IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0967

MIKE ROSS, INC.,

Petitioner and Cross-claim Defendant Below,

v.

ANTERO RESOURCES CORPORATION,

Respondent and Cross-claim Plaintiff Below.

Petitioner Mike Ross, Inc.'s Brief

Civil Action No. 13-C-528-2
In the Circuit Court of Harrison County, West Virginia
(Honorable Thomas A. Bedell, Chief Judge)

Benjamin L. Bailey (WVSB No. 200)
Rebecca D. Pomeroy (WVSB No. 8800)
Christopher D. Smith (WVSB No. 13050)
BAILEY & GLASSER, LLP
209 Capitol Street
Charleston, WV 25301
Telephone: 304.345.6555
Facsimile: 304.342.1110
bbailey@baileyglasser.com
bpomeroy@baileyglasser.com
csmith@baileyglasser.com

Counsel for Mike Ross, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. ASSIGNMENTS OF ERROR

1. Under West Virginia law, a pre-existing duty cannot be used as consideration to support the formation of a new contract. In the case below, the court determined that Antero's agreement to continue rendering payments it was already obligated to provide was sufficient consideration to create an indemnity contract with MRI. Did the lower court err when it determined that Antero's pre-existing duties amounted to consideration sufficient create a contract?

2. Under West Virginia law, a breaching party is not entitled to recover for breach of contract. Antero breached its duty to MRI when it halted royalty payments. Did the lower court err when it held that Antero was entitled to recover under a contract that it breached?

3. Under West Virginia law, a party seeking contractual indemnification must show that the injury that it seeks to recover falls within the ambit of the indemnification agreement. Antero did not do so, failing to earmark settlement proceeds or include MRI in settlement discussions with Plaintiffs. Did the lower court err when it determined that Antero was entitled to indemnification for amounts that Antero failed to demonstrate fell within the scope of the indemnification agreement?

4. Did the lower court err when it entered judgment for a sum certain where Antero's own evidence conflicted about the actual amount owed?

II. INTRODUCTION

At its heart, this is an appeal about promises: empty promises, broken promises, and promises fulfilled. Although this sounds like fodder for midday television, the law of contracts in West Virginia is built on promises. And the lower court erred when it determined that one who breaks a promise may maintain an action for breach of contract. It erred when it determined that a promise of nothing could be used to enforce a promise for something. It erred when it determined that a party was entitled to more than it was promised. And finally, it erred when it entered an order on a sum certain amount that was materially in dispute. Those errors demand reversal.

Shortly after Plaintiffs in the underlying matter filed suit to determine the ownership of natural gas royalties, Antero offered to continue paying MRI—a party who, at the time,

purportedly owned the rights to the royalties—royalties Antero legally owed to MRI at the time in exchange for new indemnity obligations from MRI. Antero's empty promise, a promise to continue doing what it was already legally obligated to do, is insufficient consideration to support a contract. The lower court determined the opposite.

Later, after an opinion partially dealing with the ownership of those royalties was rendered—but before the issue was squarely resolved—Antero broke its promise. It unilaterally reneged on its empty promise to continue paying MRI. Despite its broken promise, Antero sought to hold MRI to the contract. But West Virginia law is clear: a breaching party is not entitled to enforce a contract. Again, the lower court determined the opposite.

Thereafter, MRI fulfilled its promise to Antero (and its obligations consistent with this Court's earlier opinion) when it made an offer of judgment to, and paid, Plaintiffs $4,000,000 in the underlying action to account for royalties that were ultimately determined to belong to Plaintiffs. Despite this, Antero demanded more, seeking repayment and more of claims that MRI resolved through its accepted offer of judgment. But West Virginia law is clear—an injury may only be recovered for once and only where the party seeking indemnification shows that it falls within the scope of the indemnification agreement. The lower court once again determined the opposite and allowed Antero to recover for an injury that MRI resolved through an accepted offer of judgment. It compounded this error by entering judgment in an amount that even Antero's records demonstrate was a contested issue of fact.

West Virginia contract law is clear. An empty promise is unenforceable. One who breaks a promise cannot force another to comply with that promise. A party cannot demand more than what is promised much less recover pursuant to summary judgment on an amount that is materially

in dispute. MRI brings this appeal and asks this Court to reverse the lower court's decision to the contrary.

