 and other portions of the JVA." (*Id.*) In other documents, they represented that the Joint Venture Agreement "states, plainly, in paragraph no. 3 that the purpose of the JVA is to mutually acquire the Wellston Coal property and other properties." (R. 69.) Indeed, this representation even appears in their Complaint, as they allege that a transfer of that property to only Triple 7 was "in contravention to the terms of the said JVA," and a "breach of the terms of the Joint Venture Agreement." (R. 3.) Likewise, they carry this representation into their Amended Complaint, when they allege their right to be listed as a co-grantee is found in "the terms of [the] Joint Venture Agreement," (R. 21), and Triple 7 being listed as the only co-grantee was "in contravention to the terms of the said JVA." (R. 23.) Thus, they ask the trial court to execute a deed listing them as co-grantees "in specific performance of the terms of the JVA." (R. 24.)

Their response brief finally admits that "it is true the JVA [Joint Venture Agreement] did not have specific language stating that High Country's name would appear on any deed to the Wellston property . . . ." (Resp. p. 5.) This admission, which has been Triple 7's position all along, goes to the heart of Respondents' claims and the last 2 ½ years of litigation. Knowing they cannot maintain otherwise, Respondents attempt to salvage their misrepresentations by claiming that nonetheless "the plain meaning of paragraph no. 3 [of the Joint Venture Agreement] was that the property be acquired and held jointly." (*Id.*) The point can no longer be avoided. Respondents repeatedly represented that the "specific terms" of the Joint Venture Agreement "as expressed in the four corners of the document" provided them the right to be listed as co-grantees. Now, they admit those representations were false. This Court should reverse and remand the order appealed from with the direction that the trial court and parties address the Respondents' claims and Triple 7's counterclaims with the understanding that the Joint Venture Agreement does not contain any term that requires Respondents to be listed as co-grantees on any deed.

in the petitioner's brief, ..." Thus, Respondents' brief must conform to Rule 10(c). In particular, if Respondents want to include a section on the Statement of the Case, they must comply with Rule 10(c)(4), which provides:

> Statement of the Case. ***Supported by appropriate and specific references to the appendix or designated record***, the statement of the case must contain a concise account of the procedural history of the case and statement of the facts of the case that are relevant to the assignments of error.

(emphasis added.); see also Rule 10, cmt. ("Briefs must carefully cite to the record.").

Respondents' response brief falls to follow this mandate. Respondents' Statement of the Case in their brief is comprised of 16 pages, from pages 2 through 17, filled with the alleged facts on which their positions rely. However, the vast majority of the statements made in those 16 pages have no reference to the appendix. Half of the pages contain no citation at all, and another six contain merely one citation.

Respondents compound this problem by relying on those unsupported statements throughout their brief, as if they were established facts, in arguing that, among other things, Triple 7 acted in bad faith, Triple 7 tried to defraud lenders, Triple 7 was able to borrow millions of dollars with the lis pendens on record, and Respondents should be excused for failing to perform their only obligation in the Settlement Agreement.

A. Many of Respondents' alleged "facts" are not evidence that is supported by the appendix record for this appeal or have already been refuted by Triple 7's uncontroverted testimony.

Respondents' failure to include specific references to the appendix record is more than just a citation error. Many of the statements Respondents make do not appear in the appendix, appear only in an argument of counsel, or have been refuted by Triple 7's testimony. In the interests of brevity, Triple 7 will not list them all here. However, the most egregious examples are:

Respondents' Claim	*Actual Evidence*
"In reality the [Joint Venture Agreement between] probably required the parties to own the minerals and mining permits equally on a 50%/50% basis." (Resp. 4.)	This allegation is not in the record and is actually contradicted by the Joint Venture Agreement that is included in the record. (R. 5-8.)
"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 [Joint Venture Agreement]." (Resp. 5.)	There is only one e-mail, sent by Triple 7, in the appendix record (R. 325), and it does not address any negotiations or interactions leading up to the execution of the Joint Venture Agreement.
Respondents claim throughout their Response that the Settlement Agreement was prepared entirely by Triple 7's counsel, hoping that it will be construed against Triple 7. (*See, e.g.*, Resp. 5.)	The parties agreed in the Settlement Agreement that "[t]his Agreement is the jointly drafted product of arms-length negotiations between the Parties with the benefit of advice from counsel, and the Parties agree that it shall be so construed. As such, none of the Parties will claim that any ambiguity in this Agreement shall be construed against any of the other Parties." (R. 338.)
"Counsel for Triple 7 also telephoned counsel for High Country the same day [Triple 7 learned Respondents failed to release the Notice of Lis Pendens] 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 the 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." (Resp. 7.)	Some of these statements do not appear in the appendix record in any way. The ones that do appear (on R. 538 and 566) are not evidence. Rather, they merely appear in Respondents' counsel's argument during a trial court hearing about what he believes the facts to be in this case. A copy of the transcript of that hearing is included in the appendix record. However, there was no evidence produced to the trial court to establish these allegations as facts.
Respondents' Statement of the Case and their arguments throughout their response brief make much of the fact that they recorded a Notice of Release of Lis Pendens. (*See* Resp. pp. 7-8 for examples.) These	The ellipsis appeared in Respondents' response brief, and in this instance it is critical and possibly misleading. The part of the Release that Respondents hid with the ellipsis reads:

efforts culminate in their quoting for the Court part of the Release. They quote: "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 . . ." (Resp. at pp. 12-13.)	"the parties to said civil action having agreed to a settlement of all issues between them to their mutual satisfaction, ***said settlement having now been partially paid.***" (R. 324 (emphasis added).) The uncontroverted evidence in this case is that the Release that Respondents tout did not remedy any cloud on the title to the property, cure any breach, or enable Triple 7 to attempt to perform under the settlement. Mr. Caldwell testified at deposition in response to Respondents' counsel's questioning: Q. Have lenders, since the filing of that Exhibit 1 [the Release of Notice of Lis Pendens], expressed concern about lending you money? A. Yes. I had two different brokers tell me that this [the Release of Notice of Lis Pendens] was an unclear document, that it did not, totally, spell out what it meant to be released from the first document, the lis pendens that was on there. Q. And so is it -- A. Ambiguous was the word used. Q. So since July of 2019, you've attempted to obtain financing, and lenders were unwilling to provide you financing, because of that release, in Exhibit 1, was insufficient. Is that correct? A. Yes. (R. 395-96.) Mr. Caldwell's testimony (which is undisputed) was so clear for Respondents that they promptly recorded a new release. (R. 377 and R. 408.)
Respondents' response brief asks the	Mr. Caldwell already refuted this allegation

rhetorical 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" (Resp. p. 10) and then goes on to rely heavily on multiple accusations that Triple 7 was misrepresenting this to potential lenders and the courts. (Resp. pp. 10-12.)	during his deposition. He explained at length that he believed Respondents had fulfilled their obligation to release the Notice of Lis Pendens. Accordingly, he represented to potential lenders that Triple 7 owned the property at issue clear of any restriction on the title. (R. 221 and 396.) After he made that representation, he was made to look like a liar when lenders discovered that there was a Notice of Lis Pendens on record covering the property at issue. (*Id.*)
Respondents' response brief alleges that every time the parties entered into an agreement to extend the Settlement Agreement, "[m]ore time was always requested by Triple 7 with greater sums offered as inducement." (Resp. p. 16.) In fact, Respondents rely on this allegation multiple times throughout their response brief.	This allegation should not be represented to the Court as fact because it is disputed. Triple 7 has consistently maintained that it was not the party making offers of increased settlement payments. Mr. Caldwell testified "I didn't make offers. I responded to demands, and I made counteroffers in an attempt to have amicable resolution. I've never offered anything." (R. 237.) Respondents' counsel apparently was not content with that testimony and tried to get Mr. Caldwell to change it. But, he would not, making clear that any offer he made was "Again, I was responding to a request." (*Id.*) Respondents want this Court to believe that Triple 7 came up with the grossly inflated settlement payments as part of their argument to escape any finding of unconscionability. That fact is just not true.
"Mr. Caldwell [Triple 7's CEO] 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***." (Resp. 21. (emphasis added).) Later, Plaintiff's response brief similarly states "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***." (Resp. 22 (emphasis added).) Similarly, the response brief represents that "Mr. Caldwell had also been able to borrow $4,000,000 ***in spite of***	Respondents' repeat this representation because it is central to their argument that they should be excused for failing to perform under the Settlement Agreement. This representation is not true. Mr. Caldwell made clear during deposition that it is incorrect to say Triple 7 borrowed $4,000,000 during any specific period of time, (R. 245-47), such as after the Notice of Lis Pendens was on public record. In fact, this point was highlighted because an argument ensued between counsel during that deposition as a result of Plaintiff's counsel's

