IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0964

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

v.

L&D INVESTMENTS, INC., a West Virginia corporation, RICHARD SNOWDEN ANDREWS, JR., MARION A. YOUNG TRUST, CHARLES A. YOUNG, DAVID L. YOUNG and LAVINIA YOUNG DAVIS, successors of Marion A. Young, CHARLES LEE ANDREWS, IV, and FRANCES L. ANDREWS,
Plaintiffs-Below, Respondents

MIKE ROSS, INC.,
Defendant-Below, Respondent

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

BRIEF OF THE PETITIONER

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by rewriting the written Agreement between Petitioner, Antero Resources Corporation, and Respondent, Mike Ross, Inc., and holding that Mike Ross, Inc., was only required to pay Antero Resources Corporation $2,914,943.75 of the $6,914,943.75 in royalty payments it received from Antero Resources Corporation, and without interest, despite the clear terms of the parties' Agreement to the contrary.

2. The Circuit Court erred by awarding a windfall or double recovery to the Respondents, L&D Investments, Inc., et al., by effectively awarding them a total of $11,000,000.00 when only $7,000,000.00 was due, which was comprised of $5,621,285.25 in unpaid royalties and $1,378,714.75 in interest.

II. STATEMENT OF THE CASE

The Petitioner, Antero Resources Corporation ("Antero") brings this appeal challenging the Circuit Court's ruling on its cross-claim against the Respondent, Mike Ross, Inc. ("MRI"), wherein the Circuit Court ordered that MRI was only required to pay Antero $2,914,943.75 of the $6,914,943.75 in royalties Antero paid MRI, without interest, which is in direct contravention of the Parties' indemnity agreement ("Agreement"). Plainly, the Circuit Court rewrote the terms of the Parties' Agreement, which unambiguously required MRI to "reimburse Antero in full for any amount of royalties paid in excess of what [MRI] may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc., or any other party, is deemed to own an interest in the subject minerals . . ."[1]

[1] App. 2459.

As discussed herein, this Court ultimately determined that MRI in fact did not have any interest in the subject minerals; thus, the plain terms of the Agreement require MRI to repay Antero for any royalties MRI received from Antero, plus interest. Antero also challenges the Circuit Court's award of summary judgment to the Respondents, L&D Investments, Inc., et al., ("L&D"), because it resulted in a double recovery or windfall to L&D.

L&D initiated this action by filing a complaint on December 10, 2013, contending that it, not MRI, was the proper recipient of royalty payments under the Subject Lease arising from a dispute over the validity of a tax deed.[2] As a result of the lawsuit, Antero prudently suspended MRI's royalty payments for production from the Subject Lease.[3] Thereafter, at MRI's request, Antero and MRI entered into the Agreement whereby Antero resumed royalty payments to MRI in exchange for MRI's agreement to indemnify Antero, in full, for any overpayment of royalties, plus interest.[4] Antero ultimately paid MRI $6,914,943.75 in royalties from the Subject Lease.

On May 22, 2018, this Court held that "the tax deed issued to MRI [was] void and the statute of limitation [was] inapplicable" and remanded the case to the Circuit Court consistent with the determinations and directives provided therein.[5] After the Circuit Court entered an order declaring the tax deed "VOID AB INITIO as a matter of law,"[6] and after MRI's Offer of Judgment was accepted by L&D,[7] Antero amended its cross-claim setting forth its claim for contractual

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[2] App. 51.

[3] App. 1593, 1681, 1892, 1895, 1896.

[4] App. 2657-2661.

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

[6] App. 2171.

[7] App. 2266.

indemnity under the Agreement, and demanding judgment against MRI for all amounts paid to MRI, including interest.[8] Antero had agreed to pay royalties during the pendency of litigation to MRI with a promise by MRI to reimburse Antero for those payments, including interest, and it was now demanding enforcement of that Agreement.

On December 9, 2019, Antero entered into a settlement agreement with L&D.[9] As part of the settlement, Antero agreed to pay L&D a total of $7,000,000.00, which represented $5,621,285.25 owed to L&D in royalties and $1,378,714.75 in interest.[10] Antero paid $3,000,000.00 to L&D immediately and deposited $4,000,000.00 into an escrow account, which represented the amount paid to L&D by MRI via its Offer of Judgment. The escrow was established because the parties (Antero, MRI, and L&D) disputed the impact of MRI's Offer of Judgment and the parties agreed to submit such issues to the Circuit Court.[11]

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

- Antero and MRI agreed that Antero would pay royalties to MRI during the pendency of the litigation, but MRI would make Antero whole if MRI did not ultimately prevail vis-à-vis L&D
- Antero paid $6,914,943.75 to MRI in royalty payments during the pendency of the litigation
- MRI made a $4,000,000.00 Offer of Judgment to L&D, which L&D accepted

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[8] App. 2278.

[9] App. 2373.

[10] App. 2964 ("Antero will pay Plaintiffs the sum of $5,621,285.25 representing the current estimate of their royalty due through July 21, 2019, pursuant to the fractional ownership percentages set forth in the Stipulation of Ownership, attached hereto. Royalties accruing after July 2019, will be paid within 30 days or when they would be paid in Antero's ordinary course of business, and future royalties will likewise be paid in Antero's ordinary course of business. Antero will pay Plaintiffs an additional $1,378,714.75 representing interest accrued for the foregoing unpaid royalties.").