III. STATEMENT OF THE CASE

Although the underlying case is a labyrinth of issues spanning nearly a decade, Mike Ross, Inc.'s ("MRI") appeal centers on a lone crossclaim for contractual indemnity asserted against it by Antero. And at its core, the procedural history leading to the assertion and resolution of this claim is relatively straightforward. In 2013, Plaintiffs in the underlying action brought suit, alleging that Antero Resources Corporation ("Antero") wrongfully paid MRI gas royalties that belonged to Plaintiffs. *See* J.A. 1948-1956. Shortly thereafter, Antero approached MRI and offered to continue paying MRI royalty payments—despite the fact that Antero was already obligated to pay royalties to the apparent owner of those royalties—in exchange for a host of indemnity obligations. *See* J.A. 161-165. On November 12, 2019, after discovery was closed, four days after MRI resolved its claims with Plaintiffs through an offer of judgment on the eve of trial, and five years after signing the Agreement, Antero asserted a new crossclaim seeking repayment under the July 14, 2014 Agreement.[1] *See* J.A. 106-112. MRI sought summary judgment on this claim for several reasons, including (a) the July 14, 2014 Agreement (the "Agreement") is unenforceable because Antero offered no consideration in support of that Agreement; (b) the Agreement is unenforceable because Antero breached it by halting payments to MRI; and (c) the Agreement is unenforceable because MRI's offer of judgment extinguished its obligation to Antero. *See, e.g.*, J.A. 144-165; 201-211; 235-295. On September 15, 2020, the lower court denied that motion, instead partially granting

[1] Antero was only able to assert this crossclaim after the lower court granted an order allowing the Plaintiffs to file an Amended Complaint on October 30, 2019. J.A. 2126-2203. Antero used that Answer as a trojan horse to assert crossclaims that it never previously raised. *Compare* J.A. 106-112 *with* J.A. 113-128. Absent that order, Antero would have been unable to assert its tardy crossclaim, on which the parties never sought discovery.

summary judgment in favor of Antero[2] on the cross-claim and ordering MRI to repay a portion of the royalties pursuant to the Agreement. J.A. 52-94. On November 2, 2020, the lower court issued a Rule 54(b) order, determining that the discrete issue of Antero's crossclaim and Antero's request for a setoff were ripe for appeal. J.A. 95-99.

This appeal and the lower court's order turn on the Agreement, which is an amalgamation of promises. From its inception, the Agreement was founded on an empty promise by Antero, as it simply promised to continue doing what it was obligated to do all along. It then evolved into a broken promise. Despite promising to continue paying MRI what it was already obligated to pay, Antero halted payments before the full resolution of the royalty issue. Finally, even though it was not obligated to do so, the Agreement became a promise fulfilled when MRI satisfied the royalty payments for which Antero seeks indemnification through an accepted offer of judgment below. To truly understand this case, then, one must examine each phase of the promises that comprise the Agreement.

a) An Empty Promise: The Inception of the July 14, 2014 Agreement

In the case below, Plaintiffs asserted a variety of claims, including claims for declaratory relief, misappropriation, trespass, fraud, and slander of title, against several defendants based on natural gas royalty payments they claimed were rightfully owed to them. J.A. 113-128; 161-165. Ownership of the gas royalties was disputed because MRI purchased the rights to Plaintiffs' mineral interests at a delinquent tax sale, and Plaintiffs contended that the tax sale was invalid. *Id.* Based on that central dispute, Plaintiffs asserted claims against MRI for the wrongful receipt of funds tied to the mineral interests and against Antero for the wrongful payment of funds tied to the mineral interests to MRI. *Id.*

[2] Antero's Motion for Summary Judgment was denied to the extent it sought a setoff of $4,000,000.

Shortly after the underlying case began, Antero halted payments to MRI. *See, e.g.*, *id.* at 161-165. Despite its brief cessation of payment, Antero never disputed that it owed royalty payments to the owner of the contested mineral estates. *See e.g.*, *id.* Simply put, Antero recognized when it entered into the Agreement that it had an existing, underlying obligation to pay royalties to whomever owned the mineral estates at issue in the case which at that time Antero believed was MRI. In fact, Antero obtained a title opinion in September 2013 on the subject property in which its counsel—counsel from the very same firm hired to litigate the underlying dispute—advised that MRI was the rightful owner of the royalties. *See, e.g.*, *id.* at 281 (recommending that Antero "obtain a modification or pooling agreement from Mike Ross, Inc., or its successors or assigns, before beginning operations that pool the captioned oil and gas with other property").

On July 14, 2014, Antero used this existing obligation as a bargaining chip to create a one-way legal obligation on MRI to indemnify Antero for Antero's existing legal duty. In that Agreement, Antero promised to perform its pre-existing duty and

> resume making royalty payments to Mike Ross, Inc. with the understanding that Mike Ross, Inc. will indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc.

Id. at 161. The Agreement expressly conditioned resumption of a duty that Antero owed on an agreement by MRI

> 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.

