IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 24-ICA-154

CARBON ENERGY CORPORATION, CARBON WEST VIRIGINIA COMPANY, LLC., n/k/a DP BLUEGRASS, LLC, AND DIVERSIFIED GAS AND OIL CORPORATION,
Defendants Below, Petitioners,

v.

SHONK LAND COMPANY, LLC,
Plaintiff Below, Respondent.

Honorable Jennifer Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 20-C-613

BRIEF OF THE RESPONDENT

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I. INTRODUCTION

In this case, a jury determined Petitioners materially breached contracts—by sending Shonk a doubled right-of-first-refusal price, lying about it, withholding the documents that would reveal it, and closing their deal even after Shonk exercised its option—and committed multiple torts. On all fronts, the jury's verdict is "sacred." Indeed, according to the Supreme Court of Appeals, a jury verdict is "perhaps the most . . . treasured aspect" of our judicial system. Accordingly, appellate courts must give a jury's verdict "great deference." Petitioners do not challenge how the jury below was impaneled. They concede it was properly instructed. And they agree it considered only properly admitted evidence. Still, they ask this Court to cast aside the jury's verdict on five claims. Petitioners' arguments boil down to the view that a jury's verdict is *not* "sacred," "treasured," or even worthy of respect. They believe a jury verdict can be casually disregarded, merely because the jurors did not credit their version of events. But perhaps Petitioners' willingness to trample the cornerstone of our legal system should come as no surprise.

After all, this case began with Petitioners running roughshod over another age-old legal institution—namely, the contractual right of first refusal. The relevant contracts, two leases, required Petitioners to provide certain information. They decided to withhold it. Once their counterparty, Shonk, exercised its rights, the leases required Petitioners to convey the assets to Shonk. Petitioners decided to convey them to a third party instead. And the leases required Petitioners to send notices of subsequent transfers. Petitioners simply declined. A properly instructed jury, considering properly admitted evidence, determined each of these acts constituted a material breach. That conclusion—concerning a classic jury question—should be viewed as conclusive. As a result, the leases were forfeited to Shonk.

But Petitioners were hardly finished. After the forfeiture, they recorded an assignment, pretending to own the very assets they had just forfeited to Shonk. A properly instructed jury determined this act slandered Shonk's title. Petitioners present no basis to conclude otherwise.

Even after Shonk's repeated notices about the forfeiture, Petitioners retained, and denied Shonk access to, the 16,000 acres of land covered by the leases. And they continued to extract and sell Shonk's gas, keeping the profit for themselves. A properly instructed jury viewed this evidence, too. It determined these acts constituted willful trespass and unjust enrichment. Having been specifically instructed to avoid duplicative damages, the jury awarded Shonk damages to redress two distinct harms: $1.3 million for Petitioners' wrongful retention of the land itself (*i.e.*, unjust enrichment); and $1.6 million for Petitioners' wrongful extraction and sale of the gas (*i.e.*, trespass). Petitioners wail and gnash their teeth, but they present no basis to upset the jury's verdict.

Finally, the jury heard evidence that Shonk's contractual counterparty did not act alone. Instead, the purported transferee inflated Shonk's price, lied about how it arrived at the figure, and concocted a "confidentiality" concern to ensure Shonk would not see the documents that revealed the truth. A properly instructed jury determined this conduct amounted to tortious interference with Shonk's right of first refusal. It awarded Shonk $1.3 million in compensatory damages. Once again, these determinations deserve this Court's respect.

On each issue, Petitioners had every opportunity to present their case to the jury. The jury simply rejected Petitioners' version of events, as it was entitled to do. There is no basis to disturb the jury's verdict. This Court should affirm the circuit court's order in all respects.

II. STATEMENT OF THE CASE

One aspect of this case concerns right-of-first-refusal provisions in two oil and gas leases—the Larner Lease and the Williams Lease (collectively, "the Leases"). S. App. 0039–87 (Larner

Lease); S. App. 0088–130 (Williams Lease). Under the Leases, Shonk Land Company LLC ("Shonk") was the lessor. *See id.* Carbon West Virginia Company, LLC ("Carbon West Virginia"), was the lessee. *See id.* A transaction between Carbon West Virginia's parent company—Carbon Energy Corporation ("Carbon Energy")—and Diversified Gas and Oil Corporation ("DGO") triggered Shonk's right of first refusal ("ROFR").[1] But Carbon West Virginia disregarded Shonk's rights. It withheld information it was required to disclose; it transferred the assets to DGO after Shonk exercised its ROFR; and it mortgaged and assigned the property without offering Shonk the chance to buy it. Each failure was a material breach, resulting in a forfeiture of the Leases to Shonk.

As the jury's verdict reflects, however, this case is about more than just a contract. For example, it also involves DGO's tortious interference with Shonk's contractual right of first refusal. Although Shonk was entitled to purchase the Leases at the same price DGO was paying, DGO intentionally, and surreptitiously, *doubled* the price of only the wells subject to Shonk's ROFR. Then it lied to cover up the inflated price.

Carbon West Virginia, meanwhile, continued extracting and selling gas from the wells it had already forfeited to Shonk. And it improperly retained access to 16,000 acres of Shonk's land. These facts give rise to Shonk's trespass and unjust enrichment claims. Carbon West Virginia also slandered Shonk's title by recording an assignment of property it did not own.

On May 6, 2022, based on properly admitted evidence, a properly instructed jury determined this conduct breached Shonk's contractual rights and constituted multiple intentional torts, each of which inflicted a separate harm on Shonk. Petitioners appeal that jury verdict.

[1] Shonk will refer to Carbon West Virginia, Carbon Energy, and DGO collectively as "Petitioners."

A. Under the Leases with Carbon West Virginia, Shonk has a right of first refusal.

It is undisputed that each of the Leases gave Shonk a right of first refusal. S. App. 0082–83, 0125–126. Shonk's ROFR is triggered if Carbon West Virginia "seeks to Transfer . . . any portion of its interest under the Lease[s] (the 'Transferred Interest')." S. App. 0082, 0125. The term "Transfer" was specifically defined—subject to an exception not at issue here—to include "any sale, assignment, merger, mortgage," and "any sale of all or a controlling equity interest in Carbon West Virginia." S. App. 0083, 0126. In the event of a planned Transfer, Carbon West Virginia was required to "promptly provide written notice (the 'Notice of Intent to Transfer')" to Shonk. S. App. 0082, 0125. And that Notice of Intent to Transfer needed to include two things: (1) "information concerning the purported transferee," and (2) "information concerning . . . the value [Carbon West Virginia] expects to receive in exchange for transferring the Transferred Interest." *Id.*[2]

Upon receiving the required notice, Shonk had thirty days "to purchase the Transferred Interest for the value and upon the terms set out in the Notice of Intent to Transfer." S. App. 0083, 0126. Carbon West Virginia, meanwhile, could proceed with a planned Transfer in only two instances: (1) if Shonk failed provide written notice of its election to exercise its ROFR within thirty days, or (2) if Shonk declined, in writing, to exercise its ROFR at some earlier time. *See id.*

The Leases also set forth the consequences if Carbon West Virginia failed to comply with its ROFR obligations:

> In the event that [Carbon West Virginia] breaches any material aspect of [Shonk's] Right of First Refusal, the Parties specifically agree that the Lease shall be forfeited and forever cease and terminate without further notice by [Shonk] as of the date of such breach, regardless of any argument under law or equity against such forfeiture.

[2] At summary judgment, the circuit court interpreted the phrase "information concerning" in the Leases to apply "to both 'the purported transferee' and 'the value [Carbon West Virginia] expects to receive.'" App. 1712. Petitioners do not challenge that holding on appeal. *See generally* Pets.' Br. (nowhere raising that issue as an assignment of error or otherwise arguing it was incorrect as a matter of law).

> Upon a material breach of [Shonk's] Right of First Refusal, [Shonk] shall have the right to enter upon, use and take possession of the leased premises and all machinery and equipment thereon which is necessary for the continued production of gas on the leased premises (this specifically excludes vehicles and other mobile equipment and machinery), and hold and possess the same free and acquit from any claims of Carbon West Virginia Company, LLC thereto in like manner as if this Lease had not been made. . . . The Parties, aware of this specific remedy and its potential effect, nonetheless specifically agree to impose it in the Lease as a consequence for breach of the foregoing Right of First Refusal.

Id. Finally, the Leases defined "material breach" to mean "a breach of contract that deprives the other party of a substantial benefit that the other party reasonably expected to receive under the terms of the contract." S. App. 0084, 0127.

Relatedly, Shonk obtained a guaranty from Carbon Energy, Carbon West Virginia's parent company. *See* App. 4072–77. There, Carbon Energy expressly guaranteed "all of Carbon West Virginia's obligations under the Leases," including—of course—its ROFR obligations. App. 4072. Shonk will refer to this agreement as the "Parent Company Guaranty."

B. Carbon West Virginia breaches Shonk's right of first refusal in multiple ways.

In early 2020, Carbon Energy was out of cash and in default on its bank loans. *See* App. 3373–76. As a result, it held a fire sale. *See* App. 3376–79. Eventually, Carbon Energy decided to sell all its ownership in subsidiary companies to DGO for $110 million (the "DGO Sale"). *See* App. 3690. DGO, a public company, announced the deal in a public filing. *See* App. 3193–94. And, there, it proclaimed it would pay Carbon Energy roughly 60% of what is known as "PV10." *See id.* "PV10" is shorthand for an asset's present value, using a 10% discount rate. *See* App. 3014–15. In other words, DGO publicly announced it had purchased thousands of oil and gas wells at a roughly 40% discount to the wells' actual present value. *See* App. 3193–94.