[11] App. 2374.

- Antero's $7,000,000.00 settlement with L&D was comprised of $5,621,285.25 in unpaid royalties and $1,378,714.75 in interest[12]

- Antero and L&D then agreed that Antero would pay $3,000,000.00 to L&D of the approximately $7 million in dispute (**for which Antero could seek indemnification per its Agreement with MRI**) and Antero would deposit the remaining $4,000,000.00 into an escrow account (**for which Antero would either get indemnification from MRI or credit against its $7,000,000.00 settlement with L&D**)

On June 5, 2020, Antero[13] and MRI[14] filed cross-motions for summary judgment on Antero's cross-claim. On July 8, 2020, Antero,[15] MRI,[16] and L&D[17] filed responses to the cross-motions for summary judgment. Also, on the same day, L&D also filed a motion for summary judgment against Antero regarding offset and contribution.[18] On July 22, 2020, Antero[19] and MRI filed replies.[20]

On September 15, 2020, the Circuit Court entered its "Omnibus Ruling Order," wherein it awarded judgment in Antero's favor, in part, on its amended cross-claim against MRI as molded therein and granted L&D's motion for summary judgment against Antero regarding post-

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[12] App. 2964 ("Antero will pay Plaintiffs the sum of $5,621,285.25 representing the current estimate of their royalty due through July 21, 2019, pursuant to the fractional ownership percentages set forth in the Stipulation of Ownership, attached hereto. Royalties accruing after July 2019, will be paid within 30 days or when they would be paid in Antero's ordinary course of business, and future royalties will likewise be paid in Antero's ordinary course of business. Antero will pay Plaintiffs an additional $1,378,714.75 representing interest accrued for the foregoing unpaid royalties.").

[13] App. 2642.

[14] App. 2851.

[15] App. 2897.

[16] App. 2943.

[17] App. 2934.

[18] App. 2938.

[19] App. 3004.

[20] App. 3026.

settlement set-off or contribution.[21] The Circuit Court entered a final judgment as to these issues on November 2, 2020,[22] from which Antero filed a timely notice of appeal.[23]

That judgment has effectively awarded L&D a total of $11,000,000.00 on what should have been net settlements of $7,000,000.00, resulting in a windfall to L&D of $4,000,000.00. Antero respectfully submits that this Court should either direct that Antero receive a refund of the $4,000,000.00 it paid into escrow, at which point MRI would owe Antero $2.914,943.75, plus interest or, in the alternative, MRI should not receive a credit for that amount but should have judgment entered against it in favor of Antero in the amount of $6,914,943.75, plus interest.

III. SUMMARY OF ARGUMENT

The Circuit Court erred by rewriting the terms of the Antero/MRI Agreement and holding that MRI was obligated to Antero for only $2,914,943.75 of the $6,914,943.75 in royalty payments Antero paid to MRI. The Circuit Court compounded this error by awarding a windfall or double recovery to the L&D by effectively awarding it a total of $11,000,000.00 when only $7,000,000.00 was due, which was comprised of $5,621,285.25 in unpaid royalties and $1,378,714.75 in interest.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

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[21] App. 3083.

[22] App. 3159.

[23] App. 3170.

V. ARGUMENT

A. STANDARD OF REVIEW

As this is an appeal from summary judgment rulings, the standard of review is *de novo*[24] and applying that standard, Antero is entitled to a decision remanding for entry of judgment in Antero's favor, for the $6,914,943.75 it paid to MRI, and for an award of interest.

B. THE CIRCUIT COURT ERRED BY REWRITING THE WRITTEN AGREEMENT BETWEEN PETITIONER, ANTERO RESOURCES CORPORATION, AND RESPONDENT, MIKE ROSS, INC., AND HOLDING THAT MIKE ROSS, INC. WAS ONLY REQUIRED TO PAY ANTERO RESOURCES CORPORATION $2,914,943.75 OF THE $6,914,943.75 IN ROYALTY PAYMENTS IT RECEIVED FROM ANTERO RESOURCES CORPORATION, AND WITHOUT INTEREST, DESPITE THE CLEAR TERMS OF THE PARTIES' AGREEMENT TO THE CONTRARY.

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

> Antero agrees to resume payments to Mike Ross, Inc. pending resolution of the ownership dispute that is the subject of the Civil Action. In consideration of Antero's promise to resume payments to Mike Ross, Inc., Mike Ross, Inc. agrees to reimburse Antero in full for any amount of royalties paid in excess of what Mike Ross, Inc. may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc., or any other party, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims.[25]

In other words, MRI decided to contractually obligate itself to reimburse Antero if MRI was determined not to own an interest in the Subject Lease, which is what ultimately transpired.

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

[25] App. 2459.