Id. at 162. Put simply, Antero agreed to continue doing what it was obligated to do all along, and in return, it sought to foist a new set of indemnity obligations onto MRI. In short, Antero offered nothing for something—a quintessential empty promise.

b) A Broken Promise: Antero Reneges on the July 14, 2014 Agreement

As the years ticked by, the parties vigorously litigated Plaintiffs' claims. On February 21, 2017, the lower court entered an order declaring MRI to be the rightful owner of the mineral interests at issue in the case. J.A. 1997-2062. After the lower court refused to alter or amend its judgment through an order issued on April 5, 2017, certain Plaintiffs and a co-defendant claiming to own roughly 36% of the 80% of the mineral estates at issue, appealed to this Court. *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 56, 818 S.E.2d 872, 882 (2018). This Court reversed and determined that the tax deeds conveying those appellants' interests were void and directed the lower court to find that the 36% was owned by appellants. *Id.* But this Court's ruling did not resolve the validity of the entire mineral estates below; instead, its holding addressed only the claims of petitioners, leaving the ownership of the remaining mineral estates belonging the parties who did not appeal in question. *See, e.g.*, J.A. 1225-1242. MRI continued to assert that it rightfully owned the portion of the mineral estates that was not addressed by this Court's prior opinion and moved for summary judgment on June 7, 2019, asking the lower court to declare it the rightful owner of the remainder of the mineral estates. *Id.* It was not until October 30, 2019, that the ownership of the remainder of the mineral estates was fully resolved. On that date, the lower court denied MRI's motion for summary judgment and determined that the entirety of the tax sales were void. J.A. 2126-2203.

Although ownership of the mineral estates remained at issue, Antero admittedly reneged on its agreement to continue paying MRI. Following this Court's decision, Antero's 30(b)(7)

deponent admitted that it suspended payments to MRI in May 2018 because of the "uncertainty" created by the opinion. J.A. 1070-1081. But the Agreement between MRI and Antero contained no provision permitting Antero to suspend payments because it was "uncertain" regarding the ownership status. Antero (emptily) promised to continue making payments to MRI—and it willingly reneged on that promise in May 2018. *Id.*

c) A Promise Fulfilled: MRI Resolves the Contested Royalty Claim with Plaintiffs

Although Antero broke its promise to continue paying royalties to MRI, MRI satisfied its promise to "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." J.A. 161. On November 1, 2019, MRI tendered Plaintiffs an offer of judgment pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. J.A. 335-336. Pursuant to this offer, MRI offered Plaintiffs $4,000,000 in exchange for "a full release of all claims asserted by Plaintiffs against MRI and, similarly, an agreement by MRI to forego any further claims in this case." *Id.* Importantly, because the offer of judgment sought a "full release of all claims," it sought to extinguish the claims for wrongfully received royalties asserted by Plaintiffs. On November 8, 2019, Plaintiffs accepted the offer, extinguishing, among other claims, the claim for wrongfully received royalties. J.A. 337-346.

Shortly thereafter, on December 16, 2019, Antero settled all of the claims asserted against it by Plaintiffs. Those claims included misappropriation, trespass, fraud, deceit, conversion, slander of title, unauthorized pooling of mineral interests, and punitive damages in addition to the claims for the royalties paid to MRI. J.A. 106-112;113-128. In its settlement agreement, Antero agreed to pay Plaintiffs a lump sum of $7,000,000. J.A. 1929-1939. Antero did not, however, designate which, if any portion, of the settlement was being allocated to pay for misdirected royalties despite the fact that initial drafts of its settlement agreement allocated specific portions

of the settlement for particular claims. J.A. 256-257. Additionally, Antero neither invited MRI to participate in settlement of the claim nor sought MRI's input in determining which portion of the settlement was to be directed toward misdirected royalties and which portion was directed toward Plaintiffs' other claims.

d) A Promise Misconstrued: The Lower Court's Decision

Prior to November 12, 2019 (a date that conspicuously fell after MRI's resolution of the claims against it), Antero never asserted a claim for contractual indemnification based on the Agreement. Hastened, perhaps, by the sunset of the underlying case, Antero tardily asserted a crossclaim for contractual indemnity without seeking to leave to amend its crossclaim when answering the latest version of the Plaintiffs' Complaint. *See* J.A. 106-112.[3] Months later, MRI and Antero filed cross motions for summary judgment on that claim.

In its Motion for Summary Judgment, Antero urged the lower court to treat the Agreement not as an indemnification agreement protecting Antero against competing royalty claims by Plaintiffs but as an Agreement that entitled it to wholesale reimbursement of royalties paid to MRI. *See* J.A. 214-234. Put simply, although the Agreement, by its own language, was put in place to "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc.," Antero sought to weaponize the Agreement and use it as a method to recoup the entirety of its royalty payments despite the fact that MRI and Plaintiffs, the parties who potentially had an ownership interest in those royalties, resolved the dispute over ownership of the royalties through the accepted offer of judgment. *See*

[3] This crossclaim was asserted in an Answer to the latest version of Plaintiffs' Amended Complaint on November 12, 2019—after Plaintiffs accepted MRI's offer of judgment. *Id.* The Answer was formally entered after the lower court granted a motion to amend in its October 30, 2019 Omnibus Order. J.A. 2126-2204. MRI moved to dismiss the crossclaim on November 14, 2019, on the grounds that MRI's settlement resolved the indemnification crossclaim, or alternatively, to bifurcate the crossclaim. J.A. 1797-1827. On November 15, 2019, the lower court entered an order refusing to dismiss the crossclaim and bifurcating them "for a better presentation before this Court." J.A. 1834-1839.