To effectuate the DGO Sale, Carbon Energy and DGO entered a membership interest purchase and sale agreement ("MIPA") on April 7, 2020. *See* App. 3678–3778. The deal included

Carbon West Virginia's interests in the Leases. *See* App. 3379. Accordingly, it was a "Transfer" and triggered Carbon West Virginia's obligations under the Leases' ROFR provisions. *See* App. 3366–67; App. 4078. Carbon West Virginia immediately acknowledged this reality. On April 8, 2020, it sent Shonk two Notices of Intent to Transfer. *See* App. 4078–80; S. App. 0001–3.

Carbon West Virginia's Notices of Intent to Transfer included information concerning the DGO Sale. They specified, for example, that DGO had agreed to buy 100% of Carbon Energy's interest in Carbon Appalachian Company, LLC, which in turn "indirectly own[ed] all of the membership interests of Carbon West Virginia Company, LLC." App. 4078; S. App. 0001. As such, the DGO Sale would "result in a Transfer of the Lease, Wells, Pipelines and Equipment" under the Leases from Carbon West Virginia to DGO. *See id.*

Carbon West Virginia's Notice of Intent to Transfer the Larner Lease specified that "[t]he offer for the Transferred Interest is: **$2,605,707.00**." App. 4078. Its Notice of Intent to Transfer the Williams Lease specified that "[t]he offer for the Transferred Interest is: **$60,022.00**." S. App. 0001. Neither notice provided any *information concerning* these figures. App. 4078; S. App. 0001. They simply conveyed the numbers to Shonk. But both notices also acknowledged the obvious: Shonk had a contractual right to purchase these Transferred Interests "at the value agreed to with DGO," and, if it exercised its ROFR, Shonk would "purchase the Transferred Interest *on and subject to the same terms and conditions set forth in the agreement with DGO*." *Id.* (emphasis added); *see also* S. App. 0082–83, 0125–26 (establishing this right); App. 4960[3] (Carbon West Virginia's Vice President's testimony to the same effect).

[3] This testimony was admitted at trial by video. *See* App. 2900–01.

1. Despite Shonk's repeated requests, Carbon West Virginia refuses to provide information concerning the value it expected to receive from DGO.

On April 14, 2020—less than a week after receiving the Notices of Intent to Transfer—Shonk asked Carbon West Virginia for more information about the values contained in the notices. S. App. 0004–08. Shonk explained:

> Your letter indicates that Shonk will be required to purchase the Transferred Interest on and subject to the same terms and conditions set forth in the Purchase Agreement with DGO. However, you have not provided any indication of what those terms and conditions are. . . . Clearly Carbon [West Virginia] must furnish the terms and conditions in order for your letter to actually constitute a ["]Notice of Intent to Transfer" as contemplated by the [Leases]. Otherwise, we have no way to evaluate the fairness or accuracy of the computation of the $2,605,707.00 purchase price allocated to the Transferred Interest.
>
> Shonk is ready to make a prompt determination of whether to exercise its Right of First Refusal, but obviously needs to know the terms and conditions relating to the proposed sale. We believe that the best way for you to provide those terms and conditions is to provide us with a copy of the Purchase Agreement with DGO, including all appendixes, schedules, exhibits and attachments to the agreement. As you know, all information provided by you will be subject to the obligations of confidentiality set forth in the [Leases].

S. App. 0005–06. Put simply, Shonk needed a way to ensure the figures included in the Notices of Intent to Transfer were the prices DGO had actually agreed to pay. *See* App. 2654–55, 2733. Shonk concluded its letter with a simple warning: "If you fail to provide the information required for us to evaluate the transaction contemplated by your letter, any transfer of the Transferred Interest would constitute a material breach of [Shonk's] Right of First Refusal and result in the immediate forfeiture of the Lease[.]" S. App. 0006.

Carbon West Virginia responded by e-mail that same day. *See* S. App. 0009–12. It noted that the sale agreement itself was publicly available. *See id.* But it declined to provide any additional information. And, as Shonk explained on April 15, 2020, the publicly available agreement did not include the MIPA's various exhibits. *See id.*; *see also* App. 2659 (Shonk's

manager of mineral rights testifying that the publicly available agreement did not include the "schedules, appendices, and exhibits"). Indeed, it did not include perhaps the most important exhibit of all—the Allocated Value Table that specified the values assigned to various assets, including the wells covered by the Leases. *See* S. App. 0009–12; App. 4961[4] (Carbon West Virginia's Vice President confirming that the Allocated Value Table, if it had been provided, would have enabled Shonk to confirm the price information it had been provided). Shonk's April 15 e-mail was again clear: "[T]he price at which we would exercise our [ROFR] cannot exceed the actual price to be paid by DGO." S. App. 0009.

In response, Carbon West Virginia confirmed the "valuation was prepared by DGO." S. App. 0013; App. 2665 (testimony establishing the same point). As it turned out, Carbon Energy did not agree to a separate price for the wells covered by the Leases at all. *See* App. 3304 ("Q All right, and the 2.6 million dollar price, it is not like you all sat in a room and figured out what is the best value for the Shonk assets, is it? A No."). Indeed, Carbon Energy did not know how DGO allocated the $110 million purchase price to the various assets, including the Leases. *See id.* ("Q You have no clue how [Alex Shain at DGO] came up with 2.6 million dollars? A No, sir.").

In any event, a few days later, on April 21, 2020, Alex Shain—DGO's Vice President—told Carbon West Virginia it could provide "the portion of the allocated value schedule that corresponds to the wells in which Shonk Land has the RoFR." S. App. 0020. But, Mr. Shain said, Carbon West Virginia could not share the entire schedule or "the rest of the exhibits." *Id.*; *see also* App. 3302–03 (Carbon West Virginia's Vice President confirming DGO told him not to share the full Allocated Value Table with Shonk). And Mr. Shain expressly based this refusal to share the

[4] This testimony was admitted at trial by video. *See* App. 2900–01.

full Allocated Value Table, or any other exhibits to the MIPA, on confidentiality provisions between Carbon Energy and DGO. *See* S. App. 0020.

Carbon West Virginia did what DGO told it to do. It sent Shonk only the portion of the Allocated Value Table that dealt directly with the Shonk wells. *See* App. 3287–88, 4236–38. This partial document did not reveal—or even purport to reveal—*how* Carbon West Virginia or DGO allocated the $110 million purchase price to Shonk's wells or any other assets.

On April 29, 2020, Shonk reiterated that it "requests, and is entitled to see, a full and complete copy of the referenced purchase and sale agreement, including all exhibits." S. App. 0023. Carbon West Virginia never responded to that request. *See* App. 2678–80.

Carbon West Virginia did not provide the full Allocated Value Table by May 8, 2020—the date by which Shonk had to exercise its ROFR. *See* App. 2732–33 (testifying Shonk did not receive the Allocated Value Table until July 7, 2020). Nor did Carbon West Virginia provide the Allocated Value Table even by May 26, 2020—the day on which it closed the deal with DGO. *See id.*

The Lease's language was clear. Carbon West Virginia was contractually obligated to provide Shonk "information concerning . . . the value [it] expects to receive in exchange for transferring the Transferred Interest." S. App. 0082, 0125. Nonetheless, Carbon West Virginia refused to provide the MIPA's schedules and exhibits, including the Allocated Value Table. *See* App. 3288; App. 4920.[5] At summary judgment, the circuit court held it was "for the finder of fact to determine whether the Allocated Value Table and other information sought by Shonk was beyond the scope of information [Carbon West Virginia was] required to provide." App. 1712. After trial, based on properly admitted evidence, a properly instructed jury determined Carbon

[5] This testimony was admitted at trial by video. *See* App. 2900–01.

West Virginia committed "a material breach of the Right of First Refusal by failing to provide information to Shonk, including the schedules and exhibits to the [MIPA]." App. 3655.

On Petitioners' post-trial motion, the circuit court held that substantial evidence supported "the jury's finding that the ROFR required Defendants to provide the Allocated Value Table and the schedules and exhibits to the DGO Sale documents." App. 5079. Thus, there was "sufficient evidentiary basis for the jury's conclusion" as to this material breach. *Id.*

2. After Shonk exercised its right of first refusal, Carbon West Virginia transfers its interests in the Leases to DGO anyway.

On May 5, 2020, Shonk exercised its right of first refusal. *See* S. App. 0025–33. Shonk noted that, despite repeated requests, Carbon West Virginia had refused to provide the MIPA's exhibits and schedules "on the grounds that those documents 'are confidential as between' the parties to the proposed transaction" (*i.e.*, Carbon Energy and DGO). S. App. 0026. Thus, Shonk reserved its right "to review the full Agreements and to [e]nsure that its purchases comport to those Agreements in all material respects." S. App. 0027. And Shonk repeated the obvious: "Naturally, such review would be strictly subject to the confidentiality provisions already in place." *Id.*

Still, Shonk expected to close the transaction with Carbon West Virginia. *See, e.g.*, App. 2690–94. Again, the Leases were crystal clear on this point. Carbon West Virginia could proceed with a planned transfer to a third party *only* if Shonk did not exercise its ROFR within thirty days or declined to exercise its ROFR in writing sooner. *See* S. App. 0083, 0126. But neither condition was satisfied here. Instead, Shonk had timely exercised its ROFR. Even Mr. Shain admitted as much. *See* App. 3146 ("Q And you were aware that as a result of [Shonk's decision to exercise its ROFR], . . . the lease would not transfer over to Diversified, correct? A Correct.").