Eventually, Antero paid MRI a total of $6,914,943.75 in royalties for production from the Subject Lease.[26]

After the Circuit Court entered its Order effectuating this Court's decision in *L&D Investments, Inc. v. Mike Ross, Inc.*, ruling against MRI,[27] and after MRI's Offer of Judgment was accepted by L&D,[28] Antero amended its cross-claim setting forth its claim for contractual indemnity under the Agreement, and demanding judgment against MRI for all amounts paid to MRI, including interest. The relevant provisions of this cross-claim are as follows:

> 2. On November 8, 2019, Plaintiffs and Mike Ross, Inc. announced to the Court Plaintiffs' Acceptance of Rule 68 Offer of Judgment by Defendant Mike Ross, Inc., in the amount of $4,000,000.00 ("Judgment").
>
> 3. Antero and Mike Ross, Inc. are parties to an "Agreement" dated July 14, 2014, attached hereto as "Exhibit No. 1."
>
> 4. The Agreement provides that "Mike Ross, Inc. agrees to reimburse Antero in full for any amount of royalties paid in excess of what Mike Ross, Inc. may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc., or any other party, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims."
>
> 5. Antero demands judgment against Mike Ross, Inc. pursuant to the terms of the Agreement for all amounts paid to Mike Ross, Inc., including interest, and further for any and all damages and interest that may be awarded to Plaintiffs by the Court or jury to the extent the Judgment does not fully compensate Plaintiffs for all damages and interest allegedly due from Antero and fully extinguish any claims by Plaintiffs against Antero for royalties paid to Mike Ross, Inc.[29]

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[26] App. 2662.

[27] App. 2158.

[28] App. 2266.

[29] App. 2280-2281.

This Court has recognized that, "[i]n construing the language of an express indemnity contract, the ordinary rules of contract construction apply."[30] As such, "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."[31] This Court further has held that the language of indemnity contracts should "clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity. . . . [T]he primary purpose is to ascertain and give effect to the intention of the parties."[32] In addition, this Court has indicated that when considering the language of the indemnity provision, "facts and the surrounding circumstances" should be included in the interpretation.[33]

In *VanKirk*, the Department of Highways ("DOH") entered into contracts with two separate construction companies, Green Construction Company ("Green") and Elmo Greer and Sons, Inc. ("Greer"), for the construction of different segments of Route 64.[34] During the course of the construction, Greer incurred a variety of additional costs due to Green's failure to meet deadlines, which became the subject of the underlying claims before the court.[35] Greer sought judgment against the DOH and prevailed.[36] The DOH then sought indemnification from Green

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

[31] *Id.* at Syl. pt. 5 (quoting Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas* Co., 147 W. Va. 484, 128 S.E.2d 626 (1962)).

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

[33] *Id.*

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

[35] *Id.*

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

for amounts paid by the DOH to Greer.[37] The contract signed by Green included several indemnity provisions, including language that would "require[] Green to indemnify DOH against any claims or suits arising because of injuries or damage to any persons or property on account of the operations of the contractor [Green]." Further, Green signed a contract bond which included language that Green would "save harmless [DOH] from any expense incurred through the failure of said contractor [Green]. . . to complete the work as specified, and for any damages growing out of the carelessness or negligence of said contractor [Green] . . . [and] from all losses to it [DOH] . . . from any cause whatever . . . in the manner of constructing said Road[.]"[38] This Court held that "the indemnity language in question to be sufficiently plain, unambiguous, and broad to cover the losses incurred by Greer."[39]

In this litigation, MRI and Antero's Agreement expressly provides that MRI will reimburse "Antero **in full for any amount of royalties paid in excess** of what Mike Ross, Inc. may actually own **along with the full amount of interest due or accrued on the overpayments** in the event that **L&D** Investments, Inc., **or any other party**, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims."[40]

Here, like in *VanKirk*, the indemnity language is "sufficiently plain, unambiguous, and broad" and is irrespective of any claim against Antero. Therefore, utilizing ordinary rules of contract construction, the plain language of the Agreement requires MRI to reimburse Antero for

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[37] *Id.*

[38] *Id.*

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

[40] App. at 2459 (Emphasis supplied).

the full amount of royalties paid, plus interest. For these reasons, the Circuit Court should have fully granted Antero's motion for summary judgment.

Instead, the Circuit Court ventured beyond the clear terms of the Agreement and improperly asserted itself into the perceived equities of the Agreement vis-à-vis L&D:

> 29. Antero's [sic] asserts, *inter alia,* that "Antero is not seeking to profit; Antero is asking MRI to fulfill its promise to refund the royalties Antero paid it" while requesting that it be awarded a return of $4,000,000.00 (presently held in escrow) of the $7,000,000.00 paid Plaintiffs to settle all claims against it and with $2,914,943.75 to be paid Antero by MRI (if $4,000,000.00 return from Plaintiffs is allowed) or the full amount of purported royalties previously paid-out to MRI (i.e.; 6,914,943.75 [sic]) along with over $2.5 million in purportedly accruing interest, as so generously calculated by Antero. (See Antero's Reply, p. 8 at ¶ 1) (Underline emphasis added by this Court).
>
> 30. This Court deems such assertion highly disingenuous on Antero's part.
>
> 31. **MRI improperly benefited** by having such proceeds to extend its cash flow for purchasing other income producing assets at no cost to itself during the pendency of this instant litigation which ultimately determined that it never had any legal royalty ownership interest in the Subject Property; and no legal right to any royalty proceeds.
>
> 32. Antero's request that this Court now direct a full return to Antero of any royalty payment to MRI plus accruing interest thereon, upon its interpretation and application of the July 14, 2014 *Agreement* between Antero and MRI is deemed to misconstrue and misapply such *Agreement.*
>
> 33. The presently developed record herein before this Court supports the notion that to otherwise grant Antero's specifically requested relief would not only be an unjust enrichment to Antero but, this Court's implied approval for **Antero's** and MRI's **self-absorbed actions** in relation to the Subject Property at the heart of this litigation and, particularly, the contested royalty interests.[41]

