IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 22-0407

BLACKROCK ENTERPRISES, LLC,

Petitioner,

v.

BB LAND, LLC and JB EXPLORATION 1, LLC,
Respondents.

PETITIONER BLACKROCK ENTERPRISES, LLC'S BRIEF

Civil Action No. 18-C-2
In the Circuit Court of Pleasants County, West Virginia
Business Court Division
(Honorable Michael D. Lorensen)

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I. ASSIGNMENTS OF ERROR

1. West Virginia Rule of Civil Procedure 49(a) permits judges to present special interrogatories to the jury in lieu of a general verdict form. However, when special interrogatories are presented to the jury, those interrogatories must present all parties' claims and defenses. The lower court erred when it refused to present the jury with special interrogatories to permit the jury to make findings regarding Blackrock's waiver, reaffirmation, and ratification defenses to the first material breach doctrine.

2. Under the "first material breach" doctrine of contract law, the party who breaches a contract first is generally barred from recovering under the contract. However, it is universally recognized that "[i]f, after a breach of a contract, the nonbreaching party continues to insist on performance by the defaulting party, the previous breach by that party will not excuse the nonbreaching party from performance and the contract continues in force for the benefit of both parties." 154 Am. Jur. Trials 317. The lower court erred when it determined that, under West Virginia's "first material breach" doctrine, additional "breaches are immaterial [after the] first breach."

3. In order to constitute a material breach, a party must fail to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract. Although Blackrock did not provide written notice to Jay-Bee stating that Blackrock did not intend to purchase certain land interests, the notice provision was ancillary to the main terms of the contract and Jay-Bee specifically stated that they hoped Blackrock did not comply with the notice provision and did not purchase the lease. The lower court erred when it determined that Blackrock's failure to comply with the notice provision amounted to a material breach.

4. In order to create a common law mining partnership, the parties must actually engage in working a natural gas well together. Blackrock never worked on the wells in the leased acreage—it merely obtained lease interests, abstracted those interests, and transferred them to Jay-Bee in exchange for a percentage interest of the lease interest. The lower court erred when it determined that a common law mining partnership existed despite the fact that Blackrock did not work the wells together with Jay-Bee.

5. Parties must agree to a contract before they are bound by the terms of the contract. The parties in this case never agreed to a joint operating agreement with a penalty provision. Despite that, the court determined that Blackrock was subject to a contractual penalty provision. The lower court erred when it determined that Blackrock was subject to the terms of a contract it did not agree to.

6. The lower court bifurcated the trial below. In Phase I, the jury was asked to decide what party breached and when. In Phase II, the trial court was supposed to determine what damages flowed from the identified breaches. In Phase II, the trial court resolved issues beyond the scope of damages and made factual findings regarding additional breaches. The trial court erred when it failed to comply with its bifurcation order.

7. Under West Virginia law, a court may not issue an order affecting the real property rights of a non-party. The lower court's final judgment order direct BMB Enterprises, LLC, a non-party, to transfer its ownership interests to Jay-Bee. The lower court erred when it issued an order affecting the real property rights of a non-party.

8. In the proceedings below, the jury determined that a contract obligating the parties to transfer property interests to one another terminated in 2017. The lower court determined that Blackrock was obligated to transfer property it acquired in 2018. The lower court erred when it determined that Blackrock was obligated to transfer property after the termination date of the contract.

II. STATEMENT OF THE CASE

a. Introduction

In this case, legal errors abound. For example, Blackrock Enterprises, LLC ("Blackrock") asked to present its defenses of ratification, waiver, and reaffirmation to the jury during Phase I of the trial. The lower court refused. Blackrock asked the lower court to reconcile the jury's verdict and make additional factual findings necessary to fully resolve Blackrock's counterclaims. Again, the lower court refused. Blackrock asked the lower court to determine that it was not subject to a penalty clause because it did not agree to the contract that contained that clause. Yet again, the lower court refused. But those legal errors do not tell the full story of this case. The stark facts of this case show that the lower court's opinion demands reversal.

In 2013, Blackrock agreed to acquire property for Plaintiffs BB Land, LLC and JB Exploration I, LLC (collectively, "Jay-Bee"). In return, Blackrock got to keep a piece of the property it acquired. Jay-Bee had a reciprocal obligation. For years, the parties complied with this agreement, transferring property back and forth until the parties' failure to agree to a joint operating agreement spurred Jay-Bee to sue Blackrock. After years of litigation, the lower court and Jay-Bee

used a never-enforced notice provision, a legally deficient verdict form, and a penalty provision to which the parties never agreed to strip Blackrock of every lease it acquired in the area of mutual interest and transfer every lease Blackrock acquired to Jay-Bee. And what did Blackrock get in return for its thousands of acres of valuable mineral property? Nothing. That cannot be right. Blackrock complied with its obligations, acquired property for Jay-Bee, and kept what it was entitled to for years. But, through a kaleidoscope of legal error, the lower court somehow arrived at the decision that Blackrock was entitled to nothing for its efforts and ordered it to transfer thousands of acres of mineral interests—worth millions of dollars—to Jay-Bee in exchange for zero dollars. Worse than that, the lower court ordered BMB Enterprises, LLC, a wholly separate LLC owned by the son of Blackrock's owner, to relinquish property to Jay-Bee despite the fact that BMB Enterprises, LLC was never joined as a party in the matter below, Jay-Bee never alleged or advanced a veil-piercing theory, and there is no evidence that BMB Enterprises, LLC is intertwined with Blackrock. Those results—and the foundation of clear legal error upon which they are built—demand reversal.

b. The Lease Acquisition Agreement

On May 18, 2013, Blackrock and Jay-Bee entered into the Lease Acquisition Agreement (the "LAA" or the "Agreement"). A.R.003411-3414. Under the Agreement, Blackrock agreed to acquire and assign leases of mineral interests in an Area of Mutual Interest ("AMI") to Jay-Bee in exchange for a percentage of the leases assigned to Jay-Bee. *Id.* at ¶ 8 ("Blackrock agrees to assign unto JB all Lease Agreements obtained in the AMI after payment of rentals have been paid pursuant to item 6. herein. Blackrock shall be entitled to retain a percentage of each Lease Agreement, which will be calculated upon the price per acre paid to acquire said Lease which is more particularly described in item 9."). Similarly, if Jay-Bee acquired oil and gas interests within the AMI, Jay-Bee was obligated to offer said interests to Blackrock. *Id.* at ¶¶ 11-12.

In addition to the parties' reciprocal exchange of lease interests, Jay-Bee agreed to provide Blackrock invoices that allowed Blackrock to purchase additional interests in the leases if payment was tendered. *Id.* at ¶ 11. If Blackrock did not intend to purchase the additional interest, Blackrock was required to notify Jay-Bee in writing that it did not intend to purchase the interest within forty-five days of receiving an invoice. *Id.* Through the parties' course of performance, the notice provision was extended from forty-five days to sixty days. A.R.003941-A.R.003948.

Despite the notice provision of the contract, Jay-Bee's Vice President of Land admitted that Jay-Bee did not mind if Blackrock failed to purchase the additional interests from Jay-Bee or provide the notices and that Jay-Bee did not intend to remind Blackrock of the notice provision because "in all honesty, we really don't want them involved in all of the tracts and if they are not responsible enough to keep track of this, then I consider this to be their loss." A.R.003509-A.R.003060. Consistent with that sentiment, Sarah Hacker, one of Blackrock's employees, testified that Jay-Bee never "call[ed] you and complain[ed] about not receiving notice." March 11, 2021 Trial Tr. p. 61:15-20.

Lastly, the Agreement expressly stated that, "This agreement does not constitute a partnership. JB and Blackrock, or their parking entities, will be considered separate and distinct entities." A.R.003411-3414. Put simply, although the parties assumed responsibilities to one another under the Agreement, both parties agreed those mutual responsibilities did not create a partnership. And their conduct conformed to this. Blackrock testified that Jay-Bee never permitted it to have any role in developing the mineral interests. March 9, 2021 Trial Tr. p. 250:17-253:8. And an unexecuted draft joint operating agreement specifically noted that the parties were not partners in a mining venture. A.R.003595-A.R.003674. Further, BB Land, LLC executed a joint operating agreement with non-appellant Jay-Bee Oil & Gas, Inc. to develop the AMI interests at

issue in this case and specifically disclaimed that a mining partnership was created. A.R.003686-A.R.003770 at Exhibit B p. 11.

c. The Parties' Performance

For years, the parties performed under the LAA. For example, on December 9, 2013, Jay-Bee submitted an invoice to Blackrock with a buy in or notice deadline of February 4, 2014. A.R.003482-A.R.003494. There was nothing different about this buy-in invoice from the hundreds of other invoices Jay-Bee sent to Blackrock. Blackrock exercised its option under the LAA and did not purchase the additional interests described in the invoice, but it did not provide notice that it did not intend to purchase the interests. Nevertheless, thereafter for years, the parties continued to perform under the Agreement, and Jay-Bee neither notified Blackrock of its breach nor held that breach against it in the parties' continued performance. Indeed, after February 4, 2014, Blackrock assigned 163 leases to BB Land, including two leases on February 5, 2014. A.R.003834.

