

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MICHAEL A. LORMAND, Executor  
of the Estate of Charles P. Winkler, Jr.,  
Deceased,

Plaintiff,

Kanawha County Circuit Court

vs.

Civil Action No. 14-C-1774

KIMBERLY W. WINKLER, an  
Individual and Kanawha County  
Resident, and PREMIER LIQUOR  
WAREHOUSE, LLC, a West  
Virginia limited liability company,

Defendants.

TO: THE HONORABLE CHIEF JUSTICE

PLAINTIFF'S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Plaintiff, Michael A. Lormand, Executor of the Estate of Charles P. Winkler, Jr., Deceased, by counsel, Gordon C. Lane, Sr., Esq., respectfully requests the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

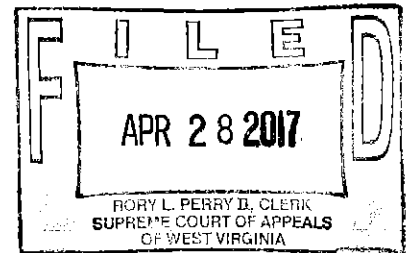
- ☒ There are no known related actions.
- ☐ The following related actions could be the subject of consolidation, and are
- ☐ now pending
  - or
  - ☐ may be filed in the future. (Please list case style, number, and Court if any)
- 
- 

This action involves: (Please check all that apply)

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Breach of Contract;                    | <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; |
| <input checked="" type="checkbox"/> Sale or Purchase of Commercial Entity; | <input type="checkbox"/> Terms of a Commercial Lease;  |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate;       |  |

(continued on next)

Motion to Refer  
Page 1 of 7



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|---|---|
| <ul style="list-style-type: none"> <li><input type="checkbox"/> Commercial Non-consumer debts;</li> <li><input checked="" type="checkbox"/> Internal Affairs of a Commercial Entity;</li> <li><input type="checkbox"/> Trade Secrets and Trademark Infringement;</li> <li><input type="checkbox"/> Non-compete Agreements;</li> <li><input type="checkbox"/> Intellectual Property, Securities, Technology Disputes;</li> <li><input type="checkbox"/> Commercial Torts;             <ul style="list-style-type: none"> <li><input type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies;</li> <li><input type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity;</li> <li><input type="checkbox"/> Anti-trust Actions between Commercial Entities;</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> Injunctive and Declaratory Relief Between Commercial Entities;</li> <li><input checked="" type="checkbox"/> Liability of Shareholders, Directors, Officers, Partners, etc.;</li> <li><input checked="" type="checkbox"/> Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest;</li> <li><input checked="" type="checkbox"/> Shareholders Derivative Claims - LLC;</li> <li><input type="checkbox"/> Commercial Bank Transactions;</li> <li><input type="checkbox"/> Franchisees/Franchisors;</li> <li><input type="checkbox"/> Internet, Electronic Commerce and Biotechnology</li> <li><input type="checkbox"/> Disputes involving Commercial Entities; or</li> <li><input checked="" type="checkbox"/> Other (Describe) <u>See below determining who can exercise control over LLC operations in this instance</u></li> </ul> |
|---|---|

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful, as more fully described here: Charles P. Winkler, Jr. ("Dr. Winkler") died before he was able to transfer his 60% interest in Premier Liquor Warehouse, LLC (the "LLC"), to his trust. Defendant, Kimberly W. Winkler ("Ms. Winkler") was Dr. Winkler's estranged wife whom he was in the process of divorcing when he died, and the 40% owner of the LLC. At Dr. Winkler's death, Ms. Winkler wrongfully assumed 100% control of the LLC. After wrongfully assuming 100% control, Ms. Winkler has since refused to provide Dr. Winkler's Estate with its share of business proceeds or documents required to adequately value and transfer Dr. Winkler's interest in the LLC pursuant to the parties' August 23, 2011 Settlement Agreement. The Plaintiff requests assistance from the Business Court in determining the right of the Estate to remove Ms. Winkler as Manager and appoint a new, neutral person to assist in the valuation of the assets of the LLC, determination of whether any waste has occurred since the Settlement Agreement was signed, and to assist in the appraisal of the business as a whole. Further, the Plaintiff requests assistance in determining the damages incurred by Ms. Winkler for her breach of fiduciary duties, wrongful conversion of the 60% share of the LLC, and any improper use or misuse of company assets since she wrongfully assumed full control of the LLC without proper authority.

The present litigation involves very complex business issues and disputes as described below:

Plaintiff asserts that disputes between owners of an entity regarding right to control, breach of duty, minority owner rights, attempt at forced liquidation of business by one owner, sale of business necessary

as resolution between owners of a business are the most complex business cases which arise and need to be assigned to the Business Court.

Some of the legal claims and issues which will need to be addressed in the instant litigation are set forth below:

(1) Breach of contract – Plaintiff asserts that the Settlement Agreement provides an option to purchase Plaintiff's 60% ownership interest in the LLC, whereas Defendant argues it is a completed commercial transaction even though no price is set, no consideration paid. This determination of option vs. completed sale must be addressed. Additionally, contrary to clear language, Plaintiff asserts breach of contract in that Defendant has breached the Settlement Agreement by not providing documents to Plaintiff needed for valuation of the business. There are many violations of the contract of the Operating Agreement: wrongfully taking control, breach of fiduciary duty, providing no records, no distributions, no tax records, and the like.

There is even a material dispute as to the application of West Virginia law governing LLCs and the Operating Agreement as to who has majority voting control where a 60% owner dies and the LLC interest is owned by the Estate. This is a complex business issue governed by West Virginia LLC law and the Operating Agreement.