First, none of this has anything to do with the proper judicial interpretation of the Agreement. Again, MRI agreed to indemnify Antero if during the pendency of the litigation

[41] App. at 3105 (Emphasis supplied).

Antero paid MRI the disputed royalties. If MRI lost its dispute with L&D, it would be required to pay over to Antero the amount of royalties improperly paid and any awardable interest.

Second, the Circuit Court cites no "self-absorbed" exception to the law of contract, and Antero is unaware of any. Moreover, the Circuit Court does not explain, and Antero is unaware of any logical explanation of how the Agreement for Antero to pay royalties in any manner benefited Antero financially or otherwise. Certainly, the Circuit Court's non-contract law observation that, "Antero and MRI played 'fast and loose' by negotiating continued payment of any such royalty proceeds pending the outcome of this litigation,"[42] makes no sense. L&D could have moved that the disputed royalty payments be paid into Court from the beginning, but it did not. Indeed, L&D rejected Antero's offer at the commencement of litigation to interplead the royalties into court.[43] And, again, the Circuit Court initially ruled in MRI's favor,[44] which makes the Circuit Court's gratuitous comments[45] even more inexplicable.

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[42] App. 3106.

[43] App. 109 ("Antero has the lawful right to deposit the disputed funds into the Clerk of Court."); App. 140 ("Plaintiff does not believe that this is a true interpleader case under the law or the Rules of Civil Procedure as Defendant Antero is not a mere stakeholder.").

[44] Antero notes the following passage from the Circuit Court's decision:

> 22. All payment of royalties from ongoing production from the Subject Property before, during and throughout this litigation not otherwise previously disbursed could have (and, **in hindsight** now with the Supreme Court's *void ab initio* determination, **should have**) been more appropriately **interpleaded into this Court** following remand and pending ultimate resolution in quieting title upon further motion pleadings by any or all of the Gas Producing Defendants (as well as MRI as it conclusively had no legal right to retain any royalty payments received that had been erroneously distributed as a result of its purported 2003 Tax Deed) in keeping with their respective pleadings post-remand and Plaintiffs' last Amended Complaint so as to assure proper accounting and distribution all thereof to the correct royalty owners in proper proportion to their respective interests.

App. 3103 (Emphasis supplied). Somehow, Antero and MRI was supposed to have more "hindsight" than the Circuit Court.

[45] In addition to the ones just discussed, the Circuit Court further stated:

Indeed, before moving on with its actual contract law analysis, the Circuit Court stated, "**Having thus critiqued**, this Court finds and concludes, as a matter of law, that the July 14, 2014 Agreement by and between Antero and MRI in its totality of mutually considered purposes for coming into existence and provisions therein made, is deemed a valid contract and free of ambiguity as to the particularly identified royalty payments."[46]

Instead of awarding to Antero, however, the full $6,914,943.75 paid by Antero to MRI, the Circuit Court then proceeded to inexplicably rule that MRI was entitled to a credit for the $4,000,000.00 of its Offer of Judgment accepted by L&D and that Antero was not entitled to a refund of the $4,000,000.00 it paid into escrow as per its agreement with L&D, thereby rewriting the parties' agreements, and **giving L&D a double recovery or windfall for a total of $11,000,000.00**:

> 43. However, given such settlements in light of the totality of circumstances herein litigated, this Court finds and concludes that Antero may recover from MRI for an amount determined by this Court **as further molded** herein it deems to properly flow from and in consideration of their July 14, 2014 Agreement of any such royalty payments that cannot be specifically apportioned on Plaintiffs' and Antero's Settlement Agreement And Release Of All Claims (made December 9,

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> The apparent reality seen by this Court of these remaining matters being litigated herein between Antero and MRI demonstrate that they entered into a contractual relationship whereby Antero willingly scratched Mike Ross's corporate back by providing MRI millions of dollars in capital (i.e.; royalty payments) for his business operations so that other mineral interest purchases and acquisitions could be made rather than placing such payments in a suspense account pending final determinations. ... As intimated earlier herein, this Court certainly views the parties' respective motives for entering such in the midst of this litigation to be incongruous and contrary to appropriate notions of fair play.

App. 3106. Again, the Circuit Court does not explain how an indemnification agreement between two litigants not prohibited by any rule or law that was consistent with the Circuit Court's own ruling regarding a dispute over contested royalty payments has any legal impact on the interpretation and applicable of such agreement, particularly when the Circuit Court agrees that the agreement is "valid" and "free of ambiguity."