J.A. 221-224. To that end, it asked the Court to enter a $6,914,943.75—the purported total amount of royalties paid to MRI—judgment against MRI. *Id.* Although it sought to weaponize the indemnification agreement, Antero *graciously* conceded that "MRI should be entitled to receive a credit for the $4,000,000.00 MRI paid to Plaintiffs." *Id.* at 223.

Beyond weaponizing an indemnification provision meant to shield it from competing royalty claims, Antero's motion suffered from another key defect. Specifically, in the affidavit supporting the motion, Alvyn Schopp, Antero's 30(b)(7) witness, claimed that Antero paid MRI $6,914,943.75. *Id.* at 232-233. Months prior, however, Mr. Schopp testified in a 30(b)(7) deposition that Antero paid MRI $6,506,754.11 in royalties. J.A. 1070-1081. Antero itself created an irreconcilable issue of material fact regarding the total payments rendered to MRI.

While Antero sought to weaponize the Agreement to claw back the royalties it owed, MRI moved to have the contractual indemnity crossclaim dismissed. Specifically, it sought summary judgment on that claim because (a) Antero offered no consideration beyond performance of a pre-existing duty in exchange for new duties from MRI, (b) Antero preemptively breached the Agreement by suspending payments to MRI, and (c) Antero improperly sought to recover for misdirected royalty payments claims that were resolved by the accepted offer of judgment between MRI and Plaintiffs. J.A. 144-165; 201-211; 235-295.

After reviewing the motions, the lower court determined "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." J.A. 75. In its Order, the lower court determined that consideration existed in the form of "Antero . . . agreeing to allow MRI to keep receiving such contested royalty payments pending this litigation's determination of

contested royalty ownerships." *Id.* at 73.This amounted to consideration, per the lower court, because "MRI was provided a distinct and highly lucrative financial benefit; that being a very significant cash flow during an extended period of time for pursuing and financing other mineral rights and income producing investments from which MRI could yield additional investment income." *Id.* The lower court did not squarely address MRI's argument that Antero was simply performing a pre-existing duty in arriving at its conclusion.

The lower court also apparently determined that Antero did not preemptively breach the Agreement, stating that "MRI's ownership of any of the subject minerals was conclusively resolved herein by our Supreme Court declaring on appeal (with reaffirmation thereof by this Court upon remand) that MRI's 2003 Tax Deed was *void ab initio*." *Id.* at 72. The lower court did not address MRI's ongoing challenges to the mineral estates that were only fully resolved by the lower court's October 30, 2019 order, which occurred months after Antero suspended payments to MRI.

Finally, the lower court rejected Antero's argument that the Agreement entitled it to wholesale royalty repayments, stating that

> Antero's heretofore produced royalty payment documentation, interest calculations and *Affidavit of Alvyn A. Schopp* are deemed to misconstrue the actual tenor and terms of such *Agreement* between these parties that called for a blanket return of royalties paid plus interest in the event any disbursed royalty proceeds by Antero to MRI under that Agreement were subsequently deemed improper through this instant litigation.

Id. at 73. It then determined that "Antero's contractual indemnification claim arising against MRI arising from their *Agreement* is premised on Antero's liability for any unpaid (i.e.; otherwise improperly paid to MRI) royalties to an appropriately entitled royalty interest owner interest owner in the Subject Property pursuant to the 1902 Andrews Lease." *Id.* at 75-76. It then noted that

> 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.

Id. at 76. It also determined that MRI was not "given an opportunity . . . to mutually participate in settlement negotiations ultimately leading to their final settlements with Plaintiffs even though all such parties litigant[s] were fully aware of the existence of the July 14, 2014 *Agreement.*" *Id.* Despite that and the court's holding that "the overall and intent and understanding of Antero and MRI at the time they entered into their July 14, 2014 *Agreement* to be . . . [i]n 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 be properly accounted for and dispersed to accurately identified royalty owners according to legally determined royalty ownership proportions," the Court ordered wholesale reimbursement by MRI, directing it to repay $6,914,943.75 without interest subject to a $4,000,000 credit to account for MRI's accepted offer of judgment. *Id.* at 79-80. In total, the lower court determined that MRI owed Antero $2,914,943.75.

Months after entering that order, the lower court entered a Rule 54(b) Order, permitting the parties to take its resolution of Antero's crossclaim up on appeal. J.A. 95-98. MRI timely filed this appeal.

IV. SUMMARY OF ARGUMENT

The lower court committed four distinct errors when it denied MRI's Motion for Summary Judgment on Antero's crossclaim and granted Antero's Motion for Summary Judgment on the

same. First, the lower court erred when it determined that Antero's continuation of a pre-existing obligation amounted to consideration sufficient to support the Agreement. West Virginia law is clear that pre-existing obligations cannot be used as consideration to support new contracts, and the lower court erred when it determined the opposite.