Jay-Bee attempted to terminate the LAA on February 8, 2015. A.R.003085-A.R.003086. Despite that attempted termination, the record conclusively establishes that Jay-Bee continued to perform under the Agreement for years and even admitted the Agreement was still in effect. Indeed, on October 26, 2015, Randy Broda ("Mr. Broda"), principal of Jay-Bee, confirmed the Agreement was still in effect when he stated: "*I agree with your attorney that the agreement is in effect* ...." A.R.003059-A.R.003060. In July of 2016, Jay-Bee used the Agreement to benefit itself by accepting the assignment of nineteen oil and gas leases from Blackrock and crediting Blackrock with an earned interest credit, per the terms of the LAA. A.R.003557-A.R.003559 and A.R.003829-A.R.003831.

Later, on August 22, 2017, Jay-Bee tendered an invoice to Blackrock for the "leases, assignments, and deeds that BB Land has acquired from 3/1/2017 to 8/7/2017" as required by the LAA. A.R.003128. In September 2017, Blackrock elected to purchase the additional interests

described in the invoice pursuant to the terms of the Agreement. A.R.003129-A.R.003130. On November 10, 2017, Blackrock tendered a check to Jay-Bee for the interests described in the invoice, but Jay-Bee refused to accept the check and did not give Blackrock the interests described in the August 22, 2017 letter. On December 11, 2017, all but acknowledging that the Agreement remained in effect, Jay-Bee tendered *another* notice of termination of the Agreement. A.R.003135-A.R.003139. At trial, the Jury found that this last notice of termination was effective, as argued by Blackrock throughout the trial. It is Blackrock's position that this determination is consistent with the jury finding that Jay-Bee waived the prior February 2014 breach.

d. The Lower Court Denies Blackrock the Opportunity to Effectively Present its Affirmative Defenses.

On January 11, 2018, Jay-Bee sued Blackrock for failure to comply with terms of the Agreement requiring Blackrock to provide certain mapping and abstracting work. *See generally* A.R.000084-A.R.000168. On February 12, 2018, Blackrock answered and asserted counterclaims for breach of contract based on Jay-Bee's failure to provide payment for or interest in leases acquired as required by the LAA.[1] *See generally* A.R.000169-A.R.000219. Later, Blackrock filed an amended answer and counterclaim. *See* A.R.000242-A.R.000289. After protracted discovery and litigation, the lower court bifurcated the issues of liability and damages and directed that the trial be conducted in two phases. A.R.001554-A.R.001565 at ¶ 4. A jury trial on liability was held on March 2, 2021, and the lower court prepared six special interrogatories aimed at resolving the parties' respective liability for breach of contract. Specifically, this Court asked the jury:

> 1. Do you find by a preponderance of the evidence that Blackrock Enterprises, LLC materially breached the Lease Acquisition Agreement?

[1] Blackrock asserted several other claims, but by the time trial arrived, its breach of contract claims were all that remained.

2. Do you find by a preponderance of the evidence that JB Exploration 1, LLC or its successor BB Land LLC, materially breached the Lease Acquisition Agreement?
3. Do you find by a preponderance of the evidence that BB Land LLC gave reasonable notice of termination of the Lease Acquisition Agreement?
4. We find by a preponderance of the evidence that BB Land gave reasonable notice of the termination of Lease Acquisition Agreement, on the following date:
5. We find by a preponderance of the evidence that the following party committed the first material breach of the Lease Acquisition Agreement?
6. We find by a preponderance of the evidence that the first material breach of the Lease Acquisition Agreement, occurred on this date:

A.R.001463-A.R.001465. On March 12, 2021, the jury answered:

1. Yes.
2. Yes.
3. Yes.
4. December 11, 2017.
5. Blackrock Enterprises LLC
6. February 4, 2014

Id. The jury's answers, however, left certain questions unanswered. For example, the jury was instructed that, even though a party materially breaches a contract first, a party who breaches a contract may recover under reaffirmation, waiver of a breach, or ratification despite its preliminary breach. A.R.001449-A.R.001462 at Inst. 10-11. And Blackrock specifically argued to the jury that any breach prior to December 11, 2017 was excused by waiver, ratification, or reaffirmation. March 12, 2021 Trial Tr. at p. 73:1-77:24. Despite that instruction, the jury was not given an opportunity to answer whether Jay-Bee reaffirmed the Agreement after Blackrock's initial breach, waived Blackrock's initial breach, or ratified the Agreement following Blackrock's breach. *See generally* A.R.001449-A.R.001462. Indeed, Blackrock's counsel specifically sought an instruction aimed at determining whether Jay-Bee "Lazarus[ed] the agreement" if Blackrock committed the initial breach, but the lower court refused to include a question on the verdict form that determined

if the contract was reaffirmed, if any breach of contract was waived, or if the contract was ratified by conduct following any breach found by the jury. March 11, 2021 Trial Tr. at p. 218: 14-18.

e. The Lower Court Denies Blackrock's Post-Trial Motions.

In an effort to clarify the gaps left by the jury's verdict and ascertain whether Jay-Bee were liable for breach of contract, Blackrock filed a post-trial motion under Rule 49(a) and 50(b) on March 18, 2021. A.R.001479-A.R.001544. Specifically, Blackrock asked the lower court to find that the jury's verdict that the Agreement was terminated on December 11, 2017, necessarily entailed that Jay-Bee waived the initial breach by Blackrock in February of 2014. This finding was necessary because the jury determined that Jay-Bee gave reasonable notice of termination after Blackrock's initial breach, implying an enforceable contract existed on the date of termination whether it be by reaffirmation, waiver of Blackrock's breach, or ratification. Alternately, Blackrock asked the lower court to find that insufficient evidence supported the jury's determination that Blackrock committed the initial material breach on February 4, 2014. It did so because Blackrock's failure to provide notice that it did not intend to purchase the lease interests in the December 9, 2013 invoice provided by Jay-Bee did not amount to a material breach; indeed, Jay-Bee admitted that they did not care whether or not Blackrock complied with the notice provision, and Jay-Bee subsequently acquired 2,702.7 net mineral acres under 163 leases from Blackrock subsequent to February 2014.

The lower court denied both motions. *See generally,* A.R.001931-A.R.001938. It first determined that relief was not warranted under Rule 49(a) because "the jury was specifically instructed on [waiver], novation, and ratification," but, according to the Court, "Blackrock has not presented evidence that it proposed to include those concepts on the verdict form, and the undersigned rejected such proposals." *See id.* at A.R.001931-A.R.001938 at p. 4. That holding is inaccurate: Blackrock specifically asked that the verdict form be modified to include

interrogatories related to waiver, reaffirmation, and ratification. *See* March 11, 2021 Trial Tr. at p. 210:7-17, 217:24-218:18. Instead, the Court determined that it was enough that "[t]he jury was asked to find who breached first and when. The jury was not asked to make determinations regarding any subsequent breaches. The Court notes such breaches are immaterial under first breach." *See* A.R.001931-A.R.001938 at p. 5.

Next, the Court determined that relief was not warranted under Rule 50 by conclusorily stating, "Evidence support[s] the jury's determination that Blackrock's failure to accept via check or decline via written notice the Benefiel offer was the first material breach of the LAA." *See id.* at 7. The Court did not explain what this evidence was nor did it explain how the breached provision was material when Jay-Bee admittedly hoped Blackrock would breach the Agreement as they explained in their December 2, 2013 email chain.

f. The Court Determines that Mining Partnership Existed between Blackrock and Jay-Bee.

Left with the jury's internally incoherent verdict, which raised more questions than it answered, the lower court and parties began the process of setting up the September 20, 2021 trial on damages in this case. One of the threshold issues in the damages trial was the method by which lease interests were to be apportioned. Jay-Bee contended that the lease interests should be apportioned according to the Revised Uniform Partnership Act ("RUPA") rules because a common law mining partnership existed between Blackrock and Jay-Bee.[2] Blackrock disagreed. In its Supplemental Briefing on the Mining Partnership Issue, Blackrock contended that a common law mining partnership did not exist because (1) the "unite and co-operate in working the lease" element required to establish a common law mining partnership was not satisfied in this case and

[2] Jay-Bee previously filed a motion for summary judgment on this issue; the lower court denied that motion.

(2) the "share in profits" element required to establish a common law mining partnership was not satisfied in this case. A.R.001870-A.R.001916. Jay-Bee contended the opposite. A.R.001917-A.R.001930.