Nonetheless, on May 26, 2020, Carbon Energy closed its transaction with DGO. *See* App. 2693–94, 3150, 3964–65. The Leases could have been carved out from that closing. *See, e.g.*,

3348–49 (Carbon Energy's lawyer identifying one way to effectuate such a carveout); App. 4974–75[6] (Carbon Energy's Chief Financial Officer identifying a second way to effectuate a carveout). But Carbon Energy did not carve out the Leases from the closing. *See* App. 3349.

As a result (ignoring the possibility of an earlier forfeiture), Carbon West Virginia's interests in the Leases transferred to DGO as of that date. *See* App. 2693–94, 3150, 3964–65. And Carbon Energy's lawyers, who had been negotiating the documents required to effectuate the transfer from Carbon West Virginia to Shonk, immediately told Shonk's lawyer to contact DGO's lawyers about the remaining issues instead. *See* App. 3965.

On May 29, 2020—three days after Carbon Energy purported to transfer Carbon West Virginia's interests in the Leases to DGO—Shonk sent Carbon West Virginia and Carbon Energy Notices of Forfeiture. *See* App. 4000–06. There, Shonk explained that the May 26, 2020, closing was a material breach of its right of first refusal. *See* App. 4005. Shonk continued:

> Accordingly, pursuant to the plain language of [the Leases], the Larner Lease and the Williams Lease were forfeited and terminated without further notice. . . . [Shonk] now has "the right to enter upon, use and take possession of the leased premises and all machinery and equipment thereon which is necessary for the continued production of gas on the leased premises."

Id. In a separate letter, Shonk explained that, for the same reasons, Carbon Energy had breached the Parent Company Guaranty as well. *See* App. 4000–03.

Even then, Shonk gave Carbon West Virginia "a second opportunity to do the right thing." App. 4005. It agreed to "forebear its right to the forfeiture and termination" for thirty days so that Carbon West Virginia could "take whatever action is necessary to place [Shonk] in the position it would have occupied had the exercised [ROFRs] been timely honored." App. 4005–06.

[6] This testimony was admitted by video. *See* App. 2899–2900.

On June 10, 2020, Shonk agreed—at Carbon Energy's urging—to work with DGO and Carbon West Virginia "to have the interests in the oil and gas wells subject to the Leases promptly assigned to [Shonk]." App. 4034. Shonk will refer to this written document as "the Standstill Agreement." Shonk made clear, however, that it entered the Standstill Agreement on the express understanding that doing so would not prejudice or waive its position that "the Leases have been breached, terminated and forfeited." App. 4035. The Standstill Agreement did not *require* Shonk to continue negotiating. *See id.* It was free to "cease such negotiation at its sole discretion." *Id.*

It quickly became clear, however, that the purported transfer to DGO had materially harmed Shonk in at least three ways. *First*, Shonk lost the ability to deal with Carbon West Virginia, its contractual counterparty, and was forced instead to deal with DGO, the proposed transferee of the interests. That difference mattered. For example, Carbon West Virginia had repeatedly confirmed that Shonk would not have to take over a firm transportation obligation (*i.e.*, a contractual obligation to deliver a specified quantity of gas into a pipeline each day, or else pay a penalty). *See* App. 2746–50 (Shonk's manager for mineral rights testifying Carbon West Virginia made that representation more than once); App. 2925–27 (same from Shonk's attorney); App. 3962 (Carbon Energy's lawyer confirming "there is no transportation contract burdening these Assets").

Initially, DGO said the same thing. *See* S. App. 0034. On July 10, 2020, however, DGO changed its tune. On that day, for the first time, it insisted a firm transportation obligation should transfer. *See* App. 2746–50 (testimony about Mr. Shain's July 10, 2020, e-mail); App. 3829–30 (Mr. Shain's July 10 e-mail). This change had a "significant monetary" impact that "definitely impacted what this acquisition meant" for Shonk. App. 2929; *see also* App. 4070 (a July 17, 2020, letter stating Carbon West Virginia "continually assured [Shonk] that there [were] no transportation

obligations, firm or otherwise, associated with the [Shonk] Assets," but that DGO had recently "identified . . . firm transportation obligations which burden the [Shonk] Assets").

In addition, Shonk was forced to duplicate all the time, energy, and expense it had invested in pushing the deal forward with Carbon West Virginia's attorneys. *See* App. 2763–64 (testifying that Shonk's initial work "trying to prepare the documents" was "gone" and that Shonk's lawyers had to start over with new lawyers from DGO, which generated additional expenses); App. 2922–23 (Shonk's attorney testifying about his initial work: "Q Poof, it is gone, right? A Right.").

Second, as discussed above, Shonk lost the ability to close the transaction on the terms to which Carbon West Virginia had expressly agreed—namely, that there would be no firm transportation obligation. *See supra* at 12. After the transfer, DGO took the opposite position, which was a material change to the deal. *See id.*

Third, because the Leases were not carved out, the DGO Sale's closing terminated the Parent Company Guaranty. *See* App. 3381–83. Carbon Energy confirmed this point. *See* App. 3383. As a result, Shonk lost an additional layer of security regarding Carbon West Virginia's performance of the ROFR obligations contained in the Leases.

After trial, based on properly submitted evidence, a properly instructed jury determined Carbon West Virginia committed "a material breach of the Right of First Refusal on May 26, 2020, by completing the Transfer of the Leases, Wells, Pipelines and Equipment." App. 3655. On Petitioners' post-trial motion, the circuit court held that "Shonk presented evidence during trial of at least three 'substantial benefits' it reasonably expected to receive but was deprived of due to the DGO Sale." App. 5078 (covering the same three benefits discussed above). As such, there was "sufficient evidentiary basis for the jury's conclusion that Defendants materially breached the Leases by closing the transaction with DGO." App. 5079.

3. Once the DGO Sale closes, Carbon West Virginia makes two more Transfers but does *not* send Shonk the required Notices of Transfer.

On May 26, 2020, Carbon West Virginia committed two additional Transfers under the Leases. *First*, it mortgaged the ROFR Property. *See* App. 3832–76. *Second*, it assigned midstream infrastructure (*e.g.*, natural gas pipeline systems, compressors, meters, gathering lines, flowlines, and other associated equipment used to take gas from the well to market) to a different DGO affiliate. *See* App. 3910–57 (the assignment); App. 2760–62 (testimony about it). Shonk will call this second agreement "the Midstream Assignment." Per the Leases, both mortgages and assignments are "Transfers." *See* S. App. 0083, 0126. As such, assuming the Leases had not already been forfeited, each event triggered Carbon West Virginia's ROFR obligations, including the obligation to send Notices of Transfer. *See id.* But Carbon West Virginia did not send Notices of Transfer to Shonk. *See* App. 2759–62, 2793–94.

At summary judgment, the circuit court explained the significance of Carbon West Virginia's failures as to both the mortgage and the assignment:

> Carbon [West Virginia] granted a new mortgage to certain secured parties under a defined set of financial instruments. However, Defendants admit they did not submit a Notice of Intent to Transfer to Shonk in respect of this mortgage. *This technically breaches the Second Lease Amendments*. However, Defendants argue that the technical breaches are not "material[.]"
>
> * * *
>
> [As to the assignment,] *Defendants admit to "technically" breaching the Second Lease Amendments* but argue it was not material.

App. 1715–16 (emphases added); *see also* App. 5048–49 (noting the same admissions after trial). As a result, materiality was the only issue submitted to the jury.

After trial, based on properly submitted evidence, a properly instructed jury determined Carbon West Virginia committed "a material breach of the Right of First Refusal by placing a mortgage on the Leases without sending Shonk a Notice of Intent to Transfer." App. 3656. It

reached the same conclusion as to the Midstream Assignment. *Id.* On Petitioners' post-trial motion, the circuit court held that "Shonk presented sufficient evidence at trial to support the jury's conclusion" as to each point. App. 5081–82.[7]

C. While under the Standstill Agreement, it becomes clear that Carbon West Virginia's informational breaches were no accident: DGO had directed it to withhold information to conceal an inflated price.

As discussed above, DGO insisted Carbon West Virginia could not share the MIPA's exhibits, including the full Allocated Value Table, with Shonk. *See supra* at 8. DGO purported to base its refusal on confidentiality concerns, even though Shonk was already contractually bound to treat any information Carbon West Virginia provided as confidential. *See id.*

While under the Standstill Agreement, Mr. Shain—DGO's Vice President—initially said DGO had valued the Shonk wells the exact same way it had valued all the wells in that geographic area. *See* App. 2864–65, 2877, 2880–81. Shonk quickly confirmed—and later proved at trial—that this claim was untrue. *See* App. 2877–81. In reality, DGO had *doubled* the price for only the Shonk wells. *See* App. 4950–52 (Mr. Shain admitting Shonk's price would have been $1.3 million, not $2.6 million, if he had used the same formula he used for all the other wells).[8]

With that explanation disproven, Mr. Shain pivoted to a new one. He next claimed he used various assumptions to calculate the value of the Shonk wells. *See* App. 2863–65. Again, the evidence showed Mr. Shain's statements were not true. Shonk could not replicate Mr. Shain's values even with the exact assumptions he claimed to have used. *See* App. 2865–75. Shonk

[7] The jury also determined that "Carbon Energy . . . commit[ted] a material breach of the guaranty agreement." App. 3656. This conclusion flows inevitably from Carbon West Virginia's breaches because Carbon Energy failed to cure them. *See* App. 5080–81.