the Notice of Lis Pendens." (Resp. 24 (emphasis added).)	attempts to characterize the $4,000,000 as being borrowed during any particular time period. (*Id.*) In the end, Mr. Caldwell made the matter clear when he testified to two points. First, he testified "I have not borrowed $4 million since December '18." (R. 247.) (The parties were discussing December 2018 because it was the month in which the Settlement Agreement was signed.) Second, he testified that the $4,000,000 figure to which Plaintiff's counsel referred "is an aggregate total of what has been borrowed over time . . . ." There was no evidence that any or all of this money was borrowed during any particular period of time much less any evidence that would establish the representation Respondents are making to this Court that the funds were borrowed after they recorded their Notice of Lis Pendens.

B. Respondents' attempts to provide their own unsupported opinions on matters that would be expert testimony should be disregarded by the Court.

In another attempt to be untethered to the appellate rules and the appendix record, Respondents' Statement of the Case includes as if they were facts their thoughts on matters that are the territory of expert testimony. Respondents had the opportunity to disclose experts and offer their testimony. They chose not to do so.

Now, Respondents' response brief improperly seeks to offer their own unsupported expert opinions on the following, and other, issues:

> 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. (Resp. 10.)
>
> Triple 7 had an obligation to inform any potential lender of the lawsuit, which has not been dismissed, and the tremendous risk of ownership of the asset upon failure to make payment to High Country. (Resp. 10-11.)

> Most private lenders/investors require oversight of 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. (Resp. 11.)
>
> 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. (Resp. 11.)
>
> A notice of lis pendens cannot be partially released, but a mortgage lien can. (Resp. 13.)
>
> Coal mines are notoriously high risk investments. (Resp. 13 and 21.)

These statements are expert opinions. Respondents did not disclose or offer any evidence from any expert in this case. They cannot now state their own expert opinions and act as if they are established facts.

C. The Court should disregard any allegation in Respondents' response brief that does not contain an appropriate and specific reference to evidence in the appendix record.

Respondents' Statement of the Case purports to be 16 pages of established facts. However, as shown above, Respondents fail to refer to appropriate and specific references to the appendix record for those alleged facts. The reason for this is simple: many of those "facts" do not appear in the record, many have already been refuted by the uncontroverted testimony of Triple 7, many are merely Respondents' counsel's argument without any evidence, and many are Respondents' improper attempts to offer their own expert opinions on what they believe the facts are. In light of the above issues, Triple 7 asks this Court to disregard any alleged factual statement in Respondents' response brief that is unsupported by a specific reference to evidence in the appendix record as required by Rule 10(c)(4).

II. Respondents were the First Party to Materially Breach the Settlement Agreement.

The primary issue before this Court is whether Triple 7 can rely upon the first-breach doctrine to relieve it of its obligation to perform under the settlement agreement. While Respondents deny that the first-breach doctrine applies in this case, they do make several admissions that are important in narrowing the scope of this issue. First, Respondents agree that West Virginia has adopted the first-breach doctrine (Resp. 19). Respondents also acknowledge that "a party who commits the first breach of a contract is not entitled to enforce the contract." (Resp. 20). Respondents do not dispute that they breached the Settlement Agreement by failing to release the lis pendens within 15 days. Finally, Respondents do not even dispute that they breached the Settlement Agreement first by failing to timely release the lis pendens. The only dispute between Triple 7 and Respondents is whether their first breach of the Settlement Agreement was "material" pursuant to the five factors set forth in §241 of the Restatement (Second) of Contracts.[2] Because Respondents' breach of the Settlement Agreement was material, the first-breach doctrine applies, and Triple 7 was relieved of any further performance under the Settlement Agreement.