[46] App. 3106 (Emphasis supplied).

2019) or specifically identified in MRI's November 1, 2019 Offer of Judgment to Plaintiffs as accepted (see Plaintiffs' Acceptance Of Rule 68 Offer Of Judgment By Defendant Mike Ross, Inc. filed on November 12, 2019).

44. To otherwise entitle Antero to a repayment of all royalty payments previously tendered to MRI in such amount and with determined interest thereon in keeping with Antero's proffered calculations **would undoubtedly bestow an unjust enrichment upon Antero**, especially **given its business behavior** reflected by the record herein and in litigating Plaintiffs' totality of claims against it as well as knowing its pending cross-claim against MRI, that distinctly involved royalty proceeds and payments based upon such Agreement, was still in play.[47]

This Court will search the record in vain for any evidence or law supporting the propositions that (1) paying $4,000,000.00 into escrow as part of Antero's settlement with L&D resulted in any "unjust enrichment" to Antero and (2) there is a "business behavior" exception to the law of contract or that Antero engaged in bad "business behavior" when it entered an indemnification agreement and honored its contractual obligation to MRI thereunder until this Court overturned the Circuit Court's decision in MRI's favor, at which time it suspended further payments to MRI pending a final order.

The next part of the Circuit Court's contract analysis is both contradictory, and unsupported by the law and the evidence:

47. This Court gleans from the totality of considerations now upon the record herein that the overall intent and understanding of Antero and MRI at the time they entered into their July 14, 2014 Agreement to be as such contractual language therein essentially reflects, to-wit: In the event any royalty payments made by Antero to MRI were ultimately found to be improper **via judgment** rendered in these proceedings, such payments would be relinquished by MRI so that they could then been properly accounted for and dispersed to accurately identified royalty owners according to legally determined royalty ownership proportions along with any interest that might otherwise actually be accruing thereon as a result of trial verdicts and related pronounced judgments rendered thereon and upon which interest would legally accrue in statutorily required fashion.

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[47] App. 3108 (Emphasis supplied).

> 48. **To apply the interest language contained therein** (in light of the settlements occurring herein without any trial, jury verdicts or judgments pronounced and now being interpreted and requested by Antero in its instant motion pleadings) **would be unconscionable as such would improperly require MRI to pay interest thereon contrary to such language in their Agreement as now correctly discerned by this Court**.[48]

Again, the Agreement provides:

> Antero agrees to resume payments to Mike Ross, Inc. **pending resolution of the ownership dispute** that is the subject of the Civil Action. In consideration of Antero's promise to resume payments to Mike Ross, Inc., Mike Ross, Inc. agrees to reimburse Antero in full for any amount of royalties paid in excess of what Mike Ross, Inc. may actually own **along with the full amount of interest due or accrued on the overpayments** in the event that L&D Investments, Inc., or any other party, **is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims**.[49]

First, the Agreement nowhere says it was triggered only upon entry of a "judgment." Instead, it was expressly triggered upon "resolution of the ownership dispute," which occurred when this Court rendered its opinion. Thus, the settlements among the parties are irrelevant to the interpretation and application of the Agreement, which required MRI to pay Antero for any overpayment of royalties, plus interest.

Second, the Agreement plainly shifted the risk of "the full amount of interest due or accrued on the overpayments" to MRI and away from Antero. And, how it is "unconscionable" to "require MRI to pay interest" is unexplained in the Circuit Court's order, but it certainly finds no basis in the "language in their Agreement as now correctly discerned by this Court."

Finally, the issuance of this Court's opinion, not the parties' settlements, is when "L&D Investments, Inc." was "deemed to own an interest in the subject minerals for which Mike Ross,

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[48] App. 3109 (Emphasis supplied).

[49] App. 2459 (Emphasis supplied).

Inc. now claims." Indeed, the Circuit Court itself noted, "Once MRI's ownership ... was conclusively resolved ... by our Supreme Court ... Antero properly suspended, yet again, (and actually ended) any further royalty payments to MRI."[50]

The Circuit Court correctly noted that, "Antero's *Amended Cross-Claim Against Mike Ross, Inc.* was filed ... as part of its *Answer to Plaintiffs' Amended Complaint Following Decision of the West Virginia Supreme Court of Appeals.*"[51] The Circuit Court also observed that, "Antero's Amended Cross-Claim ... incorporates its original Cross-Claim ... and particularly states ... Antero demands judgment against Mike Ross, Inc. pursuant to the terms of the [July 14, 2014] Agreement for all amounts paid to Mike Ross, Inc., including interest ...."[52] The Circuit Court further properly found that, "MRI voluntarily chose to tender its Offer of Judgment ... full well knowing the existence of its ... Agreement with Antero and without further addressing or possibly resolving the outstanding claim/issue with Antero prior to making its Offer of Judgment."[53]

At that point, resolution of Antero's cross-claim was simple. MRI owed $6,914,943.75, plus interest, for the amounts paid by Antero to MRI before this Court's decision. Conversely, if the $4,000,000.00 Offer of Judgment by MRI accepted by L&D was to apply as an offset against the $6,914,943.75 owed by MRI to Antero, then Antero was entitled to a refund of the $4,000,000.00 it placed into escrow as per the terms of its settlement agreement with L&D.