[8] This deposition testimony was admitted at trial by video. *See* App. 2836.

ultimately uncovered Mr. Shain's actual methodology on its own. He had simply doubled the 60% of PV10 value he had used for every other well. *See* App. 3020–24, 4418–19.

On July 17, 2020, when these points became clear, Shonk elected to exit the Standstill Agreement. *See* App. 4069–71. At that time, Shonk decided "to enforce its rights and remedies that existed as of May 26, 2020, when the [Shonk] Assets were transferred in violation of the terms of the ROFR." App. 4071. Shortly thereafter, Shonk filed this lawsuit.

Mr. Shain and DGO showed up at trial with a third explanation. For the first time, they claimed the doubled price was based on a "fair market valuation" of the Shonk wells using four specific factors: (1) a third-party valuation by Copper Run, (2) transportation issues, (3) compressors, and (4) drilling upside. *See* App. 3228–48. Mr. Shain testified he applied these four adjustments only to the Shonk wells, not to any other wells DGO acquired. *See* App. 3231–32. He confirmed he never discussed these factors or method of valuation with Carbon Energy. *See* App. 3230–31. He admitted he could not quantify how exactly he adjusted the value of Shonk's wells based on any individual factor. *See* App. 3232–37. And he admitted there was no record of his "fair market valuation" or the various adjustments it supposedly required. *See* App. 3237–38. Finally, he admitted the entire exercise was inconsistent with what he claimed to have done both contemporaneously, in an e-mail from April 21, 2020, and shortly after the lawsuit was filed, in an interrogatory response he verified in December 2020. *See* App. 3239–47. At the conclusion of his cross-examination, Mr. Shain confirmed he had never provided Shonk the information underlying the supposed "fair market valuation." *See* App. 3247–48.

This evidence, including Mr. Shain's ever-shifting explanations, confirmed DGO simply doubled the price for the Shonk wells, and then lied about it. The evidence also showed DGO and

Carbon Energy did not agree on the doubled price. *See* App. 1603[9]; App. 3304–05. The evidence also provided a simple explanation for DGO's insistence that Carbon West Virginia not share the information Shonk repeatedly requested. DGO did not want Shonk to learn the truth—DGO had *not* treated the Shonk wells like all other wells and had, in fact, doubled their price.

After trial, based on properly submitted evidence, a properly instructed jury determined DGO "intentionally and improperly interfered with Shonk's Right of First Refusal." App. 3656. On Petitioners' post-trial motion, the circuit court explained that, while "Shonk was entitled to purchase the ROFR Property for the *same price* DGO paid," the evidence showed that "DGO manipulated the allocation of the price of the ROFR Property, and also lied to Shonk to cover up the inflated price." App. 5087. Thus, "the jury's determination that DGO tortiously interfered with Shonk's ROFR is supported by sufficient evidence." App. 5088.

For the tortious-interference claim, the jury awarded $1,280,504. *See* App. 3657. On Petitioners' post-trial motion, the circuit court noted that DGO had "obtained a discounted price for the assets measured at PV10 x 60%." App. 5089. Per its own testimony, "DGO purchased a $2.6 million property for $1.3 million." *Id.* DGO's effort to double Shonk's ROFR price "intentionally prevented Shonk from obtaining the same bargain." *Id.* Thus, "the jury's calculation of $1.3 million in damages substantially matched the law and the instructions" and was also "supported by . . . the evidence presented at trial." *Id.*

D. Carbon West Virginia slanders Shonk's title by recording the Midstream Assignment.

As Petitioners admit, on June 23, 2020, "Carbon West Virginia recorded . . . an instrument dated May 26, 2020, in which it and four other affiliated companies" purported to convey certain

[9] This testimony was admitted at trial by video. *See* App. 2899–2900.

assets. Pets.' Br. at 18. This recorded assignment *included* various assets that, because of its material breaches, Carbon West Virginia had already forfeited to Shonk. *See* App. 0189, 2761; App. 4954.[10] After trial, based on properly submitted evidence, a properly instructed jury determined "Carbon West Virginia slandered Shonk's title by recording an assignment in the county land records on June 23, 2020, which conveyed ownership of Shonk's midstream assets to Diversified Midstream, LLC." App. 3657.

On Petitioners' post-trial motion, the circuit court held that recording the Midstream Assignment constituted publication of a false statement that was derogatory to Shonk's title. *See* App. 5082–83. The reason was simple: Carbon West Virginia "lacked legal title to conduct such a conveyance" after the Leases had been forfeited. App. 5083. And "evidence of Defendants' bad acts—such as improperly inflating the price of the ROFR Property and lying about it, and withholding key documents from Shonk"—was "sufficient to support an inference of malice." *Id.* The "special damages" for this claim were Shonk's attorneys' fees "incurred in removing a cloud from [its] title," which were a question for the court, not the jury. App. 5083–84 (noting that Defendants had never objected to a separate hearing on fees prior to trial).

E. Carbon West Virginia continues to extract and sell gas from the now-forfeited property despite being told they are trespassers.

Even after Shonk withdrew from the Standstill Agreement, Carbon West Virginia continued pumping Shonk's gas, selling it, and keeping the profits. Shonk repeatedly made clear its position that the Leases had been forfeited and that Carbon West Virginia was a trespasser. It sent Notices of Forfeiture. *See* App. 3970–4033. It sent a letter withdrawing from the Standstill Agreement. *See* App. 4069–71. It filed this lawsuit to enforce its rights and end the trespass. *See* App. 2756. And,

[10] This testimony was admitted at trial by video. *See* App. 2836.

in February 2021, it sent a letter expressly taking the position that "DGO is trespassing to [Shonk's] minerals." App. 4438–39 (the letter); App. 2858–59 (testimony about it).

But Carbon West Virginia ignored Shonk, extracted roughly $1.6 million of gas, and sold it for its own personal gain. *See* App. 3037–39. After trial, based on properly submitted evidence, a properly instructed jury determined "Carbon West Virginia committed a trespass against Shonk by conducting oil and gas operations on Shonk's land after May 26, 2020." App. 3657. That properly instructed jury separately determined this trespass was "willful," not "innocent." *Id.* It awarded $1,596,847 for this willful trespass. *See* App. 3658. On Petitioners' post-trial motion, the circuit court held Shonk presented "sufficient evidence" to support the jury's determination of a willful trespass and to support the damages award. App. 5085. And it explained those damages "reflect the value of the gas, severed from the land, extracted, and sold." App. 5086. Petitioners, for their part, had offered no countervailing evidence on damages. *See* App. 3419.

F. Apart from the gas, Carbon West Virginia also retains—and denies Shonk access to—16,000 acres of Shonk's land.

In addition to taking the gas, Carbon West Virginia also unjustly retained 16,000 acres of natural gas property that Shonk's expert valued at roughly $1.3 million. *See* App. 4418–19, 3017–24. Carbon West Virginia used that valuable property to obtain a loan from a bank, and then purported to sell off the equipment, gathering lines, and compressors. *See* App. 3151, 3358. After trial, based on properly submitted evidence, a properly instructed jury determined Carbon West Virginia was unjustly enriched by this continued access to Shonk's land. *See* App. 3658. And it awarded Shonk $1,302,803 in compensatory damages. *See* App. 3658.

On Petitioners' post-trial motion, the circuit court held that "Shonk presented evidence that Defendants . . . unjustly retained 16,000 acres of natural gas property that Shonk's expert valued at roughly $1.3 million." App. 5086. It also noted evidence that "Defendants used that value to

obtain a loan." *Id.* Thus, the court held there was sufficient evidence, including expert testimony, to support the jury's verdict that "Shonk was deprived of possession of $1.3 million in property." *Id.* And it explained those damages "reflect the value of the land unjustly retained by Defendants and denied to Shonk." App. 5086. Once again, Petitioners offered no countervailing evidence to the jury concerning damages. *See* App. 3419.

III. SUMMARY OF THE ARGUMENT

Petitioners raise seven assignments of error. But none can survive scrutiny. Indeed, their arguments would require this Court to reweigh the evidence, redecide the facts, and contradict the jury's verdict. In short, Petitioners would have this Court flout the applicable standard of review and disregard the most "sacred" aspect of our judicial system. This Court should decline.

First, sufficient evidence supports the jury's determination that Petitioners materially breached Shonk's right of first refusal. Indeed, sufficient evidence supports four material breaches. And materiality is a classic jury question. Any one of those breaches would result in forfeiture.

Second, sufficient evidence supports the jury's determination that the Midstream Assignment slandered Shonk's title to the forfeited assets. Petitioners' decision to record a conveyance of assets to which they had no valid claim came with consequences.

Third, sufficient evidence supports the jury's determination that Petitioners willfully trespassed on Shonk's mineral rights. Willfulness is another classic jury question.