The lower court sided with Jay-Bee. It first determined that the "unite and co-operate in working the lease" element was satisfied because, even though the parties never operated the wells together nor signed an operating agreement to jointly operate the wells together, the parties each performed pre-mining activities, such as lease acquisition, with the goal that they may one day operate wells together. A.R.001942-A.R.001951 at p. 5-6. Those pre-mining activities, however, were performed under the Agreement, which specifically stated that "[t]his agreement does not constitute a partnership." A.R.003411-3414 at ¶ 14. Counsel for Jay-Bee has consistently recognized that the lease acquisition phase and the development phase were two separate and distinct periods. First, during the pre-trial conference, counsel for Jay-Bee explained:

> Blackrock agrees there are two phases to this oil and gas transaction. Phase One was the acquisition of the oil and gas leases. The L.A.A. governed this aspect of the relationship. It set forth how leases were to be acquired in the AMI and how the parties were to obtain their respective interest in those leases. The question in this case with respect to the acquisition phase is whether a party breached any obligation under the LAA.
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> ******
>
> [The Agreement] [t]alks about lease acquisitions, just like Blackrock agrees. How we do it. What [Jay-Bee] [is] required to pull together. What [Blackrock] [is] required to give [Jay-Bee]. There's no reference to a J.O.A. There is no reference [to] how we will work this acreage. There is no discussion of who will pay what or how we will share anything.
>
> ******
>
> [The Agreement] cannot control lease development. It cannot. There is not a word in here about lease development.

March 1, 2019 Trial Tr. at p. 169: 2-10; 162: 1-2.

During opening statements, counsel for Jay-Bee again explained this distinction between the acquisition and development of leases:

> So we have [the Agreement], but this just covers the lease acquisition phase. The other thing I think we can agree on is, this talks about buying the dirt. Talks about buying the piece of property. What it doesn't cover is, okay, now it's time to drill.

March 2, 2021 Trial Tr. at p. 188: 4-8. And although the parties discussed a joint operating agreement, the draft joint operating agreement made it clear that the parties did not intend to enter a mining partnership. A.R.003595-A.R.003674. Indeed, this intent becomes clear upon seeing that BB Land, LLC executed a joint operating agreement with Jay-Bee Oil & Gas, Inc. to develop the AMI that specifically disclaimed that the joint venture created a mining partnership. *See* A.R.003686-A.R.3770 Exhibit B at p. 11.

Next, the Court determined that even though the parties never actually shared in profits or losses, their intention to one day do so satisfied the "share in profits" element. A.R.001942-A.R.001951 at p. 5. Accordingly, the Court determined that a common law mining partnership existed, and the RUPA rules governed the proceeding as it headed to the damage phase.

g. The Court Divests Blackrock of its Property Interests during the Phase II Trial.

During Phase II of the trial, the lower court heard argument regarding damages. The central issues during Phase II were: (1) whether dissociation of the partnership under RUPA rules was appropriate; (2) the appropriate value of Blackrock's rights in the partnership if it were dissociated; and (3) whether Blackrock was required to "specifically" perform under the LAA. After hearing testimony and argument during Phase II, the lower court entered a final judgment order with a series of findings. *See* A.R.002830-A.R.002857. First, it sustained its finding that a mining partnership existed and found that dissociation was warranted under RUPA. *Id.* at ¶¶ 13, 15-16. However, it determined that a "penalty" would be assessed against Blackrock's share of

partnership property pursuant to a joint operating agreement. *Id.* at ¶ 17. This penalty was based on a joint operating agreement; however, it is undisputed that the parties never agreed to a joint operating agreement. *Id.* at ¶ 12; September 22, 2021 Trial Tr. at p. 72:13-16. Instead, the court determined that the penalty was warranted because when other parties enter joint operating agreements, they typically agree to penalty provisions. *Id.* at ¶¶ 17-18.

Additionally, despite the fact that Phase II was limited to damages, the lower court made additional findings regarding liability. A.R.002830-A.R.002857 at ¶ 55. Despite the jury's finding that Jay-Bee also breached the LAA, the lower court refused to assess damages against Jay-Bee because the jury determined Blackrock committed the first material breach. *Id.* Therefore, it limited its additional liability findings to purported breaches by Blackrock. *Id.*

Ultimately, the lower court ordered Blackrock to turn over all of its interests in the AMI to Jay-Bee. *Id.* at ¶¶ 24-25. This included property acquired in 2018 despite the fact that the LAA was terminated in 2017. *Id.* Finally, the lower court ordered BMB Enterprises, LLC ("BMB"), a non-party LLC owned by the son of the owner of Blackrock, to turn over its property interests in certain tracts to Jay-Bee. Jay-Bee never alleged veil piercing, joined BMB as a party, or sought discovery regarding the relationship between BMB and Blackrock, and the limited testimony regarding the relationship between Blackrock and BMB shows that the two were separate entities. March 8, 2021 Trial Tr. at p. 20:2-24; 22:13-23:24; 26:2-27:4.

Blackrock timely filed its Notice of Appeal. *See* A.R.002943-A.R.002991. It now asks this Court to overturn the lower court's orders and order a new trial on liability and damages. Alternatively, this Court should overturn the lower court's order on damages and conduct a new damages trial taking into account Jay-Bee's breaches and correcting the numerous errors it committed, such as the application of an unagreed to contractual penalty provision.

III. SUMMARY OF ARGUMENT

The lower court committed eight separate errors, each warranting reversal. First, and most egregiously, the lower court stripped Blackrock of its ability to present its waiver, ratification, and reaffirmation defenses. Although Blackrock requested that these issues be included in the special interrogatories the lower court submitted to the jury, the court refused to do so. This violates West Virginia Rule of Civil Procedure 49(a), which requires that requested fact issues be submitted to jury when special interrogatories are used.

Next, the lower court erred when it determined that the "first material breach" doctrine bars *any and every* claim for breach of contract by the breaching party. That is, of course, wrong. This Court—and virtually every other court in the United States—has recognized that the "first material breach" doctrine may be waived by accepting subsequent performance. In this case Blackrock's subsequent performance spanned years and cost it millions of dollars. March 8, 2021 Trial Tr. at p. 172:2-22.

Third, the lower court erred when it determined that Blackrock's breach of the notice provision was material. That provision was ancillary to the primary goals of the contract and did not provide a benefit to Jay-Bee. Indeed, Jay-Bee admitted that it did not want Blackrock to comply with it. Therefore, there was insufficient evidence to determine that a breach of the notice provision with respect to one offer of acreage amounted to a material breach of the whole Agreement when Jay-bee acquired 5,457 net mineral acres after February 4, 2014.

Fourth, the lower court erred when it determined that a mining partnership existed between the parties. To create a mining partnership, the parties must unite and work the mine or well. Blackrock merely acquired leases and transferred them to Jay-Bee so Jay-Bee could develop them. It did not—and was not permitted to—exercise any authority over the development of mineral interests. Therefore, the court's determination that a mining partnership existed was legal error.

Fifth, the lower court determined that Blackrock was subject to a penalty provision found in a joint operating agreement. The problem, however, is that Blackrock never agreed to a joint operating agreement. The lower court plainly erred when it determined Blackrock was subject to the terms of a contract it did not agree to.

Sixth, the lower court violated its own bifurcation order. In its order, liability would be resolved by the jury, and damages by the court. Despite this, the lower court made additional liability findings during the damages phase of the trial. Courts ought to, at the very least, comply with their own orders.

Seventh, the lower court stripped nonparty BMB Enterprises, LLC of its property rights during the proceeding. That exceeds its legal power. Orders that affect the real property rights of nonparties are "null and void" under this Court's precedent.

Finally, the lower court ordered that Blackrock relinquish property it acquired in 2018. The jury, however, found that the LAA terminated in 2017. Blackrock is plainly not obligated to turn over property it acquired after the LAA was terminated.

These cumulative legal errors require that the jury's verdict be set aside and a new trial conducted. The jury's verdict is unclear, and it makes little sense to hold another damages trial when the liability findings issued by the jury are subject to interpretation. The only way to remedy this is a new trial from scratch. Even if a new trial on liability is not ordered, the damages trial must be re-done. The lower court failed to consider breaches by Jay-Bee, applied contractual penalty clauses that were not agreed to by the parties, and issued its own additional liability findings before ultimately ruling that Blackrock must relinquish all of its property in exchange for zero dollars. That requires reversal of the order below, with instructions to conduct a new damages

trial that considers Jay-Bee's liability, does not apply unagreed to contractual terms, and that respects the property rights of nonparties.