Second, the lower court erred when it determined that Antero was entitled to recover under the Agreement where it is undisputed that Antero preemptively breached the Agreement. It is undisputed that, when Antero breached the Agreement, MRI was still contesting the ownership of the mineral interests at issue below. West Virginia law is clear: Antero is not entitled to the spoils of a contract that it willingly breached, and the lower court's contrary holding must be reversed.

Third, the lower court erred when it determined that Antero was entitled to recover the amount of royalties MRI received minus a $4,000,000 credit. This holding is not only inconsistent with the lower court's own decision—it also runs afoul of double recovery and indemnification rules.

Finally, the lower court erred when it entered a sum certain judgment. If MRI owes Antero repayment for royalties (it does not), the precise amount of royalties is a contested issue of material fact. Indeed, Antero's own 30(b)(7) witness offers differing accounts about the precise amount of royalties paid.

V. STATEMENT REGARDING ORAL ARGUMENT

This appeal involves error in the application of settled West Virginia contract and indemnity law. MRI accordingly requests oral argument pursuant to West Virginia Rule of Appellate Procedure 19. Additionally, MRI does not believe that this case is appropriate for a memorandum decision. West Virginia Rule of Appellate Procedure 21(d) states, "A memorandum decision reversing the decision of a circuit court should be issued in limited circumstances."

Because MRI is requesting reversal of the lower court's opinion and has raised numerous assignments of error, it does not believe that a memorandum decision is appropriate.

VI. ARGUMENT

a) Standard of Review

In the proceedings below, the lower court partially granted Antero's Motion for Summary Judgment and denied MRI's Motion for Summary Judgment. Therefore, this case must be reviewed under a de novo standard of review because a "circuit court's entry of summary judgment is reviewed de novo." *Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994).

b) Antero's empty promise to perform a pre-existing duty does not amount to consideration sufficient support the formation of a contract.

West Virginia law is clear: "Consideration is . . . an essential element of a contract," and absent consideration, a contract is illusory and unenforceable. *Cook v. Heck's Inc.*, 176 W. Va. 368, 373, 342 S.E.2d 453, 458 (1986). "Consideration has been defined as 'some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another.' A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract." *First Nat. Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967). Importantly, the benefit offered as consideration must be a new and independent obligation—"it is axiomatic that past consideration already given for a previous agreement cannot constitute valid consideration for a new agreement." *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 439, 781 S.E.2d 198, 216 (2015); *see also* Syl. Pt. 1, *Cole v. George*, 86 W. Va. 346, 103 S.E. 201 (1920) ("An agreement by one to do what he is already legally bound to do is not a good consideration for a promise made to him.").

Therefore, duties under existing contracts cannot be used as consideration for new agreements. Indeed, it is hornbook law that "[a]s a general principle, when a party does simply

what it has already obligated itself to do under a contract, it cannot demand any additional compensation or benefit, and, it is clear that if the party takes advantage of the situation and obtains a promise for more, the law in general regards it as not binding as lacking consideration." § 7:36. Promise to perform or performance of preexisting obligation other than debt; contractual preexisting duty rule, 3 Williston on Contracts § 7:36 (4th ed.). This is true even where "one of the parties, having become dissatisfied with the contract, . . . refuse[s] to perform or to continue performance unless it is promised or paid a greater compensation than that provided in the original agreement." *Id.*

In this case, it is undisputed that Antero owed the rightful owners of the mineral estates royalty payments. It also undisputed that Antero had a title opinion, produced by its counsel in this case, that said MRI was the rightful owner of the mineral estates. Despite the fact that it owed an obligation to mineral estate owners and had a title opinion indicating that MRI was the owner of the mineral estates at issue, Antero used its existing obligation to pay the owners of the mineral estates as a bargaining chip to foist new indemnification obligations on MRI. Put simply, Antero offered to exchange nothing for something. This plainly does not amount to consideration, and the Agreement is therefore an unenforceable illusory contract.

The lower court erred when it failed to squarely address the fact that the Agreement was premised on a pre-existing duty. Instead, its analysis myopically observed that "MRI was provided a distinct and highly lucrative financial benefit; that being a very significant cash flow during an extended period of time for pursuing and financing other mineral rights and income producing investments from which MRI could yield additional investment income." J.A. 73. But the conclusion that "MRI improperly benefited by having such proceeds to extend its cash flow" missed the point: the cash flow that MRI received was the direct result of Antero's already-existing

obligation to pay royalties to the owners of a mineral estate. *Id.* at 74. In the Agreement, Antero undertook no new obligations to MRI; instead, it simply agreed to continue doing what it was always obligated to do, hoping that it bet on the right horse, in exchange for new indemnification obligations on the part of MRI. That plainly renders the Agreement unenforceable because under West Virginia law, a promise to keep doing what one was already obligated to do—an empty promise—does not amount to consideration sufficient to create a contract. Accordingly, because the lower court determined that the Agreement was enforceable despite the fact that it was premised on a pre-existing duty by Antero, the lower court erred in determining that the Agreement was an enforceable contract.

c) Antero was not entitled to recover under a contract that it breached.