Fourth, sufficient evidence supports the jury's determination that Petitioners were unjustly enriched by retaining 16,000 acres of Shonk's land. And the damages it awarded for *that* harm are not duplicative of damages it awarded to compensate for wrongfully extracted gas.

Fifth, sufficient evidence supports the jury's determination that DGO tortiously interfered with Shonk's contractual right by doubling the ROFR price, lying and obfuscating, and convincing

Carbon West Virginia to withhold the documents that revealed the truth. The damages for this claim—against a different wrongdoer—are not duplicative of the jury's earlier awards.

Sixth, Petitioners waived all arguments against the post-trial hearing for the circuit court to decide attorneys' fees. Petitioners *never* objected to that hearing, and they cannot do so now.

Seventh, Petitioners present no basis for a new trial. As before, there is no infirmity in the jury's damages awards. As to counsel's characterization of Shonk having been "cheated" and offered a "fraudulent price," Petitioners again waived the issue by failing to raise a timely objection. Of course, even if they had objected, the evidence clearly supported those statements.

This Court should affirm the circuit court's order denying Petitioners' post-trial motions.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Shonk believes oral argument is unnecessary. The material facts are adequately presented in the briefs and record, and the dispositive legal issues are adequately presented in the briefs and in the circuit court's thorough order concerning Petitioners' post-trial motions. *See* App. 5061–91. This case does not involve issues of first impression suitable for Rule 20 argument. *See* W. VA. R. APP. P. 20(a). Rather, the assignments of error involve the application of settled law. As such, Shonk does not believe the decisional process will be significantly aided by oral argument.

V. ARGUMENT

A. Standard of Review

This Court reviews a circuit court's resolution of a post-trial motion for judgment as a matter of law *de novo*. *See Fredeking v. Tyler*, 680 S.E.2d 16, 20 (W. Va. 2009). But this review "triggers the same stringent decisional standards that are used by the circuit courts." *Id.* (citation omitted). This Court's review is "plenary," then, but "it is also circumscribed because [this Court] must review the evidence in the light most favorable to the nonmoving party." *Id.* On such a

motion, "it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented." *Id.* "Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Id.*

Likewise, a circuit court's limited role at this stage does not permit it "to substitute its credibility judgments for those of the jury." *Id.* at 21. Instead, it must

> (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Id. "Stated another way," at this stage, "every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Id.*; *see also Reed v. Wimmer*, 465 S.E.2d 199, 210 (W. Va. 1995) (holding that jury verdicts are "entitled to considerable deference" and that reviewing courts should not disturb such a verdict so long as they can locate "some competent, credible evidence" to support it); *Stenger v. Hope Natural Gas Co.*, 90 S.E.2d 261, 266 (W. Va. 1955) ("On appellate review of a jury case, the reviewing court must treat the evidence as being favorable to the verdict, and give it the strongest possible probative force of which it will admit." (citations omitted)).

The "stringent decisional standards" discussed above reflect the underlying reality that, on appeal, "[t]he verdict of a jury will be held sacred . . . , unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as bias, undue influence, misconduct, oversight, or some misconception of the facts or law." *Huntington Eye Assocs., Inc. v. LoCascio*, 553 S.E.2d 773, 783 (W. Va. 2001) (per curiam); *see also Hubley v. Pszczolkowski*, No. 19-0211, 2020 WL 7214158, at *13 (W. Va. Dec. 7, 2020) (memorandum

decision) (holding, albeit in a criminal context, that "[t]rial by jury is perhaps the most sacred and treasured aspect" of our judicial system). The Supreme Court of Appeals has made its profound respect for jury verdicts clear for nearly 130 years:

> Why have juries if appellate judges are to go into the business of weighing evidence as if by the ounce and pound? We ought not to do this. It is an abuse of power, and a misconception of our functions and of the jury function. The jury institution is sacred under our constitution, and a verdict is to be highly respected.

State v. Bower, 27 S.E. 301, 302 (W. Va. 1897). Accordingly, as the Court long ago explained:

> If there is conflict of testimony on a material point, or if reasonably fair-minded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive and cannot be disturbed either by the trial court or by this court.

Aliff v. Berryman, 160 S.E. 864, 865 (W. Va. 1931); *see also Laney v. State Farm Mut. Auto. Ins.*, 479 S.E.2d 902, 910 (W. Va. 1996) ("Because of the jury's unique ability to hear the evidence and judge the demeanor of the witnesses on an impartial basis, a jury verdict is accorded great deference, especially when it involves the weighing of conflicting evidence."); *Young v. Ross*, 202 S.E.2d 622, 627 (W. Va. 1974) ("It is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed").

Finally, "when considering a circuit court's ruling on a motion for a new trial," this Court employs an "abuse of discretion standard of review." *McClure Mgmt., LLC v. Taylor*, 849 S.E.2d 604, 614 (W. Va. 2020). Under that broad umbrella, this Court must review "the circuit court's factual findings under a clearly erroneous standard." *Tennant v. Marion Health Care Found., Inc.*, 459 S.E2d 374, 381 (W. Va. 1995). Meanwhile, it reviews legal determinations *de novo*. *See id.*

B. Substantial Evidence Supports the Jury's Determination that Carbon West Virginia Materially Breached Shonk's First Right of Refusal.

Carbon West Virginia first argues it was entitled to judgment as a matter of law because there was "no evidence" that it materially breached the ROFR. Pets.' Br. at 11–12. Critically, it does not challenge any of the evidence presented or excluded from trial. *See generally* Pets.' Br. Accordingly, it concedes the evidence was properly submitted to the jury. Likewise, it does not challenge a single jury instruction, and thus concedes the jury was properly instructed. *See id.* Finally, it presents no argument, let alone evidence, that the jury endured any "undue influence, misconduct, oversight," or "misconception of the facts or law." *LoCascio*, 553 S.E.2d at 783.

Instead, Carbon West Virginia argues the four events the jury determined constituted material breaches were not *really* material breaches at all. To start, under West Virginia law, "whether a party materially breached a contract is a finding of fact for the jury's consideration." *Weber v. Wells Fargo Bank, N.A.*, No. 3:20-cv-48, 2021 WL 833949, at *6 (N.D. W. Va. Mar. 4, 2021) (applying West Virginia law). In addition, the Leases specifically define "material breach" as "a breach of contract that deprives the other party of a substantial benefit that the other party reasonably expected to receive under the terms of the contract." S. App. 0084, 0127. Given these realities, Carbon West Virginia is wrong four times over.

1. *Substantial evidence supports the jury's determination that Carbon West Virginia materially breached the Leases by failing to provide the MIPA's schedules and exhibits, including the Allocated Value Table.*

Under the Leases, Carbon West Virginia was required to provide Shonk "information concerning . . . the value [Carbon West Virginia] expects to receive in exchange for transferring the Transferred Interest." S. App. 0082, 0125. As Carbon West Virginia's Notices of Intent to Transfer expressly stated, Shonk was entitled to buy "at the value agreed to with DGO" and "on and subject to the same terms and conditions set forth in the agreement with DGO." App. 4078;

S. App. 0001. As a matter of straightforward logic, Shonk was entitled to all the information necessary to establish that it was, in fact, buying at the "value agreed to with DGO" and subject to "same terms and conditions." On this point, the Leases were clear.

According to Carbon West Virginia itself, "the agreement with DGO"—the entire agreement, not just bits and pieces of it—was the definitive source of both the relevant "value" and the applicable "terms and conditions." App. 4078; S. App. 0001. That fact explains why Carbon West Virginia identified "the agreement with DGO" in both Notices of Intent to Transfer. Its newfound argument that the MIPA's various schedules and exhibits, including the Allocated Value Table, "have no bearing on the transaction," Pets.' Br. at 17, makes no sense. The MIPA, including *all* its schedules and exhibits, are the very basis of the transaction. There is no other way to determine the relevant value or the applicable terms and conditions.

Carbon West Virginia's argument that the Leases entitled Shonk to receive only "two pieces of information: (1) the identity of the proposed transferee[,] and (2) the value Carbon West Virginia expects to receive," Pets.' Br. at 14, simply rewrites the contract. Shonk did not negotiate to receive only the value itself (*i.e.*, a dollar figure). It negotiated to receive "information concerning . . . the value." S. App. 0082, 0125. Carbon West Virginia reads "information concerning" right out of the Leases. And it does so even though its notices do *not* merely identify the proposed transferee. Instead, those notices provide "information concerning" DGO and the proposed Transfer, including the nature of the sale. App. 4078; S. App. 0001.

That the parties did not agree "that the scope of information to be provided included assets other than the Leases," Pets.' Br. at 17, is irrelevant. It is no surprise the Leases did not name the exhibits or anticipate the particular features of a then-nonexistent deal. Instead, the Leases' requirements were broader. Per the Leases, Carbon West Virginia needed to provide "information

concerning . . . the value [it] expects to receive in exchange for transferring the Transferred Interest." S. App. 0082, 0125. And Shonk explained why it negotiated for this language: It did not want a bottom-line number; it wanted to "understand how the value [was] calculated." App. 2629–32. Accordingly, when "information concerning" that value can be gleaned only from reviewing a broader deal that includes other assets, Carbon West Virginia needed to produce that broader deal in its entirety. Having admitted the broader deal sets both the relevant value and the applicable terms and conditions, Carbon West Virginia was not free to withhold any part of it.[11]

Moreover, Carbon West Virginia's argument that "Shonk never identified any specific exhibit or schedule that it believed could be germane," Pets.' Br. at 17, is both untrue and irrelevant. Shonk was not required to guess which part of "the agreement with DGO" revealed the relevant information or which exhibit, precisely, might have contained it. *See, e.g.*, App. 2630–31 ("[I]t would be impossible to say 'Well, provide us Exhibit C.' We wouldn't know what Exhibit C was."). The entire "agreement with DGO" was relevant and should have been provided. But, even if Shonk needed to identify the relevant exhibit by name, it did so. It repeatedly pointed to the Allocated Value Table, which Carbon West Virginia refused to provide (at DGO's direction). *See, e.g.*, S. App. 0018–22; S. App. 0009–12; App. 1712 (identifying that document as relevant at summary judgment); App. 2732–33, 4920–21 (eliciting testimony about that specific document).