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

In its initial brief, Triple 7 identified two errors that the trial court committed when considering this factor. First, Triple 7 argued that the trial court committed reversible error by using the improper standard in determining the extent to which it was deprived of the benefit it expected. Instead of utilizing the "significantly deprived" standard as suggested by the Restatement, the trial court determined that the breach was not material because Triple 7 was not "completely denied" the benefit that it expected. Respondents failed to address this issue at all in

[2] Respondents incorrectly assert that Triple 7 has abandoned its argument that they also breached the Settlement Agreement by trespassing upon the property and by disparaging Triple 7. Triple 7 has not abandoned that argument and maintains that the trial court erred in finding that the additional breaches did not occur.

their Response, and accordingly, Triple 7's argument that the trial court committed reversible error by utilizing the wrong standard is not disputed by Respondents.

The second error identified by Triple 7 was that the trial court ignored the specific benefit Triple 7 negotiated and expected (the release of the lis pendens), and instead, substituted it with a generic benefit applicable to all settlement agreements (Triple 7 wanted the case settled). Again, Respondents failed to specifically address this argument, as there is no discussion at all in their Response regarding the substitution of expected benefits by the trial court.

More importantly, Respondents ***admit*** that they did not release the lis pendens within 15 days. This is critical because the timely release of the lis pendens was the ***only*** affirmative action required of them under the Settlement Agreement. In other words, the timely release of the lis pendens was the ***only*** specific benefit to which Triple 7 was entitled, and it was deprived this benefit. Thus, the analysis of this factor ends here, and it ends in Triple 7's favor.

B. Triple 7's Ability to be Adequately Compensated.

Triple 7 argued in its initial brief that this factor relates to the type of harm incurred and whether its injuries can be remedied purely by compensatory damages. It further argued that, while it could be compensated for the additional $300,000 that it paid Respondents over and above the initial settlement amount, it could not be adequately compensated for its loss of the 51% interest in the property. The reason this is true is because property is considered unique under West Virginia law, and as such, the equitable remedy of specific performance is required instead of the legal remedy of monetary compensation. *Allegheny Country Farms, Inc. v. Huffman,* 237 W. Va. 355, 787 S.E.2d 626 (2016). Respondents did not address this issue, but instead, argued that Triple 7 was not entitled to monetary damages because of a lack of proof connecting the timely release of the lis pendens to its failure to obtain funding. Respondents'

argument misses the mark because "causation" is not part of the analysis of this factor. The question is, assuming causation has been proven, can Triple 7 be made whole purely by compensatory damages. Since it argues that it cannot be made whole purely by compensatory damages and because Respondents failed to address this factor on the merits, this factor weighs in favor of Triple 7.

C. The extent to which Respondents will suffer forfeiture.

Respondents misinterpret this factor. In their Response, they argue that if this Court applies the first-breach doctrine that they will forfeit a 51% interest in the property. This is incorrect because Respondents cannot forfeit something they were never entitled to receive in the first place. This factor does not relate to the trial court's ultimate award, but actually relates to actions taken by Respondents pursuant to the Settlement Agreement ***after*** their initial breach. For example, assume that the Settlement Agreement placed the additional requirement on Respondents of paying Triple 7's legal fees within 30 days of execution of the Settlement Agreement. Further, assume that after breaching the Settlement Agreement by failing to timely release the lis pendens, Respondents actually paid a significant amount to cover Triple 7's legal fees. It is this payment of legal fees that would be forfeited by Respondents upon an application of the first-breach doctrine. The purpose of this factor is to protect those who are guilty of the first breach from being punished twice. The first punishment is the inability to enforce the contract as a result of their breach. The second punishment would be forfeiting any specific performance made by the breaching party after their initial breach. This factor does not apply in this instance because Respondents did not engage in any specific performance under the Settlement Agreement after their initial breach. As such, there is nothing for them to forfeit.

D. The likelihood that Respondents will cure their failure.

Respondents did not cure their failure to timely release the lis pendens. Instead, they took advantage of it by leveraging Triple 7's inability to obtain funding into an increased settlement amount. To be clear, Respondents did not file the initial release until several months after they were supposed to have done so and they only did so after being told to by Triple 7. When they did file the initial release, it stated that the purported settlement payment had been "partially" made. This was not an accident, and experienced counsel understands the importance of such a word. Advising the public that the settlement payment has been "partially" paid also advises the public that it has been "partially" not paid, which means that the property is still subject to potential liens. Having the public record reflect that the property may still be subject to potential liens is a cloud on the title. While the significance of that cloud may be disputed by Respondents, it is a cloud on the title nonetheless. The lis pendens was not correctly released and the cloud on the title was not removed until ***after*** Respondents had already moved the trial court for relief for Triple 7's alleged breach of the Settlement Agreement. Respondents' release of the lis pendens after they sought to hold Triple 7 in breach of the settlement agreement is akin to installing a fire detector after one's house has already burned down. It is simply too little too late.