A breaching party is not entitled to recover for breach of contract. Whenever a party "fail[s] to perform an act which is a condition precedent to the assertion of a right to which [it] may have been entitled had [it] performed such act, [it] is not entitled to the benefit of the promise for which the omitted act was of the essence of the consideration for such promise." *Shank v. Jefferson Standard Life Ins. Co.*, 128 W. Va. 435, 36 S.E.2d 897, 903 (1946); *see also Wood Cty. Airport Auth. v. Crown Airways, Inc.*, 919 F. Supp. 960, 968 (S.D. W. Va. 1996). Put simply, a party is not entitled to enforce a contract that party itself has already breached. *See Va. Elec. & Power Co. v. Bransen Energy, Inc.*, 850 F.3d 645, 655 (4th Cir. 2017) ("'[A] party who commits the first breach of contract,' if material, 'is not entitled to enforce the contract' and thereby excuses the nonbreaching party from performance.").

In this case, Antero admittedly broke its empty promise to MRI. According to Antero's 30(b)(7) witness, Antero suspended payments to MRI in May 2018 after it became "uncertain" regarding MRI's ownership status following this Court's opinion in *L&D Investments, Inc. v. Mike*

Ross, Inc., 241 W. Va. 46, 818 S.E.2d 872 (2018). But the Agreement did not allow Antero to make a unilateral decision to stop payments based upon its uncertainty. Moreover, when Antero ceased making payments, it was aware MRI continued to maintain it owned the mineral estates not squarely addressed by this Court's opinion. Therefore, assuming Antero's promise to perform what it was already obligated to do amounts to consideration sufficient to support a contract, Antero admittedly breached that contract. Antero is not entitled to the spoils of a contract on which it willingly reneged.

The lower court only fleetingly touched on Antero's preemptive breach, stating, "Once MRI's ownership of any of the subject minerals was conclusively resolved herein by our Supreme Court declaring on appeal (with reaffirmation thereof by the Court upon remand) that MRI's 2003 Tax Deed was *void ab initio*, Antero properly suspended, yet again, (and actually ended) any further royalty payments to MRI." J.A. 72. But the lower court's opinion omits MRI's challenge to the remainder of the mineral estates following the remand of this case. Specifically, it omits that MRI challenged ownership of the mineral estates because while this Court held that the appealing parties' were the rightful estate owners, it "declined to address the issue of ownership of interests in the subject property that were not separately assessed." J.A. 1227-1240. MRI noted that "the remaining 36.894% interest acquired by MRI . . . was not "double assessed." *Id.* Because it was not double assessed, MRI claimed that this Court's opinion, which turned on double assessment, did not apply to those interests and that the remaining interests that were not addressed in the previous appeal rightfully belonged to MRI. *Id.*

Ownership of those mineral interests was not squarely resolved until the lower court issued its ruling on October 30, 2019, declaring all tax deed transfers to MRI *void ab initio*. Despite the fact that this issue was not resolved until October 2019, Antero halted payments in May 2018 and

kept those payments for itself. Antero should not reap the rewards of the Agreement when it abandoned its obligation to pay under that Agreement before its obligation to pay had been squarely resolved. Antero preemptively breached its contract—it broke its promise—and it is therefore not entitled to enforce the Agreement. Accordingly, the lower court's determination that Antero's preemptive breach of the Agreement does not foreclose its contractual indemnity claim should be reversed.

d) The lower court erred when it determined that MRI owed Antero $2,914,943.75 to account for royalty claims that MRI resolved through its accepted offer of judgment.

If the Agreement is an enforceable contract (it is, as described above, not), the lower court correctly determined that

> 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.

J.A. 78. Put simply, if the Agreement is enforceable, it provides only that MRI will indemnify Antero for amounts Antero owes to mineral estates owners whose payments were misdirected to MRI—it does not provide for indemnification for claims beyond misdirected royalties and it does not permit wholesale claw back of royalties Antero paid to MRI. The lower court was wrong, however, when it determined that "any previous royalty payments to MRI by Antero that cannot be otherwise assigned by this Court as further and collectively addressed within the settlements of Plaintiffs' claims against Antero and MRI respectively shall be relinquished by MRI and returned

to Antero in a sum certain amount determined by this Court as further reflected herein *infra.*" *Id.* That holding is erroneous for three reasons. First, it is internally inconsistent with the lower court's other holdings. Second, it impermissibly permits double recovery for a single injury. And finally, Antero is not entitled to recover for funds that have not been shown to fall within the scope of the indemnification provision in the Agreement.

i. The lower court's holding that Antero is entitled to claw back royalty payments is erroneous because it is inconsistent with its other holdings.