Indeed, Shonk pointed to that document as early as April 15, 2020: "We would not have thought that providing *the exhibits which actually set forth, among other things, the Allocated*

[11] In its brief, Carbon West Virginia focuses on what *it* supposedly expected to provide under the Leases' informational language. *See* Pets.' Br. at 14. But "material breach" is defined based on what the non-breaching party (*i.e.*, in this case, Shonk) "reasonably expected to receive under the terms of the contract." S. App. 0084, 0127. And the jury necessarily determined Shonk's informational expectation was reasonable here. It likewise necessarily determined Carbon West Virginia's expectation that it could make a Transfer subject to the terms and conditions of a particular contract and then hide away portions of that contract was *un*reasonable.

Value for our leases as well as the other exhibits, would be objectionable." S. App. 0009 (emphasis added). The exhibit that "actually set[s] forth" the value allocated to the Leases was, of course, the Allocated Value Table. That early request, standing alone, is enough to show that Shonk reasonably expected to receive that specific exhibit.

And, to the extent necessary, Shonk also explained why the table was "useful." *Compare* Pets.' Br. at 18 (arguing that Allocated Value Table "was not . . . useful"), *with* App. 2654–57, 2732–45 (testifying Shonk sought the Allocated Value Table "to validate that the price [it was] being asked to pay," which it had been unable to do without the table); App. 4961 (Carbon West Virginia's Vice President confirming the Allocated Value Table would have allowed Shonk to confirm the price information it had been given); App. 3020–24 (testifying the Allocated Value Table revealed even Shonk's "loser wells" had been doubled in value).

Finally, Carbon West Virginia suggests DGO's conduct—after May 26, 2020—might somehow be relevant to this question. *See* Pets.' Br. at 18 (noting DGO provided the Allocated Value Table after the DGO Sale closed). It is not. By contract, Carbon West Virginia was required to include this information in the Notices of Intent to Transfer. S. App. 0082–83, 0125–26. It was certainly required to provide the information before May 8, 2020 (*i.e.*, when Shonk needed to make its ROFR election). But it did neither. Nor did it provide the information by the time it closed the DGO Sale (*i.e.*, May 26, 2020) or even by the time it received Shonk's Notices of Forfeiture (*i.e.*, May 29, 2020). As a result, it materially breached and forfeited the Leases.

That DGO eventually provided the Allocated Value Table—in July 2020, *see* App. 2732–33—does not somehow undo Carbon West Virginia's material breach or the resulting forfeiture. Indeed, nothing DGO did under the Standstill Agreement could affect Shonk's rights at all. *See* App. 4034 (expressly stating the Standstill Agreement would not "in any way prejudice, waive, or

otherwise affect" Shonk's rights under "the Notices," which were defined as Shonk's Notices of Forfeiture from May 29, 2020). Shonk did not need to show that "it remained unsatisfied," Pets.' Br. at 18, during the period the Standstill Agreement was in effect. By that time, Carbon West Virginia's informational breach was final.

Put simply, the evidence supports the jury's determination that Carbon West Virginia materially breached the Leases by refusing to provide the MIPA's schedules and exhibits, including the Allocated Value Table. There is no basis to disturb the jury's verdict. And that material breach alone is enough to sustain the judgment as to the contract claim (*i.e.*, forfeiture of the Leases).

2. Substantial evidence supports the jury's determination that Carbon West Virginia materially breached the Leases by closing the DGO Sale without a carveout.

It was undisputed at trial that Shonk validly exercised its right of first refusal. *See* S. App. 0025–33; App. 3146. As a result, under the Leases, Carbon West Virginia was not free to close its proposed Transfer to DGO. *See* S. App. 0083, 0126 (providing it could transfer to a third party *only* if Shonk failed to exercise its ROFR within thirty days or gave earlier written notice declining to exercise its ROFR). Instead, the Transferred Interests needed to go to Shonk. *See id.* There were multiple ways to achieve that result. For example, Carbon West Virginia could have transferred the assets to Shonk on May 26, 2020—the same time the DGO Sale closed. Alternatively, it could have carved out the Shonk Assets from the DGO Sale, so that closing would not have affected the property Carbon West Virginia needed to transfer to Shonk. *See* App. 3348–49, 4974–75. But Carbon West Virginia did neither, opting instead to close the DGO Sale without any carveout for the properties subject to Shonk's right of first refusal. *See* App. 3349.

Carbon West Virginia's decision to proceed with the planned Transfer despite Shonk's exercise of its right of first refusal had consequences. Carbon West Virginia initially argues those consequences do not matter because the various "benefits" Shonk expected to receive do not

"appear in the ROFR provision of the Leases." Pets.' Br. at 13. But the Leases specifically protect all "substantial benefit[s] the [non-breaching] party reasonably expected to receive under the terms of the contract." *See* S. App. 0084, 0127. The Leases do not limit their protections to specifically enumerated contractual "benefits," nor do they require that such "benefits" be set out in the contract. The question, then, is whether Shonk reasonably expected to receive the "benefits" at issue. And the jury necessarily decided Shonk's expectation of closing with its contractual counterparty, with all the associated benefits such a closing would provide, was reasonable.

Carbon West Virginia then argues its "obligation to honor Shonk's exercise of its ROFR was wholly unaffected by the closing." Pets.' Br. at 12. It is no wonder this argument comes without citation. *But see* W. VA. R. APP. P. 10(c)(7) (requiring "specific citations to the record on appeal" and permitting the Court to "disregard errors" without such citations). It flatly contradicts the evidence at trial. Consider three specific "benefits" Shonk expected to receive but was denied.

First, because of the impermissible transfer, Shonk was unable to close with Carbon West Virginia, its contractual counterparty, and was instead forced to deal with DGO. *See* App. 2766, 2690–93. Carbon West Virginia argues the ROFR did not give Shonk the right to close with Carbon West Virginia's attorneys instead of DGO's. *See* Pets.' Br. at 14. But the Leases provide no reason for Shonk to think it might need to negotiate with the proposed transferee or its attorneys at all. And this counterparty switcheroo subjected Shonk to additional outlays of time, effort, and expense. *See* App. 2763–64, 2922–24. Nothing in the Leases permitted Carbon West Virginia to impose those burdens on Shonk. Nor did the Leases require Shonk to duplicate its efforts. Indeed, the Leases prevented these outcomes by proscribing Transfers to third parties in all but two narrow instances (*i.e.*, failure to exercise the ROFR within thirty days or an earlier written declination).

Moreover, DGO quickly reneged on a critical representation. Carbon West Virginia had repeatedly stated there were no firm transportation obligations. *See* App. 2746–50, 2925–27, 2929, 3962. Once it took over the negotiation, however, DGO said the exact opposite. *See* App. 2746–50, 3829–30. DGO's sudden reversal meant Shonk would face a $1,129,000 liability under the firm transportation contract. *See* App. 3041. Substantial evidence supports the jury's conclusion that changing the responsible party from Carbon West Virginia to DGO was a material breach.

Second, as noted above, after the DGO Sale closed and Shonk was forced to deal with DGO, DGO changed the terms of the deal by tacking on a firm transportation obligation. *See* App. 2746–50, 3829–30. Petitioners now argue this firm transportation obligation was merely "something for discussion," not a "demanded term of the transaction." Pets.' Br. at 16. This characterization collapses under the weight of the very evidence Petitioners cite to support it. To start, the e-mail in which DGO raised the issue never mentioned that it was merely "something for discussion." Instead, it said "some of the DTI Firm obligation should probably transfer . . . as a material contract." App. 3829–30. It went on to state that the parties "will *have* to think through how to transfer this over to [Shonk]" and that Shonk "should begin thinking of how [it] will satisfy the credit requirements for this contract." *Id.* (emphasis added). Those statements bolster the conclusion that DGO intended to impose an additional obligation on Shonk.

The cited testimony similarly confirms DGO was making a demand. *See* Pets.' Br. at 16 (including Mr. Shain's testimony as a block quote). When asked "What did you mean by that?" Mr. Shain—who sent the e-mail stating the firm obligation "should probably transfer"—initially testified he "thought it probably should, but you know, *one demand*." App. 3187 (emphasis added). He then agreed with his attorney's leading suggestion that "it was something [he was] raising for further discussion with Shonk." *Id.* The jury was entitled to credit Mr. Shain's initial, and

unprompted, characterization of his e-mail as conveying "one demand." It was not required to credit the self-serving effort to recharacterize it more innocently. This evidence, too, supports the jury's determination that closing the DGO Sale without a carveout was a material breach.