(2) Sale of entity – The relief sought by Plaintiff is a Court appointment receiver to operate the business, provide full information to both parties, and eventually sell the entire entity or assets of the LLC. A Business Court is much better equipped to oversee the business operations of an appointed receiver, ensure that the sale of the business is consummated in line with industry standards, ensure that the trust receives a fair value for the business, and that the business is operated in an appropriate manner until it is sold.

(3) Internal affairs of the business – This is at the heart of this litigation under West Virginia LLC law and the Operating Agreement. Plaintiff, the Estate of Dr. Winkler, believes that it clearly retains voting control to name the manager and control over all operations of the LLC and Defendant asserts the opposite. The first issue is who legally has voting control. Second, Defendant was obligated to allow Plaintiff to look at books and records, to receive distributions, to receive tax information, taxable income, etc. However, this review has not been permitted at all other than very limited records around the time of Dr. Winkler's death. Further, records received for a period after Dr. Winkler died showed Ms. Winkler has wrongfully taken funds and wrongfully used LLC funds to pay Defendant's personal expenses.

At this point, the matter has gone on long enough and the Defendant is so recalcitrant to provide records or honor clear law and operating agreements. Plaintiff believes it will take an independent person to get the books and records in order, retain a CPA to prepare a forensic report of funds wrongfully taken, and other breaches of duty, and sell the business and distribute the proceeds 60% to Plaintiff and 40% to Defendant, adjusted for damages and theft caused by Defendant.

(4) Liability of shareholders, directors, officers, partners, etc. – All of this has been described above. Defendant wrongfully assumed control and has liability for breach of duty, failure to follow clear agreements and State law, theft, and the like. Special business laws relate to the fiduciary duty of one in control of a business as officer and owner to other owners. Defendant is obviously liable as an owner and the top officer, which position was assumed by Defendant upon the death of Dr. Winkler. The standard is clearly breach of fiduciary duty.

(5) Shareholder derivative action – This action is exactly like a shareholder derivative action, except the business is an LLC, not a corporation. However, it has added complexity in that in a derivative action, Plaintiff asserts that the LLC has been damaged by Defendant because Defendant controls the LLC, albeit wrongfully. The prototype derivative action is based upon the control person of an entity who wrongfully takes money and refuses to provide access to information. Although the entity should sue the control person, it does not because the control person will not bring a suit against themselves. As in any derivative action, here, claims are brought for amounts wrongfully taken from the LLC, expenses incurred for personal and not business reasons, failure to provide accountings, concealment of records, using control to shift value and cash flow to the owner in control, and breach of duty as an officer of the LLC. In addition to traditional derivative claims, there are other layers of complexity in this case to resolve – (1) who actually has majority voting power under law, as the Settlement Agreement provides an option to purchase 60% interest or a consummated purchase of the 60% interest, and (2) the need for appointment of an independent receiver to sell the business and a Court to oversee operations and the sale.

(6) Injunctive action – Plaintiff seeks injunctive relief to appoint a Special Commissioner to control the LLCs business operations and to enjoin Plaintiff and Defendant from interfering with their duties.

For all of the above reasons, Plaintiff respectfully asserts that internal fights within a commercial entity present the most complex business cases and the complexity in the instant matter has been compounded.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint(s), the operative answer(s), the docket sheet, and the following other documents: Motion for Referral to Business Court Division, Objection to the Plaintiff's Motion to Refer Case to the Business Court Division, Response to Motion to Dismiss, Plaintiff's Response to Defendant's Objection to Plaintiff's Motion to Refer Case to Business Court Division, Reply to the Plaintiff's Response to the Defendants' Motion to Dismiss and Objection to the Plaintiff's Motion to Refer Case to Business Court Division, and Plaintiff's Reply to Defendants' Reply to the Plaintiff's Response to the Defendants' Motion to Dismiss and Objection to the Plaintiff's Motion to Refer Case to Business Court Division.

In regard to expedited review, the Movant:

X DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.

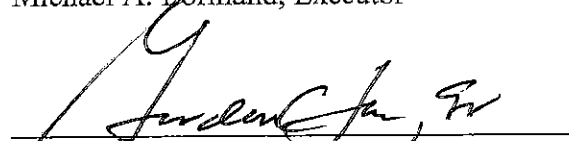
☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following constitutes good cause to do so: \_\_\_\_\_

**WHEREFORE**, the undersigned hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 26<sup>th</sup> day of April, 2017,

Respectfully submitted,

Michael A. Lormand, Executor

  
Gordon C. Lane, Sr. (WV Bar 2137)

*Counsel for Michael A. Lormand, Executor*  
Lane & Young  
1538 Kanawha Boulevard, East  
Charleston, WV 25311  
(304) 345-6000

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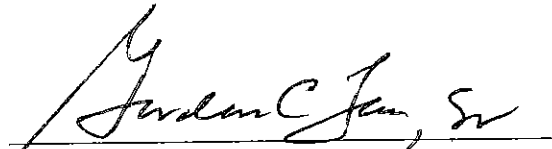
CERTIFICATE OF SERVICE

I, Gordon C. Lane, Sr., do hereby certify that on this 26<sup>th</sup> day of April, 2017, I have served the foregoing "Plaintiff's Motion to Refer Case to Business Court Division," with attachments by either hand delivery or first class mail to

**Christopher S. Smith, Esq.  
Hoyer, Hoyer & Smith, PLLC  
22 Capitol Street  
Charleston, WV 25301**

**Charles R. Bailey, Esq.  
Bailey & Wyant  
P. O. Box 3710  
Charleston, WV 25537**

; the Kanawha County Circuit Clerk's Office; and the Business Court Division Central Office, Berkeley County Judicial Center, 380 West South Street, Suite 2100, Martinsburg, WV 25401.

  
Gordon C. Lane, Sr.