E. Respondents' Lack of Good Faith and Fair Dealing.

The facts are simple. Respondents breached the Settlement Agreement first. They did not attempt to cure the breach until Triple 7 demanded that they do so. Once Triple 7 demanded that the lis pendens be released, Respondents filed a partial release that they knew caused a cloud to remain upon the title of the property. In the meantime, Respondents continued to squeeze Triple 7 for more and more exorbitant settlement amounts under the guise of skyrocketing coal

prices making the property more valuable. Respondents claimed that it was this increase in coal prices that necessitated an increase in the settlement amount from $600,000 to $3,600,000.

Unfortunately for Respondents, Triple 7's counsel is a part owner of a coal mining company and was aware of the price of coal during the time Respondents claimed the prices increased. Upon cross-examination, Respondent Church was forced to admit that the price of coal had actually ***dropped*** 25% instead of increasing as Respondents represented to the trial court. (R. 580-81.) The fact that Respondents misrepresented the justification for the increased settlement amount to Triple 7 and the trial court is a clear indicator of their lack of good faith and fair dealing.

At bottom, all of the elements for the application of the first-breach doctrine have been shown in this case. Because Respondents' breach of the Settlement Agreement was material, the first-breach doctrine applies, and Triple 7 was relieved of any further performance under the Settlement Agreement.

III. Respondents' arguments do not refute the fact that the agreements were unconscionable.

Triple 7's appeal brief discussed the required showings for both procedural and substantive unconscionability in West Virginia and established how Triple 7 met both. In response to Triple 7's points regarding procedural unconscionability, Respondents argue both parties were represented by counsel, Triple 7 was not required to enter into the Settlement Agreement or any of the extension agreements, and Respondents' failure to fulfill their obligations under the Settlement Agreement really only prevented Triple 7 from engaging in fraud to potential lenders.

None of these points refutes the presence of procedural unconscionability in the events leading up to and involving the execution of the Settlement Agreement and the extension

agreements. The fact that the parties may have been represented by counsel does not even begin to refute Respondents' failure to fulfill their obligations under the Settlement Agreement.[3] Further, Triple 7 indeed was required to enter into those agreements, and Respondents unsupported statements to the contrary are unavailing. The compulsion came from the fact that it would lose a substantial interest in its property and, later, a controlling interest. Further, Triple 7 has already discussed how Respondents' argument about Triple 7 seeking to defraud potential lenders is not true and was known to them not to be true well before this appeal was docketed.

In response to Triple 7's points about substantive unconscionability, Respondents only argue that one of them testified that there was 4,000,000 tons of coal under the property; thus, increasing the settlement payment 6 ½ times from $600,000 to $3,600,000 was not substantively unconscionable. This argument ignores that Respondents agreed in the Settlement Agreement that $600,000 was a reasonable payment for the release of their claims and any right to be added as a co-grantee on the deed. (R. 333.) However, in the end, they received $900,000, a controlling interest in the property, and a dismissal of Triple 7's counterclaims.

With regard to their argument about their testimony on the price of coal, it should not be forgotten that, while one of the Respondents testified that he previously had received $120 per ton for coal, within a few minutes, he admitted that the current price at the time of the October 2, 2019 hearing was more in line with $90 per ton. (R. 577-80.) Accordingly, as the price of coal decreased, the cost of Triple 7's settlement payment increased.

These facts, along with Respondents' failure to fulfill their only obligation in the Settlement Agreement renders that agreement and the extension agreements unconscionable.

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[3] Further, when Respondents finally (and belatedly) released the lis pendens, they did so only partially. The inclusion of the word "partial" could be meant for one and only one purpose: to convey to anyone seeing it that Respondents still held a claim to some part of the property. Respondents chose to make the release a partial release only, and Triple 7's uncontroverted testimony showed that the recording of that release created even more ambiguity. (R. 275.)