IV. STATEMENT REGARDING ORAL ARGUMENT

Under West Virginia Rule of Appellate Procedure 18(a), Blackrock requests a Rule 19 oral argument. This appeal is appropriate for oral argument pursuant to Rule of Appellate Procedure 19(a)(2). Specifically, this Appeal addresses an unsustainable exercise of discretion where the law governing that discretion is settled in the State of West Virginia. The lower court misapplied law governing special interrogatories, contracts, and common law mining partnerships, among several others. These issues are settled by the governing law of West Virginia and the lower court's ruling only operates to sidestep the governing law, ignore it, and generally misapply it as discussed more fully below. Accordingly, because this Appeal satisfies Rule 19 of the West Virginia Rules of Appellate Procedure, oral argument is both necessary and appropriate.

V. ARGUMENT

a. The lower court misapplied West Virginia Rules of Civil Procedure 49(a) by refusing to submit a factual issue raised by Blackrock to the jury.

Under West Virginia Rule of Civil Procedure 49(a), courts "may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." When the court creates a verdict form using special interrogatories, parties must specifically raise facts that they want addressed by the court. Indeed, under the Rule, if the court "omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." Although omitted issues are waived, lower courts must present all properly raised issues. This Court has specifically stated that "*[a]ll material factual issues should be covered by the questions*

submitted." *Teter v. Old Colony Co.*, 190 W. Va. 711, 720, 441 S.E.2d 728, 737 (1994) (emphasis added). Although this Court "applies an abuse of discretion standard to a trial court's decision regarding a verdict form," *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 562–63, 814 S.E.2d 205, 225–26 (2018), when a demand to submit a factual issue to the jury is raised "but the trial court fails to submit the issue to the jury, reversible error occurs." Cleckley, Davis, & Palmer, Litigation Handbook on the West Virginia Rules of Civil Procedure § 49(a) (5th ed.). Failure to submit an issue to the jury amounts to reversible error because verdict forms must "allow[] the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions." *Tri-State Petroleum Corp.*, 240 W. Va. at 563, 814 S.E.2d at 226.

The reason it amounts to reversible error is simple: failure to present all material factual issues to a jury effectively hampers parties' abilities to present their claims and defenses. Indeed, while courts generally have discretion to craft special interrogatories under Rule 49(a), "such discretion cannot be exercised in a manner which withdraws from the jury's consideration a valid theory of defense upon which defendant has produced sufficient evidence." *Cutlass Prods., Inc. v. Bregman*, 682 F.2d 323, 328–29 (2d Cir. 1982). In *Cutlass*, for example, the Second Circuit determined that a jury verdict in favor of the plaintiff must be vacated because the wording of one special interrogatory "withdrew from the case one theory of defense asserted throughout the trial." *Id.* at 328. This holding is wholly consistent with this Court's interpretation of the Rules of Civil Procedure, which must not be interpreted in a way that "delay[s] the determination of causes on their merits." *Rosier v. Garron, Inc.*, 156 W. Va. 861, 871, 199 S.E.2d 50, 56 (1973).

Despite the fact that special interrogatories must be presented in a manner that resolves the merits of all parties' claims and defenses, the lower court's special interrogatories stripped Blackrock of its ability to present its waiver, ratification, and reaffirmation defenses to any alleged

breach of the Agreement by Jay-Bee. Specifically, counsel for Blackrock contended that the verdict form must be altered to account for the fact that Jay-Bee "can Lazarus the agreement, they can raise it from the dead" through the doctrines of waiver, ratification, and reaffirmation. March 11, 2021 Trial Tr. at p. 219:14-18; *see also id.* at 210:15-17 ("Right, there's no place for waiver of the notice in this verdict form. Are you wanting them to remember that? I mean, what is your reasoning on that?"); 212:20-21 (seeking special interrogatory ascertaining whether Jay-Bee "waive[d] or ratif[ied] continued performance of" the Agreement). The lower court overruled all of Blackrock's objections to the verdict form and presented a verdict from with the following six questions:

> 1. Do you find by a preponderance of the evidence that Blackrock Enterprises, LLC materially breached the Lease Acquisition Agreement?
> 2. Do you find by a preponderance of the evidence that JB Exploration 1, LLC or its successor BB Land LLC, materially breached the Lease Acquisition Agreement?
> 3. Do you find by a preponderance of the evidence that BB Land LLC gave reasonable notice of termination of the Lease Acquisition Agreement?
> 4. We find by a preponderance of the evidence that BB Land gave reasonable notice of the termination of Lease Acquisition Agreement, on the following date:
> 5. We find by a preponderance of the evidence that the following party committed the first material breach of the Lease Acquisition Agreement?
> 6. We find by a preponderance of the evidence that the first material breach of the Lease Acquisition Agreement, occurred on this date:

A.R.001463-A.R.001465.[3] That verdict form deprived Blackrock of its ability to present its waiver, reaffirmation, and ratification defenses to any alleged breach on its part because it began and ended the inquiry of breach by asking which "party committed the first material breach." *Id.*

[3] The Court's verdict form was especially odd in light of the fact that it instructed the jury on waiver, ratification, and reaffirmation. A.R.001449-A.R.001462. It makes little sense to instruct the jury on those issues and then deny it the opportunity to resolve them.

But, as Blackrock pointed out, this Court has long held that waiver, ratification, and reaffirmation can resuscitate a breached contract. *See, e.g., J.W. Ellison, Son & Co. v. Flat Top Grocery Co.*, 69 W. Va. 380, 71 S.E. 391, 394 (1911) ("If, however, the injured party knowingly accepts defective performance of the contract, or accepts further performance after he is aware that a breach of contract has been committed, such conduct will operate as a waiver of his right to refuse to go on with the contract."); *cf. Toney v. Sandy Ridge Coal & Coke Co.*, 84 W. Va. 35, 99 S.E. 178 (1919) ("If, after such breaches, the parties meet and modify the contract, mutually forgive the previous breaches, and agree to perform the contract in the future, as modified, neither can recover damages for such breaches."). Therefore, the issue of which party breached the contract first is only the first step in the inquiry. If Jay-Bee waived Blackrock's breach, reaffirmed the contract despite Blackrock's breach, or ratified the contract in spite of Blackrock's breach, then Blackrock was entitled to recover for any breach following the waiver, ratification, or reaffirmation. But the verdict form denied Blackrock that opportunity. Accordingly, because the special interrogatories proffered by the lower court denied Blackrock the opportunity to present the issues of waiver, reaffirmation, and ratification to the jury, the special interrogatories are clearly erroneous as a matter of law.

b. The lower court misapplied West Virginia Rule of Civil Procedure 49(a) and the "First Material Breach" doctrine when it refused to find waiver, ratification, or reaffirmation necessarily flowed from the jury's verdict.

Although the lower court denied Blackrock the opportunity to present its waiver, ratification, and reaffirmation defenses, West Virginia Rule of Civil Procedure 49(a) gave it a mechanism to correct that error. Under that Rule, "As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in

accord with the judgment on the special verdict." Put simply, "the rule provides that the court may make a finding on the omitted issues." Cleckley, Davis, & Palmer, Litigation Handbook on the West Virginia Rules of Civil Procedure § 49(a)[2][a] (5th ed.). Not only, however, must a court resolve omitted issues—it must "reconcile inconsistencies" on the verdict form. *Id.* at § 49(a)[2][c]. And, precisely as the rule permits, Blackrock asked the lower court to make a "finding which was omitted from, but likely implicit in, the verdict." *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 919 (1st Cir. 1988), aff'd, 900 F.2d 388 (1st Cir. 1990). The lower court refused.

That refusal is legal error. When a court is asked to resolve whether there "is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). A court's "reconciliation of the special verdict forms returned by the jury" is reviewed *de novo.* Cleckley, Davis, & Palmer, Litigation Handbook on the West Virginia Rules of Civil Procedure § 49(a)[2][c] (5th ed.) (citation omitted). Under that standard—or any standard—the lower court's attempt to interpret and reconcile the special verdict form is reversible error.

In its Rule 49(a) Motion, Blackrock noted that the jury's verdict necessarily entailed that any breach of the Agreement by Blackrock was waived or that Jay-Bee reaffirmed or ratified the contract. Consider the jury's verdict:

> 1. Do you find by a preponderance of the evidence that Blackrock Enterprises, LLC materially breached the Lease Acquisition Agreement? Yes
> 2. Do you find by a preponderance of the evidence that JB Exploration 1, LLC or its successor Land LLC, materially breached the Lease Acquisition Agreement? Yes
> 3. Do you find by a preponderance of the evidence that BB Land LLC gave reasonable notice of termination of the Lease Acquisition Agreement? Yes
> 4. We find by a preponderance of the evidence that BB Land gave reasonable notice of the termination of Lease Acquisition Agreement, on the following date: December 11, 2017

> 5. We find by a preponderance of the evidence that the following party committed the first material breach of the Lease Acquisition Agreement? Blackrock Enterprises LLC
> 6. We find by a preponderance of the evidence that the first material breach of the Lease Acquisition Agreement, occurred on this date: February 4, 2014

A.R.001463-A.R.001465. Although the jury found that Blackrock breached the Agreement first on February 4, 2014, the jury found that Jay-Bee gave reasonable notice of termination of the Agreement on December 11, 2017. If Jay-Bee were capable of terminating the Agreement on December 11, 2017, then the Agreement must have been in force on that date. Therefore, the jury's verdict necessarily entails that Blackrock's initial breach was waived or that Jay-Bee reaffirmed or ratified the contract in the wake of that breach. After all, one cannot terminate a contract that is not in effect.