In its opinion, the lower court specifically found that Antero "misconstrue[d] the actual tenor and terms of such *Agreement* between these parties [to the extent Antero contended that the Agreement] called for a blanket return of royalties paid plus interest in the event any disbursed royalty proceeds by Antero to MRI under that Agreement were subsequently deemed improper through this instant litigation." *Id.* at 73. Instead, the lower court determined that "Antero's contractual indemnification claim against MRI arising from their *Agreement* is premised on Antero's *liability for any unpaid (i.e.; otherwise improperly paid to MRI) royalties to an appropriately entitled royalty interest owner in the Subject Property.*" *Id.* at 75-76 (emphasis added). Put simply, the lower court determined that Antero was contractually entitled to indemnification limited to its liability to third parties related to misdirected royalty payments.

Despite that holding, the lower court then held that "any previous royalty payments to MRI by Antero that cannot be otherwise assigned by this Court as further and collectively addressed within the settlements of Plaintiffs' claims against Antero and MRI respectively shall be relinquished by MRI and returned to Antero in a sum certain amount determined by this Court as further reflected herein infra." *Id.* at 78. Those holdings are impossible to reconcile. If Antero's contractual indemnity claims are limited to liability to third parties, the lower court had no grounds to order MRI to return funds "that cannot be otherwise assigned." Instead, if there is no liability to

a third-party for misdirected royalty payments, Antero has no entitlement to recover under the lower court's interpretation of the Agreement. Thus, to the extent the lower court's holdings conflict and it ordered MRI to indemnify Antero for amounts that are beyond Antero's liability to third-parties for misdirected royalty payments, it is erroneous and must be reversed.

ii. The lower court's holding violates the law's prohibition on double recovery.

Under West Virginia law, "[i]t 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." Syl. Pt. 7, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982); *see also McDavid v. U.S.*, 213 W. Va. 592, 601, 584 S.E.2d 226, 235 (2003) (noting that it is "axiomatic" that only one recovery is permitted for each loss). In the case below, Antero asked MRI to indemnify it for payments wrongfully made to MRI instead of Plaintiffs. MRI, however, already made full payment, in the form of its accepted offer of judgment, to Plaintiffs to compensate them for royalty payments it received from Antero that should have been paid by Plaintiffs. As MRI argued below, Antero was not entitled to recover for an injury for which Plaintiffs also recovered. The lower court did not squarely address this issue; instead, it summarily concluded that under "the totality of the settlements," recovery by Antero did not result in "any double payment by MRI." J.A. at 80.

That, however, is plainly wrong. MRI resolved the misdirected payments issue through its accepted offer of judgment with Plaintiffs. Upon Plaintiffs' acceptance of the $4,000,000 offer of judgment to resolve "all claims" against MRI, which included all the royalty claims, the misdirected payments claim was extinguished. Antero's claim for indemnification, which the lower court recognized was premised on "liability for any unpaid . . . royalties to an appropriately entitled royalty interest owner," cannot proceed where they are derivative of the injury for which

Plaintiffs already recovered. Indeed, permitting this claim to proceed undercuts the salutary public purpose of an offer of judgment, which should have given MRI finality. The lower court's holding to the contrary was erroneous and must be reversed.

iii. The lower court's holding improperly permitted Antero to recover despite the fact that Antero did not establish "actual liability."

To recover under an express indemnity theory when a case has been settled, this Court has announced two differing standards: an "actual liability" standard and a "potential liability standard." *See, e.g., Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987). The actual liability is exacting, requiring the party seeking indemnification to demonstrate that they were actually entitled to recover for indemnity in the case. The potential liability standard is laxer, and to prevail, "the indemnitee must in his indemnity suit show that the original claim is covered by the indemnity agreement. Then he must demonstrate that he was exposed to liability which could reasonably be expected to lead to an adverse judgment. Finally, he must prove that the amount of the settlement was reasonable." Syl. Pt. 4, *Id.* at 15. However, in order to invoke the potential liability standard, the party seeking indemnification must show that the "party having a duty to indemnify has been notified or been made a party to the underlying proceedings and *given an opportunity to participate in its settlement negotiations*." Syl. Pt. 2, *Id.* The opportunity to participate in settlement negotiations with the party seeking indemnification is crucial because "notice and an opportunity to defend are the indispensable due process satisfying elements." *Id.* at 19. Therefore, if the party from whom indemnification was sought was not part of settlement negotiations, the laxer standard does not apply.

The trial court determined that the Agreement was an indemnification agreement, permitting Antero to recover for "liability for any unpaid (i.e.; otherwise improperly paid to MRI) royalties to an appropriately entitled royalty interest owner in the Subject Property." J.A. 38.

Despite this holding, the lower court, after conducting no meaningful analysis, essentially ordered wholesale repayment of royalties minus a credit for MRI's offer of judgment. This is improper. Under West Virginia law, because Antero is seeking to recover a settlement through indemnification, the trial court should have examined whether the "actual liability" or "potential liability" standard applied and proceeded to analyze the issue from that point. It did not.