IV. The Trial Court impermissibly dismissed Triple 7's Counterclaim.

Triple 7's brief discussed the fact that the trial court's dismissal of its counterclaims, which was done *sua sponte*, violated due process requirements of the Fourteenth Amendment to the U.S. Constitution. It explained how Triple 7 met the procedural and substantive elements necessary to prevail on its due process claim. It further discussed how the *sua sponte* dismissal of its counterclaims was contrary to the parties' settlement agreement, which expressly made Triple 7's release of those counterclaims contingent on Respondents' "receipt of Triple 7's Settlement Payment." (R. 336.)

Respondents do not even attempt to refute the point that dismissal of the counterclaims violated Triple 7's due process rights. They likewise do not even attempt to refute the fact that the dismissal of those counterclaims was contrary to the parties' Settlement Agreement.

Instead, Respondents want to avoid Triple 7's arguments by simply calling them "so strange as to be difficult to even address." (Resp. 31.) Respondents admit - and the parties agree - that the Settlement Agreement included a resolution and release of all of the claims amongst the parties. (Pet. Br. 34 at R. 336; Resp. 31.) Respondents posit, however, that "[t]here was nothing in any of the agreements that permitted Triple 7 to proceed to trial on its Counterclaim under the circumstances of its default." (Resp. 31.) Thus, Respondents argue Triple 7's alleged failure to complete its obligations under the Settlement Agreement unilaterally voided its counterclaims in their entirety and only Respondents could continue to pursue their claims. (*Id.*) This is simply wrong under West Virginia law and contrary to the express terms of the Settlement Agreement.

A. The dismissal of Triple 7's Counterclaims violated the Fourteenth Amendment.

Due process, which is guaranteed by the United States Constitution, "requires both notice and the right to be heard." *Syl. pt. 1, Norfolk and Western R. Co. v. Sharp,* 395 S.E.2d 527, 183

W. a. 283 (1990). Civil causes of action are considered property rights "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); *see also State v Letcher,* 2017 WL 5046744 (W. Va. Nov. 3, 2017 (Memo. Dec.) (stating that "due process of law requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950)).

As more fully set forth in Triple 7's brief, and not disputed in Respondents' response, Triple 7 asserted counterclaims against Respondents that were dismissed *sua sponte* by the trial court without any notice to the parties, without a hearing, and without the trial court considering any evidence relating to the counterclaims. The dismissal of the counterclaims under these circumstances is a textbook example of a violation of Triple 7's substantive and procedural due process rights. Thus, the circuit court's dismissal of the counterclaims must be reversed.

B. Under the settlement agreement, the parties' claims -- including Triple 7's counterclaims -- were not released because Respondents never received Triple 7's Settlement Payment.

"It is well-established that settlement agreements are contracts and therefore, 'are to be construed 'as any other contract.'" *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 311, 599 S.E.2d 730, 734 (2004) (citations omitted).[4] "Under the broad liberty of contract allowed by the law, parties may make performance of any comparatively or apparently trivial and unimportant covenant, agreement, or duty under the contract a condition precedent, and in such case the contract will be enforced or dealt with as made." *Wellington Power Corp. v. CNA Sur.*

[4] It is a basic tenant of contact law that "[i]f language in a contract is found to be plain and unambiguous, such language should be applied according to such meaning." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont,* 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996); *see also Payne v. Weston,* 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1985) (reiterating the contract canon that unambiguous language must be construed according to its plain and natural meaning).

Corp., 217 W. Va. 33, 35, 614 S.E.2d 680, 682 (2005) (quoting *Syl. pt. 2, Watzman v. Unatin,* 101 W.Va. 41, 131 S.E. 874 (1926)). Generally, conditions precedent in contracts are precursors that make it "incumbent upon a party to perform before any interest, right, title, or estate can vest, [and] the contract will not become operative until the condition precedent occurs." *Jochum v. Waste Management of West Virginia, Inc.*, 2007 WL 5859127 (W. Va. Cir. Ct. Oct. 01, 2007) (summary judgment reversed on appeal) (citing to *Adams v. Guyandotte Valley Ry. Co.*, 61 S.E. 341 (W. Va. 1908) (stating that "Conditions precedent and subsequent" differ in this: The former is one by the performance of which a right, estate, or thing is obtained or gained; the latter, one by the performance of which a right, estate, or thing already obtained is kept and continued.")).