And the jury understood that its finding of an initial breach by Blackrock did not foreclose recovery for subsequent breaches of the Agreement by Jay-Bee. Indeed, the jury was specifically instructed that a party could waive its rights under a contract, that a breached contract could be ratified, and that a terminated agreement could be reaffirmed through the conduct of the parties. A.R.001449-1462. Based on this, Blackrock contended that the lower court "should make further findings of fact pursuant to its authority under West Virginia Rule of Civil Procedure 49(a) to resolve questions of fact left unanswered by special interrogatories to the jury"—namely, whether the Agreement was alive after Blackrock's initial breach and the date Jay-Bee breached the Agreement. A.R.001479-A.R.001544.

The lower court denied Blackrock's request, stating, "The Court does not find Blackrock's argument regarding waiver, ratification, and/or reaffirmation convincing." A.R.001445-A.R.001448 at p. 5. It first noted that despite the fact the jury "was specifically instructed on waiver, novation, and ratification," "Blackrock has not presented evidence that it proposed to

include these concepts on the verdict form." *Id.* That holding is, however, at odds with reality because Blackrock specifically asked that the jury verdict form be modified to address waiver, reaffirmation, and ratification. *See, e.g.*, March 11, 2021 Trial Tr. at p. 219:14-18; *id.* at p. 210:15-17; *id.* at p. 212:20-21. Beyond that—why would a jury be instructed on something that it was not supposed to consider on the verdict form? By instructing the jury regarding those defenses, the lower court plainly recognized that they could factor into the jury's verdict. And the fact that the jury determined the Agreement was alive in 2017 shows that they thought those defenses applied. Nevertheless, the court determined that its instructions were extraneous and that the jury was forbidden from applying concepts the lower court specifically instructed it on. In short, instead of reconciling the jury's verdict and making the additional factual findings Blackrock requested, the lower court interpreted the jury's verdict in a way that made its "date of termination" finding extraneous. That is plainly reversible error. But this was not the most egregious error committed by the lower court.

After wrongly rejecting Blackrock's Rule 49(a) arguments and interpreting the jury's verdict in a manner that rendered several of its findings extraneous, the lower court held "The jury was asked to find who breached first and when. The jury was not asked to make determinations regarding any subsequent breaches. *The Court notes such breaches are immaterial under first breach.*" A.R.001931-A.R.001938 at p. 6 (emphasis added). Put simply, the lower court held that once a party breaches a contract, the first material breach doctrine forecloses that party from asserting future breaches against the other party to the contract. That is a profound misstatement of contract law.

Indeed, this Court explicitly foreclosed the position taken by the lower court. In *J.W. Ellison*, this Court stated,

> If either buyer or seller, therefore, has committed a *material* breach of contract, or has by repudiation manifested an intention to commit such a breach, the other party should be excused from the obligation to perform further. If, however, the injured party knowingly accepts defective performance of the contract, or accepts further performance after he is aware that a breach of contract has been committed, such conduct will operate as a waiver of his right to refuse to go on with the contract, though not necessarily of his right to recover damages for the breach committed by the other party.

J.W. Ellison, Son & Co., 69 W. Va. at 380, 71 S.E. at 394; *see also Toney*, 84 W. Va. at 35, 99 S.E. at 178 ("Partial breaches of a contract are waived by partial performance thereof after such breaches, in so far as they may constitute good ground for refusal of the injured party to perform it further and right in him to treat the entire contract as broken and sue for damages."); *cf.* Syl. Pt. 2, *Elkins Manor Associates v. Eleanor Concrete Works, Inc.*, 183 W. Va. 501, 396 S.E.2d 463 (1990) ("Where time is of the essence in the performance of a contract, a delay in performance beyond the period specified in the contract, unless caused by the other party or *waived by such party*, will constitute a breach of the contract, entitling the aggrieved party to terminate it." (emphasis added)). This holding is not aberrant—courts have universally recognized, "If, after a breach of a contract, the nonbreaching party continues to insist on performance by the defaulting party, the previous breach by that party will not excuse the nonbreaching party from performance and the contract continues in force for the benefit of both parties." 154 Am. Jur. Trials 317; *see Levco Constr., Inc. v. Whole Foods Mkt. Rocky Mountain/Sw. L.P.*, 549 S.W.3d 618 (Tex. App. 2017) (determining that a party was obligated to make payment under a contract to a breaching party where the paying party continued to accept performance from the breaching party); *Walker v. Lehto*, No. WWMCV075001025S, 2010 WL 1885806, at *3 (Conn. Super. Ct. Apr. 1, 2010) ("Where there has been a material breach that does not indicate an intention to repudiate the remainder of the contract, the injured party has the election of continuing or ceasing performance

. . . An election by a party to perform notwithstanding a breach, and thus waiving the breach is conclusive, in the sense of depriving that party of any excuse for ceasing performance, with the result that the party at fault may require the other party to perform. Thus a party may waive a breach by the other party and then be liable for his or her own subsequent breach." (citation omitted)); *Sanders v. Breath of Life Christian Church, Inc.*, 2012 WL 114279, *28 (Tenn. Ct. App. 2012) (determining that a contractor's breach by failing to provide a construction timeline pursuant to a contract was waived where the other party to the contract accepted four months' worth of performance following the failure to provide the timeline); *see also* 17A Am. Jur. 2d Contracts § 681 ("Generally, one may waive a breach of contract by the other party by words or conduct, including inaction or silence. Conduct indicating a willingness to continue honoring the contract, despite knowledge that the other party has failed to perform, may constitute a waiver. Thus, anything that induces the other party to perform an agreement after a default, or which shows that the agreement subsists after a default, amounts to a waiver."). Indeed, it is black letter law: "[A]n obligor's acceptance or his retention for an unreasonable time of the obligee's performance, with knowledge of or reason to know of the non-occurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that non-occurrence." Restatement (Second) of Contracts § 246 (1981).

"Therefore, when the nonbreaching party is faced with the issue of breach, the nonbreaching party must decide whether to cease performance under the contract and seek damages or continue performance under the contract, thereby keeping the contract in force." 154 Am. Jur. Trials 317. This rule makes good sense—the first material breach is not a get-out-of-jail-free card. If the nonbreaching party continues to perform after the other party breaches, the nonbreaching party is not entitled to sit on the opposing party's breach for years, continue

performance, and then attempt to evade liability when it fails to perform under the contract. But that is exactly what the lower court determined Jay-Bee was entitled to do. Although the jury determined that Blackrock breached the Agreement on February 4, 2014, by failing to comply with the notice provision, the parties continued performing under the Agreement for years—transferring and assigning hundreds of leases involving 5,000 net mineral acres of property. Despite that continued performance, Jay-Bee materially breached the Agreement on November 10, 2017, when it refused to allow Blackrock to purchase additional interests as permitted by the Agreement. That breach cannot be excused by Blackrock's breach of the notice provision—which occurred years earlier and was waived by years of subsequent performance. Accordingly, the lower court committed reversible error when it determined that the first material breach doctrine barred subsequent claims against the non-breaching party even where the non-breaching party waived first material breach, reaffirmed the contract, or ratified the contract in spite of the breach. Therefore, its ruling should be set aside, and this matter either set for re-trial or judgment on liability entered in Blackrock's favor on its counterclaims with the lower court instructed to re-try damages consistent with that finding.

c. The lower court committed legal error when it determined that sufficient evidence existed to support the jury's finding that Blackrock's failure to comply with the notice provision of the Agreement was a material breach.

Beyond the lower court's misapplication of the first material breach doctrine and Rule 49(a), the lower court wrongly concluded that the jury's determination that Blackrock materially breached the contract on February 4, 2014 was sufficiently supported. In addition to asking the lower court to make additional findings of fact under Rule 49(a), Blackrock also asked the lower court under Rule 50(b) to enter judgment in its favor and set aside the jury's finding that Blackrock materially breached the notice provision of the Agreement on February 4, 2014.