Unfortunately, this simple resolution of straightforward contractual interpretation and application did not occur:

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[50] App. 3103 (footnote omitted).

[51] App. 3099.

[52] App. 3100.

[53] App. 3099.

39. These respective settlements further **took into consideration all royalty payments due and owing Plaintiffs according to their ownership** interests as stipulated to and further ordered herein on March 20, 2020 that were due and owing from both Antero and MRI given the various royalty payments previously made by Antero to MRI in consideration of MRI's 2003 Tax Deed and the July 14, 2014 *Agreement.*

40. However, Antero's settlement with Plaintiffs:

- Involved the settlement of a multitude of claims asserted by Plaintiffs against Antero including any potential liability.
- Included a lump sum settlement without any specific amount carved-out or being specifically allocated in satisfaction of outstanding royalty payments due and owing Plaintiffs.
- **Negated any trial proceedings wherein a jury would have determined the apportionment of both liability and damages among the Parties** by appropriate verdict forms and special interrogatories as necessary to settle multiple divisible causes of action and potential verdicts for separate conduct. ...

51. Antero cannot established [sic] that the amount of its settlement with Plaintiffs is entirely tied to any royalty payments made to MRI that should have been paid to Plaintiffs as MRI presented its Offer of Judgment to settle, inter alia, Plaintiffs' claims for any royalty payments lawfully theirs that had been paid to MRI as a result of the July 14, 2014 Agreement (and in further contemplation of MRI's 2003 Tax Deed) as well as other related claims and before Antero reached its full settlement with Plaintiffs.

52. Antero is not entitled to any set-off or contribution insofar that it would recover any of their $7,000,000.00 settlement with Plaintiffs in resolving Plaintiffs' totality of claims against it (and which included, inter alia, claims of negligence or intentional conduct).

53. Upon the totality of the litigation record herein and the ultimate settlement agreements of the parties' litigant herein to date, particularly Plaintiffs' respective settlements with Antero and MRI, this Court directs, as a matter of law, that:

- **MRI shall be required to reimburse Antero**, under the terms of their July 14, 2014 Agreement, **the entire amount of royalty payments** received from Antero pertaining to the Subject Property and the 1902 Andrews Lease **in the amount of** Six Million Nine Hundred and Fourteen Thousand Nine Hundred and Forty-Three Dollars and Seventy-Five Cents (**$6,914,943.75**) **without interest as no interest has accrued or otherwise heretofore become due and owing**.

- However, **given the timing, nature and totality of these parties' respective settlements with Plaintiffs**, particularly with respect to such royalty payments, **MRI shall be entitled to and receive an offset of Four Million Dollars ($4,000,000.00) to such reimbursement to Antero that reflects MRI's total settlement with Plaintiffs herein**.
- Therefore, **MRI shall be required to reimburse Antero in the amount of** Two Million Nine Hundred and Fourteen Thousand Nine Hundred and Forty-Three Dollars and Seventy-Five Cents (**$2,914,943.75**) **without interest**.
- **Antero shall not be entitled to or receive any offset of** Four Million Dollars (**$4,000,000.00**) from their settlement with Plaintiffs as a result of these determinations.
- **The** Four Million Dollars (**$4,000,000.00**) presently being held in escrow pursuant to Plaintiffs' and Antero's settlement agreement **shall be released to Plaintiffs**.
- Antero and MRI shall still be required to account for all royalties pertaining to this litigation and especially those royalty proceeds that are still respectively in their possession that are not otherwise attributable to and accounted for as to Plaintiffs, L&D Investments, Inc., Richard Snowden Andrews, Jr., Marion A. Young Trust, Charles A. Young, David L. Young, Lavinia Young Davis, Charles Lee Andrews, IV, and Frances L. Andrews and the settlements achieved herein by these parties' litigant.

54. Thereupon, this Court further finds and concludes that, upon the totality of settlements (particularly by and between Plaintiffs, Antero and MRI as to Plaintiffs' multiplicity of valid claims) and its analysis herein, such settlements as entered into by the respective parties and determinations pronounced herein supra with regard to Antero's and MRI's July 14, 2014 Agreement and any related offsets **do not result in**: (a) **any double recovery of damages by Plaintiffs**; (b) any double payment by MRI; or (c) **any improper recovery or double payment by Antero**.[54]

Of course, on its face, these rulings are contradictory, holding that MRI is obligated under the Agreement to reimburse to Antero the entire $6,914,943.75, but that MRI is entitled to an offset for its $4,000,000.00 Offer of Judgment paid to L&D. And, not only that, but on approximately $7,000,000.00 in unpaid royalties and interest due to L&D, L&D would receive $4,000,000.00

[54] App. 3107, 3109-3111 (Emphasis supplied).

from MRI as per MRI's Offer of Judgment, and $7,000,000.00 from Antero as per its settlement with L&D, for a total of $11,000,000.00.