Under West Virginia law, a release "may be made subject to the happening of a condition precedent[.]" *Clark v. Sperry,* 125 W. Va. 718, 25 S.E.2d 870, 872 (1943) (citing to *Williston on Contracts, Rev.Ed.,* § Section *1824*, and authorities cited under note 1). "A release which states that it shall take effect on the occurrence of a condition precedent is operative as a discharge on the occurrence of the condition." *Id.* (quoting *2 Restatement of the Law, Contracts, § 404(1)(A)*).

Pursuant to Paragraph 9.1 of the Settlement Agreement, the parties agreed to mutually release "any and all Claims, claims, demands, damages, losses, liabilities, obligations, debts, liens, costs, attorneys' fees, actions or causes of action" against each other. (R. 336.) However, there is a condition precedent to those releases. Paragraph 9.1 expressly provided those releases would be "[e]ffective upon receipt of Triple 7's Settlement Payment." (R. 336.)

Nothing in the extensions of the original Settlement Agreement changed the parties' obligations under Paragraph 9.1. (R. 343-357.) Indeed, the opposite is true. Each of the

extension agreements expressly stated that the provisions of the Settlement Agreement not changed by the extension agreements remained in effect. (*Id.*)[5]

Because the extensions did not alter Paragraph 9.1, the provision in the original Settlement Agreement that provided the releases were "[e]ffective upon receipt of Triple 7's Settlement Payment" continues to govern. (R. at 336.) The predicating event - Respondents' receipt of Triple 7's settlement payment - did not occur.

Indeed, Respondents' basis for seeking to divest Triple 7 of a portion of its property through their Motion to Appoint Special Commissioner relies on their position that Triple 7 did not make the settlement payments as required. This fact is repeated throughout the appendix record. (R. 344, 348, 353, 354, and 358.) It is a part of the trial court's order that Triple 7 appeals. (R. 453-54.) It even is in Respondents' response brief. (Resp. 8-9 and 31.) There is no doubt that Triple 7 did not make the settlement payment, and in fact Respondents' positions rely on the fact they never received that payment.

Because the condition precedent to releasing Triple 7's counterclaims did not occur, the release of those counterclaims never took effect. Thus, the trial court's dismissal of Triple 7's counterclaims must be reversed.[6]

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[5] Moreover, High Country's representative, Woodrow Church, testified explicitly that the extension agreements did not alter Respondents' obligation to release the lis pendens pursuant to the terms of the original Settlement Agreement. (R. 563-564.)

[6] Although not needed for the Court's analysis on this point, the structure of the Settlement Agreement's release of claims clearly makes sense. That release is only effective on Respondents' receipt of Triple 7's settlement payment. If Triple 7 paid the settlement amount to Respondents, it would retain 100% of the property. If that result happened, the parties would go their separate ways, and Triple 7 was willing to dismiss its counterclaims. However, if the settlement amount was not paid, and Respondents went back to court to get the relief they sued for, then Triple 7 was not releasing its counterclaims. If it had done that, it would essentially be releasing its counterclaims without receiving any benefit at all.

CONCLUSION

The trial court's decision should be reversed for four reasons. First, Respondents 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, Respondents 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 Respondents not be given a windfall after they 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 trial court committed the aforementioned reversible errors, and accordingly, ***reverse*** and ***remand*** the trial court's decision to appoint a special commissioner in its entirety with specific findings that: (1) Respondents' 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 Respondents is reinstated.

TRIPLE 7 COMMODITIES, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0155

TRIPLE 7 COMMODITIES, INC.,

Triple 7,

v.

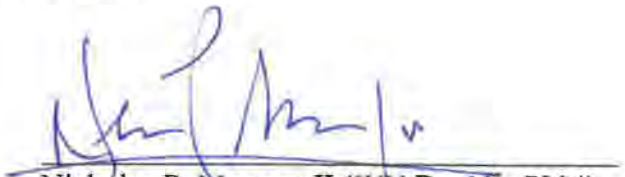
HIGH COUNTRY MINING, INC.,
WOODROW W. CHURCH, AND
DARREN J. SPENCER,

Respondents.

CERTIFICATE OF SERVICE

I, Nicholas P. Mooney II, hereby certify that a copy of the foregoing **TRIPLE 7 COMMODITIES, INC.'S REPLY BRIEF** was served via U.S. Mail, postage prepaid, this 2nd day of September, 2020, to the following:

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



Nicholas P. Mooney II (WV Bar No. 7204)