West Virginia Rule of Civil Procedure 50(b) permits a party to move for judgment as a matter of law on issues that have been tried to verdict. A motion under Rule 50(b) tests the legal sufficiency of a claim by assessing whether the claim should succeed or fail based on the adequacy of evidence developed at trial. *W. Va. Dep't. of Trans. v. Newton*, 236 W. Va. 281-82, 773 S.E.2d 371 (2015); *see also Cowart v. Erwin*, 837 F.3d 444, 450 (5th Cir. 2016) ("When a case is tried to a jury, a [renewed] motion for judgment as a matter of law is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." (cleaned up)). "A post-verdict motion for judgment as a matter of law should be granted only upon a showing that (1) there is such a complete absence of sufficient evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded jurors could not arrive at a verdict against such movant." Cleckley, Davis, & Palmer, Litigation Handbook on the West Virginia Rules of Civil Procedure § 50(b)[3][b] (5th ed.). Because the sufficiency of evidence under a Rule 50(b) is a legal determination, this Court must review it *de novo*. *See Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

In its Rule 50(b) Motion, Blackrock challenged the legal sufficiency of the jury's determination that it materially breached the Agreement on February 4, 2014 by failing to comply with the notice provision. This holding, as the lower court's order denying Blackrock's Rule 49(a) Motion demonstrates, was crucial because the lower court interpreted that material breach to bar Blackrock's breach of contract counterclaims under the first material breach doctrine. In particular, Blackrock argued that although it failed to comply with the notice provision, that failure was not material. A.R.001828-A.R.001867. The lower court rejected this argument. Again, the lower court was wrong.

In order to constitute a material breach, a party must fail "to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Horton v. Horton*, 254 Va. 111, 115, 487 S.E.2d 200, 204 (1997). To determine whether a breach is material, this Court has looked to the Restatement (Second) of Contracts. *Id.* According to that treatise, courts should consider the following in determining whether a breach is material:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981).

For example, in *Milner Hotels, Inc. v. Norfolk & W. Ry. Co.*, 822 F. Supp. 341, 346 (S.D. W. Va. 1993), *aff'd*, 19 F.3d 1429 (4th Cir. 1994), Judge Faber, applying West Virginia law, determined that a hotel company's failure to remove asbestos or keep their hotel compliant with safety and health codes amounted to a material breach of their agreement with a railroad company to provide safe lodging for the railroad company's employees. The court determined that the hotel's failure "completely deprived [the railroad company] of the benefit it reasonably expected under the contract, that is, a safe, clean hotel in which to house its employees." *Id.* In sharp contrast, Blackrock's failure to comply with the notice provision did not deprive Jay-Bee of anything. Indeed, Jay-Bee *admitted* it did not want Blackrock to comply with that provision.

Under Provision 11 of the Agreement, Blackrock "agree[d] to notify JB in writing within said 45 day period if Blackrock desires not to exercise its right to acquire the Additional Percentage." A.R.003411-A.R.003414 at ¶ 11. Although Blackrock did not provide written notice that it did not intend to purchase the interests in the invoices it received from Jay-Bee on December 9, 2013, that did not deprive Jay-Bee of any benefits it expected to receive under the contract. Indeed, the ability to purchase additional property interests was not a benefit to Jay-Bee at all; instead, it was an option that was "solely Blackrock's decision." *Id.* And Jay-Bee admitted it did not care whether Blackrock provided notice or not under the provision because "in all honesty, we really don't want [Blackrock] involved in all of the tracts and if they are not responsible enough to keep track of this, then I consider this to be their loss." A.R.003059-A.R.003060.

Despite this, the lower court summarily upheld the jury's determination, holding that "[e]vidence supports the jury's determination that Blackrock's failure to accept via check or decline via written notice the Benefiel offer was the first material breach of the LAA." A.R.001931-A.R.001938 at p. 7. But it did not discuss any evidence—and it certainly did not describe how Blackrock's failure to comply with the notice provision denied Jay-Bee of any benefit. Indeed, the evidence admitted at trial conclusively established that despite Blackrock failing to comply with the notice provision, Jay-Bee was able to complete the drilling units and drill producing wells on the jointly owned acreage. Beyond vaguely referencing the "evidence," the Court also determined that "the jury could have found that there were breaches made by Blackrock on subsequent dates that would have been material." *Id.* That misses the point. The lower court's determination that Blackrock was not entitled to recover on its counterclaim for breach of contract hinged on its (wrongful) determination that Blackrock was foreclosed from recovering under the first material breach doctrine. That Blackrock might have breached the

contract on a later date does not matter—Blackrock cannot determine its right under the lower court's theory if it is unable to ascertain who breached what and when they breached it. Therefore, to the extent the lower court's ruling turned on the fact that evidence potentially showed that Blackrock breached the Agreement at a later date, that fact is legally insufficient to support the jury's verdict that Blackrock materially breached the Agreement on February 4, 2014. Accordingly, the lower court's decision not to set aside the jury's finding that Blackrock materially breached the Agreement on that date is legal error.

d. The lower court erred when it determined that pre-development activities, such as leasing, were sufficient to create a mining partnership.

The lower court erred when it determined that a common law mining partnership existed between the parties despite the fact that the parties neither worked jointly to extract minerals from the leased tracts nor shared in the profits and losses from the leased tracts. This finding is a conclusion of law, and it is subject to *de novo* review. *See* A.R.001942-A.R.001951 at p. 2 - conclusions of law section; Syl. Pt. 4 in part, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996) ("[C]onclusions of law are reviewed de novo."). Under West Virginia law, the party seeking declaration of a common law mining partnership must show: (1) co-ownership of the land or leases; (2) joint operation thereof; and (3) profit and loss sharing. *See Valentine v. Sugar Rock Inc.*, 745 F. 3d 729, 732 (4th Cir. 2014) (applying West Virginia law). The parties below did not dispute that they were cotenant lessors[4]; however, Blackrock contended that a common law mining

[4] Blackrock notes that Jay-Bee previously claimed in its *Trial Memorandum Addressing The Legal Issues That West Virginia Law Provides Are To Be Resolved By This Court As A Matter of Law* that for partition to be applicable in this case, Jay-Bee and Blackrock were cotenants in the AMI leases: "W. Va. Code § 37-4-1—titled Who Entitled to Partition—informs that Jay-Bee has the right to request a 'partition' of the undeveloped leases, ***as Jay-Bee and*** *Blackrock are 'tenants in common' and/or 'joint tenants' of such interests....*" A.R.000928 (emphasis added).)

partnership did not exist because it did not operate the gas wells at issue. The lower court disagreed on that point.

It determined that Blackrock and Jay-Bee jointly operated wells on the leased land because "the Court finds this process of engaging to jointly develop acreage must be categorized as a mining partnership." A.R.001942-A.R.001951 at p. 4. In arriving at this decision, the lower court noted that Blackrock contributed to the acquisition of leases in Pleasants County by providing "piles of abstracts," certifying title on the land at issue, and permitting Jay-Bee to market and sell interests acquired by Blackrock. *Id.* at p. 6. The lower court also noted that Blackrock was not involved in the operation of wells and that Jay-Bee was solely in charge of running well operations, "including the drilling contractor, casing supplier, casing cementing company, pumping company for fracking operations, and frack size proppant amount." *Id.* at p. 5. Despite this, the lower court found a mining partnership existed because "[u]nder the terms of the LAA, the parties assigned each other oil and gas leases in [Pleasants County]. Paragraph 2 of the LAA obligated both Jay-Bee and Blackrock to offer to the other an interest in all leases, land, and minerals owned or leased in [Pleasants County]. Further, extensive testimony was heard at trial regarding the fact that Blackrock was to provide certified title, under the terms of the LAA." *Id.* at p. 4. This determination was wrong.

The second element of the common law test requires that "tenants in common of mines or oil leases actually engage in working the same." *Childers et al. v. Neely*, 34 S.E. 828, 829 (W. Va. 1899). Although the scope of the "actually engage in working the same" element has not been clearly defined by West Virginia, law throughout other jurisdictions makes it clear that "[b]y joint operation [it] is obviously meant that each of the joint owners *must have some choice and participation in control and management*." *Dunbar v. Olson*, 110 N.E.2d 664, 666 (Ill. App. Ct.