Accordingly, the Circuit Court erred as a matter of law in holding that the Respondent, Mike Ross, Inc., was obligated to the Petitioner, Antero Resources Corporation, for only $2,914,943.75 of the $6,914,943.75 in royalty payments the Petitioner, Antero Resources Corporation, paid to the Respondent, Mike Ross, Inc.

C. THE CIRCUIT COURT ERRED BY AWARDING A WINDFALL OR DOUBLE RECOVERY TO THE RESPONDENTS, L&D INVESTMENTS, INC., ET AL., BY EFFECTIVELY AWARDING THEM A TOTAL OF $11,000,000.00 WHEN ONLY $7,000,000.00 WAS DUE, WHICH WAS COMPRISED OF $5,621,285.25 IN UNPAID ROYALTIES AND $1,378,714.75 IN INTEREST.

Despite the Circuit Court's statements to the contrary, its rulings effectuated a windfall or double recovery to L&D when it directed the release of the $4,000,000.00 in settlement proceeds placed in escrow by Antero to L&D while also crediting MRI its $4,000,000.00 Offer of Judgment to L&D, thereby allocating $8,000,000.00 to L&D in addition to the $3,000,000.00 remainder of Antero's $7,000,000.00 settlement with L&D, for a total of $11,000,000.00, rather than the bargained total of $7,000,000.00, representing the unpaid royalties and interest. Nowhere in the Circuit Court's decision does it set forth any basis for the additional $4,000,000.00 effectively awarded to L&D because there is none.

1. MRI's Rule 68 Offer of Judgment Did Not Extinguish Its Obligation under the Agreement to Reimburse Antero for All Royalties Paid to MRI for Production from the Subject Lease.

Although this Court has not addressed this specific issue, the United States District Court for the Southern District of West Virginia has indicated that express indemnity survives settlement with the plaintiff.

In *Deloach v. Appalachian Power Co.*,[55] the plaintiff filed suit against Appalachian Power, Stone & Webster ("S & W"), and The Shaw Group (collectively "defendants").[56] The plaintiff then settled separately with all defendants.[57] At oral argument, the parties agreed that claims for contribution and implied indemnity were extinguished by settlements with the plaintiff.[58] However, the court noted that the express indemnity cross-claim between Appalachian Power and S & W survived and remained after settlement.[59]

Other courts have reached similar conclusions. For example, in *C. L. Peck Contractors v. Superior Court*,[60] the plaintiff was injured while working at a construction site and sought recovery from the general contractor, the owner, and a subcontractor.[61] The plaintiff settled with the subcontractor, and the subcontractor sought a dismissal of all cross-claims against it for indemnification.[62] The lower court dismissed the cross-claims for indemnity, holding that settlement extinguished all claims for indemnity, even those provided by contract.[63] On appeal, the court considered whether a good-faith settlement between a plaintiff and defendant barred the remaining co-defendants from seeking indemnity from the settling defendant based under an express contract.[64] The appeals court recognized that express indemnity permitted "great freedom

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

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

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] 159 Cal. App. 3d 828 (Cal. Ct. App. 1984).

[61] *Id.* at 831.

[62] *Id.*

[63] *Id.*

[64] *Id.*

of action to the parties in the establishment of the indemnity arrangement."[65] The appeals court further reasoned that the policy favoring settlement must be subordinated to the policy favoring enforcement of contracts and went on to hold that the contractual express indemnity provision survived the settlement.[66]

As was the case in *Deloach*, *C. L. Peck*, and *Bay Development*, MRI's Offer of Judgment to Plaintiffs for $4,000,000.00 did not extinguish MRI's contractual obligation under the Agreement to reimburse Antero for the $6,914,943.75 in royalties paid to MRI for production from the Andrews Lease. MRI has argued that its Rule 68 Offer of Judgment to Plaintiffs satisfied the amounts MRI received from *all* the gas producers for production from the Andrews Lease in this case.[67] Antero alone paid MRI $6,914,943.75 in royalties for production from the Andrews Lease. MRI's $4,000,000.00 Offer of Judgment to L&D categorically did not cover the entire amount for which MRI is required to reimburse Antero pursuant to the Agreement. MRI's argument is specious. Why would a party enter an indemnity contract if the party providing the indemnity could thwart its express contractual obligations by settling with some, but not all the parties to which the indemnified party owed payments to, for far less than the amount owed? The simple answer is, they would not.

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[65] *Id.* at 757.

[66] *Id.* The Supreme Court of California later affirmed this decision on other grounds and stated that, "[w]hen an indemnitee under such an agreement reasonably relies on express terms in the agreement in conducting its affairs, *it would be unfair to permit a party that has agreed to indemnify to escape its express contractual obligations by entering into a partial settlement.*" *Bay Dev., Ltd. v. Superior Court*, 791 P.2d 290, 302 (Cal. 1990) (Emphasis supplied).

[67] App. 2289.

2. Antero's Settlement With L&D Expressly Preserved Its Rights Against MRI.

It is ludicrous to suggest that Antero's $7,000,000.00 settlement with L&D was completely divorced from the $6,914,943.75 it had paid to MRI or MRI's Rule 68 Offer of Judgment which was the exact amount -- $4,000,000.00 - that had been deposited by Antero into escrow as per Antero's agreement with L&D.