Third, once the DGO Sale closed, the Parent Company Guaranty terminated. *See* App. 3381–83. As a result, Shonk lost the benefit of this separately negotiated and agreed-upon layer of security for Carbon West Virginia's performance. Petitioners confusingly argue this loss does not matter because "the guaranty terminates upon assignment of the Leases to an unaffiliated third party or termination of the Leases." Pets.' Br. at 16. This argument confirms Shonk's point. Before May 26, 2020, Shonk had a security instrument binding the parent company (*i.e.*, Carbon Energy) to guarantee performance of the lessee's (*i.e.*, Carbon West Virginia's) obligations. After May 26, 2020, and while negotiating with DGO, it did not. In other words, after the closing, Shonk had fewer rights and less leverage. The jury credited Shonk's view that it lost a substantial benefit because of the May 26, 2020, closing. This breach was material.

The argument that "[t]he MIPA expressly required [DGO] to ensure Carbon West Virginia completed that transaction," Pets.' Br. at 12, fails for similar reasons. To start, Petitioners cite only the MIPA's cover page for this assertion. *But see* W. VA. R. APP. P. 10(c)(7). More to the point, even assuming the claim is true, nothing permitted Petitioners to swap out Carbon Energy for DGO as guarantor of Carbon West Virginia's performance. The evidence supported the jury's conclusion that Petitioners' unilateral attempt to do so was a material breach of the Leases.

Once again, the evidence supports the jury's determination that Carbon West Virginia materially breached the Leases by closing the DGO Sale. There is no basis to disturb the verdict. This material breach is enough to sustain the judgment as to the contract claim (*i.e.*, forfeiture).

3. *Substantial evidence supports the jury's determination that Carbon West Virginia materially breached the Leases by mortgaging the property without sending Shonk a Notice of Intent to Transfer.*

The Leases plainly required Carbon West Virginia to provide a Notice of Intent to Transfer any time it sought to mortgage "all or any portion of its interest under the Lease[s]." S. App. 0082, 0125; App. 2628–29, 2762. The same day the DGO Sale closed, Carbon West Virginia mortgaged the ROFR Property *without* providing notice. *See* App. 2762, 2793–94, 3832–76.

Petitioners argue the Leases "were supposed to have been omitted from the instrument." Pets.' Br. at 18 (citing a portion of Petitioners' attorney's opening statements, not evidence, about something unrelated to whether the mortgage was supposed to omit the Leases). In any event, the jury was not required to accept Mr. Shain's self-serving testimony that it was all an innocent mistake. *See* App. 3154–55. And Carbon West Virginia did not record the release, which was supposed to correct this purported "mistake," until July 27, 2020, *see* Pets.' Br. at 18, App. 4429–30—ten days *after* Shonk elected to exit the Standstill Agreement. *See* App. 4069–71.

Carbon West Virginia's also argues no reasonable jury could have determined this conduct amounted to a material breach because "Shonk had already contractually bound itself to purchase the entirety of the lease interests by exercising the ROFR." Pets.' Br. at 19. One can arrive at this post-closing mortgage, however, only by ignoring the previous Notices of Intent to Transfer and Shonk's elections. Otherwise, the Leases were already forfeited both by Carbon West Virginia's failure to share information it was required to provide and by its Transfer to DGO. *See supra* Parts V.B.1 & V.B.2. Assuming there was no earlier forfeiture, however, Carbon West Virginia needed to provide a Notice of Intent to Transfer regarding the mortgage. S. App. 0082–83, 0125–26. And it failed even this most basic requirement. The evidence supports the jury's determination that,

assuming no previous forfeiture, this failure amounted to a material breach. Once again, this failure alone is enough to sustain the judgment as to the contract claim (*i.e.*, forfeiture).

4. Substantial evidence supports the jury's determination that Carbon West Virginia materially breached the Leases via the Midstream Assignment.

The same logic applies to the Midstream Assignment. *See* Pets.' Br. at 18. Carbon West Virginia's sole additional defense is that the instrument "does not mention Shonk or the subject Leases by name." *Id.* But the jury heard evidence, including from Mr. Shain himself, that the Midstream Assignment included the Shonk wells covered by the Leases. *See* App. 0189, 2761, 4954. The jury was entitled to credit this evidence. And Carbon West Virginia once again failed to send the required Notice of Intent to Transfer.

As such, the evidence supports the jury's determination that, assuming no previous forfeiture, Carbon West Virginia's failure to send a notice was a material breach. As before, this failure is independently sufficient to sustain the judgment as to the contract claim (*i.e.*, forfeiture).

5. Substantial evidence supports the jury's determination that Carbon Energy materially breached the Parent Company Guaranty.

Petitioners' argument on the guaranty hinges entirely on their argument that there were no material breaches of the Leases. *See* Pets.' Br. at 19–20. If the jury's determination as to even one material breach is affirmed, however, Carbon Energy breached the guaranty.

C. Substantial Evidence Supports the Jury's Determination that Carbon West Virginia Slandered Shonk's Title by Recording the Midstream Assignment.

A slander of title involves (1) the publication of (2) a false statement (3) that is derogatory to plaintiff's title, (4) with malice, (5) causing special damages (6) as a result of diminished value in the eyes of third parties. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 879 (W. Va. 1992). The Midstream Assignment easily satisfies the first three requirements. *See* App. 5082–83. Petitioners' sole argument to the contrary is that the Midstream Assignment "reflects no

statement about Shonk or the Leases" or somehow did not include the Leases. Pets.' Br. at 21–22. But this argument fails for the same reasons identified above—namely, the jury heard evidence, including from Mr. Shain, that the assignment included assets covered by the Leases, which had been already forfeited to Shonk. *See* App. 0189, 2761, 4954.

As to malice, evidence of prior bad acts suffices to establish the requirement via "a pattern and practice of deception." *TXO*, 419 S.E.2d at 883. Here, of course, Carbon West Virginia participated in a prolonged pattern of deception—putting DGO's doubled price in the Notices of Intent to Transfer and withholding the information necessary to reveal the truth, despite being contractually obligated to provide it. *See* App. 5082–83. That evidence shows malice.

As to special damages and diminished value, West Virginia "follow[s] the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title." *TXO*, 419 S.E.2d at 881. In addition, under the majority rule, an aggrieved party has the right to recover as special damages the litigation expenses incurred in removing the effects of the slander, even in the absence of an impairment of vendibility. *See, e.g.*, *Sumner Hill Homeowners' Ass'n v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1031, (2012), *as modified on denial of reh'g* (May 30, 2012); *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996); *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn. 2000). In effect, the existence of the spurious cloud on one's title to property is *per se* evidence of the property's diminished value. Otherwise, only irrational actors would ever spend money to clear their title.

And Shonk presented evidence that it incurred attorneys' fees to remove the cloud on its title to the land. *See* App. 2763–64, 2922–24. No more is required. Thus, substantial evidence supports the jury's determination that Carbon West Virginia slandered Shonk's title.

D. Substantial Evidence Supports the Jury's Verdict that Carbon West Virginia Committed a Willful Trespass as to Shonk's Minerals.

Shonk provided Carbon West Virginia Notices of Forfeiture on May 29, 2020. *See* App. 3970–4033. And, as the jury concluded, the Leases had in fact been forfeited. *See* App. 3655–56. But Carbon West Virginia kept extracting gas, selling it, and keeping the profits. It did so even after Shonk entered and then withdrew from the Standstill Agreement, filed this lawsuit, and sent a letter telling Carbon West Virginia it was "trespassing to [Shonk's] minerals." *See* App. 2756, 2858–60, 4069–71, 4438–39. It continued to do so even when Shonk refused its royalty payments for those continued operations. *See* Pets.' Br. at 25. Petitioners do not dispute these facts.

Instead, Petitioners claim "[t]he jury lacked any evidentiary basis to conclude that the continued operation of the wells after May 26, 2020, was done intentionally." Pets.' Br. at 24 (internal quotation marks omitted). Whether a trespass is innocent or willful is a classic jury question. *See Pan Coal Co. v. Garland Pocahontas Coal Co.*, 125 S.E. 226, 230 (W. Va. 1924).

Petitioners believe there is "uncontroverted evidence" of their "good faith." *Id.* But they are wrong. Shonk repeatedly made its position known: The leases had been forfeited. Shonk did not need to seek a preliminary injunction, *see* Pets.' Br. at 25, for Carbon West Virginia to take the hint. Knowing Shonk's position, Carbon West Virginia took a risk and continued to operate the wells. As of trial, Carbon West Virginia *still* had not ceased its impermissible extraction from Shonk's wells. Substantial evidence supports the jury's conclusion that Carbon West Virginia had no good-faith basis to continue these operations, particularly in light of its participation in the scheme to inflate the price, hide the evidence, and transfer the assets to DGO despite Shonk's valid exercise of the ROFR, and in light of the repeated notices from Shonk.

As a result, as Carbon West Virginia admits, the correct measure of damages "is the value of the gas extracted without any deduction for operation expenses." Pets.' Br. at 24. And that is the

exact calculation of damages Shonk's expert presented at trial. *Id.* at 23; *see also* App. 3037–39. Thus, there is no basis to disturb the jury's verdict.

E. Substantial Evidence Supports the Jury's Determination that Carbon West Virginia Was Unjustly Enriched by Retaining 16,000 Acres of Shonk's Land.