4th Dist., 1953) (emphasis added). For example, in *Snodgrass v. Kelley*, the plaintiff was injured while working on an oil well drilled, owned and operated by the lessee of the tract, Mitchel. 141 S.W.2d 381, 382 (Tex. Civ. App. 1940). After leasing the tract, and prior to drilling, Mitchel assigned working interests to various parties. *See id.* Plaintiff alleged that the assignment between Mitchel and the other working interest owners had created a mining partnership. *See id.* The Court phrased plaintiff's argument as follows: "Appellant further contends that the appellees and Mitchel were joint owners of the leasehold estate and had agreed to jointly drill the well and were to share the profits from the production of oil, if any, and that the parties were mutual agents of each other." *Id.* The plaintiff, in effect, argued that because the assignees and Mitchel were co-owners by virtue of the assignment, and Mitchel subsequently drilled the well, the parties had formed a common law mining partnership. Importantly, the assignees "did not contribute any money, supplies or labor towards the drilling of the well and exercised no control or supervision over it." *Id.* Instead, Mitchel put up all the money for drilling the well and "had complete charge of all drilling operations and the employment of all the labors." *See id.* The Court found that a mining partnership was not formed by these facts, reasoning,

> [w]e are also of the opinion that the evidence fails to show a mutual undertaking of the drilling operations. The evidence is undisputed that Mitchell had absolute control of all drilling operations. There is no evidence to show that the appellees contributed any money, labor, or services toward the drilling of the well. As above stated, the only thing that they did was to purchase an undivided interest in the leasehold estate.

Id.

The Supreme Court of Oklahoma came to a similar conclusion in *National Union Oil & Gas Co. et al. v. Richard et al.*, 22 P.2d 88 (Okla. 1933). In *Richard*, the sole issue was whether two defendants, by virtue of their separate assignments, had created a mining partnership in a lease

with another defendant, Miller. *See* 22 P.2d at 89. Miller held a lease on a tract and assigned one half interest in the gas rights to one defendant, Harris & Haun, Inc. ("HH"). *Id.* Miller also assigned one-eighth of the gas rights to the other defendant, National Union & Gas Company ("National"). Miller eventually drilled a well on the lease, but it was abandoned as a dry hole. *Id.* at 90. Plaintiffs sued the parties for sums due related to drilling and working the well, and plaintiffs alleged that Miller, HH, and National had formed a mining partnership. *Id.* Specifically, the plaintiffs alleged that the agreements and assignments entered into between the parties were to develop the lease for oil and gas purposes and thus a partnership was formed. *Id.* The Court addressed HH and National's legal relationship with Miller in turn. First, the Court found that Miller and HH had formed a common law mining partnership. *Id.* at 90-91. The facts clearly supported this decision as HH: paid half the cost of digging a slush pond; furnished the pipe and fuel gas for drilling the well; furnished the water line; delivered the casing as needed in HH's own vehicles; watched the daily progress of the well; required and received daily drilling reports; and kept a HH foreman at the drilling site. *Id.* The Court concluded "it seems clear that the defendant corporation, Harris & Haun, Inc., being interested with J.E. Miller in the lease and in the well, did in truth and in fact co-operate with him in the development of the lease and in the drilling of this well, and were mining partners." *Id.* at 91-92.

Second, the Court found that Miller and National had not formed a common law mining partnership. The Court first noted that the assignment between Miller and National was only a conveyance in an interest in the lease, nothing more. *Id.* at 93. The Court's analysis on the issue clearly shows that no partnership was entered because National did not co-operate the lease as HH had with Miller:

> [T]his assignment to the National Union Company does not in any sense create a mining partnership between Miller and National

> Union Company, *nor does it indicate, nor tend to indicate, an intention to form such partnership, or to in any manner co-operate in the drilling.* The National Union Company *did not in any manner co-operate* with Miller, or with Harris & Haun, Inc., *in the actual development of the leasehold or in the drilling of this well.* We have heretofore observed that Harris & Haun, Inc., did cooperate with Miller, and we have observed the particular details of this co-operative development, but the *National Union Company did none of these things.* It is true that the National Union Company did own an interest in the gas rights, and in all rights theretofore granted to Miller by the White Eagle Company, which held the oil and gas lease, and that the National Union Company was interested in the success of this drilling venture, *but the National Union Company paid Miller the consideration for this interest, and did nothing further.* We have carefully examined the record, and, after considering all the evidence and the foregoing authorities, it clearly appears that the National Union Company was not a mining partner with either J. E. Miller or Harris & Haun, Inc.

Id. (emphasis added).

Here, the undisputed facts establish that Blackrock did not participate in the management of the wells on the leased tracts. Indeed, its principal testified that Jay-Bee actively excluded it from management activities, and consistent with this, the unexecuted draft joint operating agreement between the parties recognized that Blackrock and Jay-Bee were not partners in mining operations. Mr. Broda confirmed at trial that Jay-Bee operated the leases alone. First, Mr. Broda discussed how Jay-Bee built the locations alone: "we do pipeline work, we do location making—although we didn't make these locations, we made the road but the locations, I did hire that out . . ..We do water hauling, we do trucking, so we do welding—hooking up our production facilities. *We pretty much do everything, a lot of things in house.*" March 9, 2021 Trial Tr. at p. 116:21-117:3 (emphasis added). Further, Mr. Broda confirmed that Jay-Bee did the initial testing of the area without Blackrock and declined to share the well logs showing the results of the tests:

> So I already had a log of what was there. Me, I keep all my logs, title. *Nobody gets a copy of them.* I take the computer drive out of the truck and put it in my pocket. No one knows this but me. If this

> [well] is good or if this [well] is bad....*But [Blackrock] doesn't know. I don't give anything.*

March 10, 2021 Trial Tr. at p. 36:21-37:4 (emphasis added). And the lower court recognized that Jay-Bee developed the leases alone. It determined that the partnership existed not because of shared management and development responsibilities but because Blackrock "obtain[ed], offer[ed] interests in, and assign[ed] leases" to A.R.001942-A.R.001951 at p. 4.

But a business relationship wherein one party transfers property to another so that the transferee may develop the property is *not* a mining partnership; indeed, courts considering this issue have determined, "A partnership for the purchase and sale of minerals and mineral lands is not a mining partnership." 53A Am. Jur. 2d Mines and Minerals § 225 (citing *Stephens v. Allen*, 314 Ky. 769, 772, 237 S.W.2d 72, 74 (1951) ("One of the essential elements is joint operation, and an association merely for the purchase and sale of mineral lands is not such but is an ordinary partnership or venture . . . .")). The reason for this was best described by the Supreme Court of the United States in *Kimberly v. Arms*, 129 U.S. 512, 530 (1889). In *Arms*, the parties entered into a contract under which they agreed to jointly lease lands so that others could develop them as mines. *Id.* In determining that the mere agreement to purchase and lease lands did not amount to a mining partnership, the Supreme Court determined, "It was not a partnership for developing and working mines, but for the purchase and sale of minerals and mining lands, and in that respect was subject to the rules governing ordinary trading or commercial partnerships. It can no more be called a mining partnership than a partnership for the purchase of the products of a farm, and the lands upon which those products are raised, can be called a partnership to farm the lands." *Id.* That holding makes good sense: individuals who merely purchase interests in land that will be mined by others in the future are more akin to investors in a business than actual partners in the business. The lower court's holding to the contrary is therefore legal error and must be reversed.

e. The lower court erred when it determined that Blackrock was bound by the terms of a contract it did not enter.

Before a party is bound by a contract, the parties must agree to terms and actually enter a contract. *See, e.g.*, Syl. Pt. 2, *Sanson v. Brandywine Homes*, 215 W. Va. 307, 599 S.E.2d 730 (W. Va. 2004) ("A meeting of the minds of the parties is a *sine qua non* of all contracts."). Absent that agreement, no contract exists. *Id.* Simply put, if parties do not agree to a contract, there are no contractual terms to enforce against the opposing party. The lower court erred when it held the opposite, determining that Blackrock was subject to a penalty provision in a joint operating agreement that it did not enter.[5] And that error cost Blackrock. After applying the unagreed-to penalty provision, the lower court ultimately determined that Blackrock was required to relinquish every acre of mineral interest it acquired during the LAA (and more, that error is detailed below) to Jay-Bee in exchange for nothing. A.R.002830-A.R.002857 at ¶ 46.

Commonsensically, in the proceedings below, Blackrock argued that it was not subject to penalties contained the parties' contemplated joint operating agreement because it never entered a joint operating agreement with Jay-Bee. A.R.002302-A.R.002496 at p. 12-13. And no one disputes that fact—Jay-Bee's own witness admitted that "no one signed a [joint operating agreement]." September 22, 2021 Trial Tr. at p. 72:13-16. Despite this uncontested fact, the lower court determined, "The Court considers Blackrock's contention that no penalty or risk premium applies since no JOA was signed, and concludes that Blackrock cannot escape a JOA by not agreeing to

[5] This issue most closely approximates a legal question, namely, what were Blackrock's obligations? It is therefore subject to *de novo* review. Questions of law are subject to a *de novo* review. Syl. pt. 1, *Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996). The standard of review, however, matters little on this issue. Plainly, parties are not bound to the terms of contracts they do not enter. The lower court's holding to the contrary is reversible regardless of what standard it is reviewed under.

one." A.R.002830-A.R.002857 at ¶ 29. Of course, that is wrong. Not agreeing to a contract is quite literally the easiest and best way to "escape" being bound by it.