Had the lower court applied settled West Virginia law, the undisputed facts show that the actual liability standard should have applied below. The lower court explicitly found that MRI was not "given an opportunity . . . to mutually participate in settlement negotiations ultimately leading to [its] final settlements with Plaintiffs." J.A. 76. Despite this, the lower court undertook no effort to determine whether Antero demonstrated "actual liability" for the discrete claims—namely, misdirected royalty payments—that it could recover through indemnification. Instead, without rhyme or reason, the lower court required MRI to reimburse Antero for the entire amount of royalty payments less a $4,000,000 credit to account for MRI's accepted offer of judgment by Plaintiffs. That is plainly wrong.

Under the Agreement, Antero's recovery is cabined to misdirected royalty payments. When it settled its case with Plaintiffs for $7,000,000, Antero—which could have earmarked its settlement funds and should have included MRI in its discussions with plaintiffs—made no effort to categorize which of those funds were given to Plaintiffs to account for misdirected royalty payments and which were for settlement of the multiple other claims by Plaintiffs against Antero. Indeed, the lower court recognized as much, noting that "Antero cannot establish[] 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." J.A. 79. Strangely, despite recognizing that Antero's indemnification under the Agreement was limited to liability to third parties for misdirected settlement funds and

that it was impossible to ascertain how much of Antero's settlement went toward those particular claims, the lower court totally bypassed the "actual liability" test and randomly determined that MRI somehow owed Antero the entire amount of royalties paid with a $4,000,000 credit. This holding, which is premised vaguely on "the totality of the litigation record herein," is plain error. The lower court undertook no effort to apply the actual liability test, and its holding must therefore be reversed, protecting the finality of MRI's $4,000,000 payment and leaving Antero with its separate settlement obligations to Plaintiffs.

e) The lower court erred when it directed MRI to pay a royalty amount that Antero's own records demonstrate is a contested issue of fact.

Finally, the lower court erred when it held 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 . . . 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)." J.A. 79-80. The amount of royalty payments Antero rendered to MRI is a contested issue of fact as asserted by MRI in its pleadings before the lower court. Indeed, Antero's own 30(b)(7) witness cannot keep the amount straight, testifying during deposition that Antero paid MRI $6,506,754.11 and later, in an affidavit in support of Antero's motion for summary judgment, testifying that Antero paid MRI $6,914,943.75. The lower court seemingly ignored this conflict in the evidence when it ruled on the amount certain. The lower court's decision to grant summary judgment on this conflicted issue of fact plainly amounts to error. Accordingly, because Antero's own evidence shows that the amount of royalties paid to MRI is a contested issue of fact, the lower court should have, at the very least, ordered an accounting of the royalties paid to MRI to determine the correct amount of damages.

VII. CONCLUSION

For the foregoing reasons, the lower court's order granting Antero's Motion for Summary Judgment in Part and Denying MRI's Motion for Summary Judgment should be reversed, this case should be remanded, and the lower court directed to enter summary judgment for MRI on Antero's crossclaim.

MIKE ROSS, INC.

By Counsel

Benjamin L. Bailey (WVSB No. 200)
Rebecca D. Pomeroy (WVSB No. 8800)
Christopher D. Smith (WVSB No. 13050)
BAILEY & GLASSER, LLP
209 Capitol Street
Charleston, WV 25301
Telephone: 304.345.6555
Facsimile: 304.342.1110
bbailey@baileyglasser.com
bpomeroy@baileyglasser.com
csmith@baileyglasser.com

CERTIFICATE OF SERVICE

I, Benjamin L. Bailey, do hereby certify that on the 2nd day of March 2021, I have caused to be served a true and accurate copy of the foregoing **PETITIONER MIKE ROSS, INC.'S BRIEF** upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses as follows:

David J. Romano, Esq. Romano Law Office 363 Washington Avenue Clarksburg, WV 26301 *Counsel for L&D Investments, Inc.*	W. Henry Lawrence, Esq. Justin A. Rubenstein, Esq. Steptoe & Johnson, PLLC 400 White Oak Blvd. Bridgeport, WV 26330 *Counsel for Antero Resources Corporation*
Charles F. Johns, Esq. Shaina Massie, Esq. Steptoe & Johnson, PLLC 400 White Oak Blvd. Bridgeport, WV 26330 *Counsel for Consol Energy, Inc. and CNX Gas Company, Inc.*	Timothy M. Miller, Esq. Matthew S. Casto, Esq. Katrina Bowers, Esq. Babst, Calland, Clements, Zomnir, PC BB&T Square 300 Summers Street, Suite 1000 Charleston, WV 25031 *Counsel for SWN Production Company, LLC and Enervest Operating, LLC*
Ancil G. Ramey, Esq. Steptoe & Johnson, PLLC P.O. Box 2195 Huntington, WV 25722-2195 *Counsel for Antero Resources Corporation*	

Benjamin L. Bailey (WVSB No. 200)