In addition to extracting and selling Shonk's gas, Carbon West Virginia also unjustly retained 16,000 acres of Shonk's land. *See* App. 2858–59, 3017–24. And Carbon West Virginia used that valuable property to obtain a loan from a bank. *See* App. 3151, 3358. Put simply, Carbon West Virginia unjustly retained Shonk's land to enrich itself at Shonk's expense.

The jury returned a verdict reflecting the fact that Shonk was deprived of possession of $1.3 million of land. *See* App. 3658, 5086. The jury based this figure on evidence of DGO's own valuation. *See* App. 3014–17, 3024. Importantly, Petitioners offered no counterevidence of damages on any claim. App. 3419 (Petitioners' expert disclaiming testimony "about damages for any party in the trial."). "Like a finding of liability, an award of damages is a factual determination reserved for the jury." *Bressler v. Mull's Grocery Mart*, 461 S.E.2d 124, 128 (W. Va. 1995). As the circuit court noted, $1.3 million represented the *value of the land* Carbon West Virginia improperly retained, which is distinct from the *value of the gas* it improperly extracted and sold. *See* App. 5086. Thus, there is no "double recovery," Pets.' Br. at 25, here. *See* 25 C.J.S. Damages § 24. Indeed, as Petitioners admit, the jury was specifically instructed not to duplicate the trespass damages. *See* Pets.' Br. at 26; App. 3475, 3658. And "juries are presumed to follow their instructions." *State v. Miller*, 476 S.E.2d 535, 553 (W. Va. 1996).

To be clear, Shonk did not receive "the value of that [$1.3 million] benefit in the form of forfeiture." Pets.' Br. at 27. The forfeiture occurred on May 26, 2020, at the latest. But Carbon West Virginia improperly retained the property through trial. Indeed, it *still* has not vacated the

property. The $1.3 million compensates Shonk for the fact that Carbon West Virginia, without any legal right, overstayed its welcome on land that had already been forfeited back to Shonk.

To use Petitioners' "farmland example," Pets.' Br. at 27–28, the farmer whose ROFR rights have been trampled may be awarded the acre after trial. She may also be awarded the value of accessing the acre for the earlier period her counterparty wrongfully denied it. And she may even be awarded the value of the crops grown and sold at a profit after violating her ROFR. No part of those awards would amount to double recovery. Each remedy redresses a different harm. Thus, a jury can "conclude[] that Shonk was entitled to $1,302,803" (for denied access to its land) "*and* $1,596,847" (for the improper extraction of its gas). Pets.' Br. at 28.

That Shonk did not "incur[] $1,302,803 in losses," *id.*, is irrelevant. The Leases were forfeited, sure, but Carbon West Virginia nonetheless remained on the property. Shonk was not required to pay Carbon West Virginia for the forfeited Leases. It was entitled to immediate possession of its land. *See* S. App. 0083–85, 0126–28. Carbon West Virginia wrongfully denied Shonk that benefit, and it must answer in damages for its unjust enrichment.

As a final point, the circuit court correctly awarded prejudgment interest because the unjust-enrichment damages are a calculable pecuniary amount that Shonk was deprived of by Petitioners' continued occupation of Shonk's land after the termination of the Leases. *See Kirk v. Pineville Mobile Homes, Inc.*, 310 S.E.2d 210, 211–12 (W. Va. 1983). Once again, there is no basis to disturb the jury's verdict.

F. Substantial Evidence Supports the Jury's Determination that DGO Tortiously Interfered with Shonk's Right of First Refusal.

As the Fourth Circuit recognized nearly forty years ago, "allocations of price to elements of a package may readily be manipulated to defeat contractual rights of first refusal. It is easy to imagine an unreasonably inflated value assigned to the subject of any first-refusal option." *Pantry*

Pride Enters., Inc. v. Stop & Shop Co., 806 F.2d 1227, 1231–32 (4th Cir. 1986). Here, the evidence showed DGO did exactly that. It inflated the price allocated to the wells subject to Shonk's ROFR, and then it hid its price-doubling scheme from Shonk. *See* App. 1602–03, 3023–24, 3304–05, 3380, 4910–13. Indeed, it fabricated a "confidentiality" concern to prevent Carbon West Virgnia from providing information the Leases required it to provide. *See* S. App. 0020; App. 3302–03. DGO was not free to meddle with Shonk's ROFR this way.

DGO argues its effort to inflate the allocated price is permissible because the doubled price is "more consistent with fair market value." Pets.' Br. at 34. But the ROFR required Carbon West Virginia to offer the property at *the same price* DGO offered, not at some "fair market value" DGO dreamed up after the fact. Moreover, DGO prevented Carbon West Virginia from sharing the full Allocated Value Table, purportedly based on confidentiality concerns. S. App. 0020. The jury was not required to ignore the fact that Shonk was already bound to treat any information provided by Carbon West Virginia as confidential. *See* S. App. 0006, 0008, 0027. DGO was not concerned with confidentiality; it wanted to cover its tracks. A reasonable juror might also wonder why, if the price truly reflected "fair market value," DGO kept spinning stories. *See supra* at Part II.C (recounting DGO's shifting explanations). Indeed, it did not land at its current rationale until it arrived at trial.

DGO also justifies its price-doubling scheme on the argument that it was in "legitimate competition" with Shonk to acquire the Leases. Pets.' Br. at 34–35. But DGO never pleaded "legitimate competition" as a defense. *See* App. 0201–02. Nor did DGO offer a jury instruction on this supposed defense. *See* App. 2345–46. It never attempted to present the defense at trial. *See* 3551–52. It does not cite a single piece of evidence to support the defense even on appeal, opting instead to cite an irrelevant portion of Shonk's opening statement. *See* Pets.' Br. at 35 n.138. These failures are fatal. DGO cannot present a defense now, for the first time, on appeal after the jury

returned a verdict against it. The circuit court correctly held that DGO waived this defense. *See* App. 5088; *Nellas v. Loucas*, 191 S.E.2d 160, 163 (W. Va. 1972).[12]

The evidence supports the jury's determination that DGO tortiously interfered with Shonk's ROFR. It likewise supports its calculation of damages. *See Spangler v. Washington*, No. 21-0002, 2022 WL 123006, at *7 (W. Va. Jan. 12, 2022). The jury awarded Shonk $1.3 million—recoverable against DGO—for the value of the deal Shonk was deprived of via DGO's intentional manipulation and deceit. *See* App. 3130–31, 3190–94, 3656. The verdict should stand.

G. Petitioners Waived All Arguments Against the Circuit Court Determining Slander-of-Title Damages in a Post-Trial *Pitrolo* Hearing.

Petitioners argue the circuit court erred by allowing Shonk to present post-trial evidence of special damages in the form of attorneys' fees. *See* Pets.' Br. at 35–36. There is just one problem: Petitioners never objected to this presentation of evidence before or during trial. *See* App. 1685, 3054–56, 3069, 3082–83, 5083–84. Thus, Petitioners waived any argument against this *Pitrolo* hearing. *See State v. Miller*, 459 S.E2d 114, 129 (W. Va. 1995); App. 5084.

H. The Circuit Court Did Not Abuse Its Discretion in Declining to Award a New Trial.

Petitioners argue the circuit court erred by failing to grant a new trial for two reasons. Neither survives scrutiny or warrants the requested relief.

First, Petitioners argue they should get a new trial because the damages are duplicative, "phantom," or otherwise unsupported by the evidence. Pets.' Br. at 36–38. This argument fails here for the same reasons it failed above. *See supra* at Parts V.D–F. As the circuit court held, the damages awarded against Carbon West Virginia account for two separate injuries it inflicted after

[12] Petitioners' "legitimate competition" argument shines a spotlight on the absurdity of their earlier argument that forcing Shonk to deal with DGO (*i.e.*, a supposed competitor instead of a contractual counterparty) was immaterial. *See supra* at Part V.B.2.

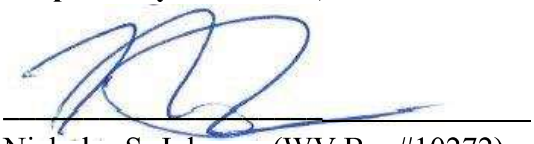
the forfeiture—the value of land it wrongfully retained and the value of the gas it impermissibly extracted. *See* App. 5086. The damages awarded against DGO for tortious interference represent a third injury caused by a different party.

Second, Petitioners argue they should get a new trial because, during closing argument, Shonk's counsel referred to Shonk having been "cheated" and offered a "fraudulent price." Pets.' Br. at 38–39. There are two problems here. To start, Petitioners failed to object to these statements when they were made, resulting in waiver. *See Yuncke v. Welker*, 36 S.E.2d 410, 416 (W. Va. 1945); App. 5090. Moreover, the challenged comments were clearly supported by the evidence. Shonk presented substantial evidence that DGO worked to double Shonk's price, deprive it of its ROFR rights, and then conceal its bad acts by pretending to be concerned with confidentiality. *See supra* at Part V.F. Thus, there are no grounds for a new trial. *See* App. 5090.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's order and preserve the properly instructed jury's verdict.

Respectfully submitted,



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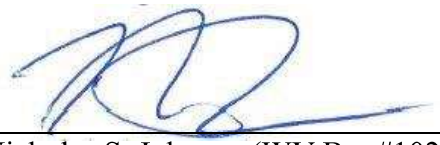

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