To this end, Antero's settlement agreement with L&D stated in pertinent part as follows:

> 1. Antero will pay Plaintiffs the sum of $7,000,000.00 ...
>
> 2. **Any claims by Antero** or MRI **to offset or reduce the amounts in Section 1**, above, **by Plaintiffs' acceptance of Mike Ross, Inc.'s $4,000,000.00 Offer of Judgment will be preserved by all Parties**, as will Plaintiffs' right to contest such offset or reduction. If the issues need to be resolved among Antero, MRI and/or Plaintiffs, then Antero and Plaintiffs agree to submit such issues to Judge Bedell for resolution of both legal and factual issues, if any, and reserve the rights of any party to appeal Judge Bedell's rulings on those issues. **Antero agrees to deposit $4,000,000.00 of the $7,000,000.00 settlement payment in Paragraph 1, above, in an interest bearing account at an agreed FDIC insured institution**, in West Virginia, with Counsel for Antero and Plaintiffs being joint Escrow Agents, **with such fund representing the amount of MRI's Offer of Judgment accepted by Plaintiffs** which upon resolution of the offset or reduction issues whether by agreement of Antero and Plaintiffs or by final court order of the court of last resort, Antero and Plaintiffs will agree to pay or refund all or any part of such deposited funds and accrued interest as agreed or as ordered in a final decision by such court of last resort. . . . [68]

The reason this language was included in the settlement between Antero and L&D is because the issue of Antero's entitlement to a credit for the $4,000,000.00 had been briefed before the settlement.[69] Indeed, L&D filed a motion to extinguish Antero's claims for contribution and setoff in which it acknowledged, "Antero ... [has] asserted" that it is "entitled to set-off or

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[68] App. 2373-2374 (Emphasis supplied).

[69] App. 2320.

contribution regarding the $4,000,000.00 Offer of Judgment made by MRI and accepted by Plaintiffs."[70] So, L&D cannot legitimately claim surprise that Antero's settlement with both L&D and MRI was predicated on the $4,000,000.00 escrow being returned to Antero if the Court determined that MRI was entitled to a credit for such amount.

In *Old Republic Ins. Co. v. O'Neal*,[71] this Court held, "Old Republic is attempting to recover money that it never paid and that its insured is not entitled to receive. If this Court were to allow Old Republic to exercise the statutory right of subrogation in this matter, Old Republic would receive a windfall insofar as it would receive monies it never expended. Moreover, under such a scenario, Old Republic's insured, Speed Mining, would be allowed to circumvent its settlement of the deliberate intention claim entered into with the Plaintiffs, as Speed Mining gave up any claim of reimbursement as part of the terms of the settlement of that claim."

Similarly, in this case, L&D is receiving a windfall to the extent that L&D obtains both the full amount of MRI's $4,000,000.00 Offer of Judgment and the $4,000,000.00 placed by Antero into escrow, for an effective recovery of $8,000,000.00, instead of $4,000,000.00 under the settlement terms of the parties. Or, has been noted, $11,000,000.00 on claims worth $7,000,000.00.

Accordingly, Antero clearly should have been awarded the $4,000,000.00 placed in escrow as part of its settlement with L&D if the Court reduced the amount owed by MRI to Antero by

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[70] App. 2591.

[71] 237 W. Va. 512, 526-527, 788 S.E.2d 40, 54-55 (2016) (footnote omitted).

MRI's $4,000,000.00 Offer of Judgment. To hold otherwise would allow L&D to recover twice for the same injuries, which is anathematic to our justice system.[72]

VI. CONCLUSION

WHEREFORE, the Petitioner, Antero Resources Corporation, respectfully requests that this Court reverse the judgment of the Circuit Court of Harrison County, and remand with directions that it enter judgment against the Respondent, Mike Ross, Inc., for the $6,914,943.75 in royalty payments the Petitioner, Antero Resources Corporation, paid to the Respondent, Mike Ross, Inc., and for pre- and post-judgment interest on that amount; or that it enter judgment against the Respondents, L&D Investments, Inc., et al., refunding to the Petitioner, Antero Resources Corporation, the amount of $4,000,000.00 paid by the Petitioner, Antero Resources Corporation, into an escrow account as per the terms of an agreement between the Petitioner, Antero Resources, Inc., and the Respondents, L&D Investments, Inc., et al.

ANTERO RESOURCES CORPORATION

By Counsel:

[72] See Syl. pt. 7, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) ("It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories."); see also *City of Fairmont v. W. Virginia Mun. League, Inc.*, No. 18-0873, 2020 WL 201188, at *4 (W. Va. Jan. 13, 2020) (memorandum) ("The law does not permit a double recovery for a single injury."); *Doe v. Pak*, 237 W. Va. 1, 5, 784 S.E.2d 328, 332 (2016) ("Therefore, we hold that when an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, the damages recovered by the claimant on a subsequent judgment shall be reduced by the amount of the advance payment.") (footnote omitted).

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CERTIFICATE OF SERVICE

I do hereby certify that on March 2, 2021, I served the foregoing "BRIEF OF THE PETITIONER" on counsel of record by having a true copy thereof placed in the United States mail, postage prepaid, addressed as follows:

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