The lower court's erroneous holding—that parties are bound by contracts they do not agree to—is premised on Jay-Bee's expert testimony that "a penalty/premium is standard in the oil and gas industry and varies from 200% to 500% of the expended costs being recouped before that party is entitled to any remuneration related to oil and gas sales." *Id.* And it is true that Mr. Casto, the expert in question, testified regarding "the industry standard for penalty amounts found in joint operating agreements between operators and their non-participating working interest owners." *Id.* at ¶ 45; *see also* September 22, 2021 Trial Tr. at p. 148:11-17. However, whatever the industry standard for joint operating agreements is, the record is clear that there was no joint operating agreement in this case. The fact that other people enter into contracts and those contracts usually have certain terms does not change the fact that there were no such contracts or terms to enforce in this case.

At bottom, the lower court's opinion allows parties to foist contractual obligations onto others who do not agree to be bound by a contract. That is wrong. If Jay-Bee wanted Blackrock to agree to a penalty clause, the parties could have mutually contracted for one. They did not. Instead, Jay-Bee began operating and, after the fact, asked the lower court to force contractual penalty provisions onto Blackrock that the parties never agreed to. The lower court did so, and that is a grave legal error. Contract law is clear—parties are only obligated to contracts to which they agree. The lower court's determination—that parties can impose contractual obligations on those who never agreed to be bound by them—demands reversal.

f. The lower court erred when it made additional factual findings regarding breach in the damages phase of the trial.

"Rule 42(c) expressly demands that bifurcation not infringe upon the right to trial by jury." Cleckley, Davis, & Palmer, Litigation Handbook on the West Virginia Rules of Civil Procedure § 42(c)[2][b] (5th ed.). Accordingly, "it is unequivocally clear that all 'ducks' must be in a row before the trial court takes the giant step of potentially influencing the outcome of a case by allowing bifurcation of liability and damages." *Id.* at § 42(c)[2][b]. The trial court's ducks were in decided disarray in the case below.

Before trial began, the lower court bifurcated trial into two phases. Phase I, the liability phase, would be tried to a jury. Phase II, the damages phase, would be tried to the bench. During Phase I, the jury rendered its liability ruling, using the legally deficient verdict form provided by the court. Phase II, then, should have been devoted solely to damages. It was not. Instead, in its final judgment order, the lower court took it upon itself to find additional breaches by Blackrock—liability issues that were reserved for Phase I—and order specific performance based on those breaches. *See, e.g.*, A.R.002830-A.R.002857 at ¶ 53. That effectively removed liability from the jury.

This is, admittedly, a novel issue. It appears this Court has never addressed what happens when a lower court disregards its own bifurcation order. Traditionally, lower court decisions regarding bifurcation are reviewed for abuse of discretion that generates "compelling prejudice." *Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 239, 539 S.E.2d 478, 499 (2000). "'Compelling prejudice' exists where a [party] can demonstrate that without bifurcation he or she was unable to receive a fair trial . . . and that the trial court could afford no protection from the prejudice suffered. In short, this Court will grant relief only if the appellant can show prejudice amounting to fundamental unfairness." *Id.* That is a high standard, but it is a standard that is easily satisfied here.

It is undisputed that the trial court in Phase II rendered liability rulings reserved for the jury in Phase I. That effectively stripped Blackrock of its to a jury trial. This Court has recognized that lower courts may not structure trials in ways that compromise a party's constitutional right to a jury trial. *See Moon v. Michael Koslow Const., Inc.*, 193 W. Va. 673, 675, 458 S.E.2d 610, 612 (1995) ("Although the circuit court has discretion to appoint commissioners to resolve complex matters to lighten the circuit court's docket, it clearly cannot do so in violation of a party's right to trial by jury."). The lower court did that and that alone requires its Phase II order to be overturned. But its error extended further.

Beyond commandeering liability issues reserved for the jury, the lower court actively disregarded the jury's liability findings when propounding its own liability findings during Phase II. It is undisputed that the jury found Jay-Bee breached its obligations to Blackrock. *See* A.R.001463-A.R.001465. Despite this, the lower court only found additional breaches by Blackrock during Phase II. It found that Blackrock was not entitled to recover for any breaches by Jay-Bee because Blackrock committed the first material breach and therefore "is precluded from receiving any damages or other affirmative relief and is liable for any equitable remedies and damages incurred by Jay-Bee." A.R.002830-A.R.002857 at ¶ 55. This holding only highlights the gross error of the lower court's interpretation of the first material breach doctrine. Under the lower court's interpretation, if the parties continue to perform a contract after the first material breach, only the nonbreaching party is entitled to recover for subsequent breaches of the contract. That cannot be right—it effectively renders the continuing agreement illusory because only one side is entitled to enforce it. Accordingly, because the lower court's Phase II order infringes on the liability issues reserved for the jury and misapplies the first material breach doctrine to render additional liability findings, it must be overturned.

g. The lower court violated the West Virginia Constitution's promise of due process when it deprived a non-party of its property interests.

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n.*, 161 W.Va. 154, 241 S.E.2d 164 (1977). Because of this constitutional guarantee, "[w]hen a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an interest in the real property at issue are indispensable parties to the proceeding. *Any order or decree issued in the absence of those parties is null and void.*" Syl. Pt. 2, *O'Daniels v. City of Charleston*, 200 W. Va. 711, 490 S.E.2d 800 (1997) (emphasis added). The lower court's April 25, 2022 Order violated the promise of due process when it divested BMB of its real property interests despite the fact that BMB was not a party to the proceeding below. And it did so in the face of a remarkably sparse record. Jay-Bee never asserted in any of its pleadings that there was an LLC veil to pierce between Blackrock and BMB. Jay-Bee never called any of BMB's officers to testify regarding the issue. Jay-Bee never requested any discovery related to the relationship between Blackrock and BMB. Instead, the sole testimony on this issue—all testimony from Blackrock's owner—shows that BMB was owned by Blackrock's owner's son, BMB independently operated and did "whatever [BMB's owner] would like it to do," and that Blackrock never directed BMB to circumvent the LAA between Jay-Bee and Blackrock. March 8, 2021 Trial Tr. at p. 20:20-22.

That sparse record is plainly insufficient to invoke the veil-piercing doctrine: "[T]he corporate form will never be disregarded lightly." *Southern States Cooperative, Inc. v. Dailey,* 280 S.E.2d 821, 827 (W. Va. 1981) (emphasis added). That error is magnified by the fact that the party whose real property interests were at stake was not a party to the proceeding. West Virginia law is clear—the failure to join BMB renders the lower court's final judgment order "null and void." Syl.

Pt. 2, *O'Daniels*, 200 W. Va. 711, 490 S.E.2d 800. Therefore, this Court must reverse the lower court's order.

h. The lower court erred when it required Blackrock to relinquish title to property acquired after the LAA's termination date.

The lower court's mistaken conclusion that a mining partnership existed was premised on lease acquisitions performed pursuant to the LAA. *See, e.g.*, A.R.002830-A.R.002857 at ¶ 20-21. The jury determined that the LAA was terminated on December 11, 2017, and neither party was obligated to transfer property pursuant to the LAA after that date. Nevertheless, the lower court ordered Blackrock to transfer portions of the Shimer tract, which were obtained in 2018 after the LAA was terminated to Jay-Bee. But Blackrock is not obligated to transfer any property to Jay-Bee that Blackrock acquired for itself after the LAA terminated. The lower court's holding to the contrary imposes the terms of the LAA on Blackrock *after* the jury determined the contract terminated. Blackrock plainly need not comply with the LAA after its termination, and the lower court's holding to the contrary must be overturned.

VI. CONCLUSION

For the reasons stated above, Blackrock asks this Court to set aside the jury verdict and the court's order following that verdict and order a new trial. Alternatively, Blackrock asks this Court to set aside the verdict from Phase II of the trial, direct the lower court to enter judgment on Blackrock's counterclaims in its favor, and conduct a new trial on damages.

Respectfully submitted,

Petitioner, **BLACKROCK ENTERPRISES, LLC**,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 22-0407

BLACKROCK ENTERPRISES, LLC,
Petitioner,

v.

BB LAND, LLC and JB EXPLORATION 1, LLC,
Respondents.

CERTIFICATE OF SERVICE

Civil Action No. 18-C-2
In the Circuit Court of Pleasants County, West Virginia
Business Court Division
(Honorable Michael D. Lorensen)

I hereby certify that on **August 25th, 2022**, I served the foregoing ***"PETITIONER BLACKROCK ENTERPRISES, LLC'S BRIEF"*** to the Clerk of this Court via hand delivery and electronically to scawv.filing@courtswv.gov, and that counsel of record has received a true and accurate copy via Federal Express, postage prepaid, addressed as follows:

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