

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**HAROLD D. WARD, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,**

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

**Kanawha County Circuit Court
Judge Joanna Tabit
Civil Action No. 20-C-282**

TO: THE HONORABLE CHIEF JUSTICE

JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the parties to this action, Harold D. Ward, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection ("DEP") and ERP Environmental Fund, Inc. ("ERP"), jointly, by their respective counsel, respectfully request the above-styled case be referred to the Business Court Division. In support thereof, the parties represent the following:

Background

1. On Thursday, March 26, 2020, DEP filed a Complaint in the Circuit Court of Kanawha County seeking injunctive relief from ERP's continuing violations of the West Virginia Surface Coal Mining and Reclamation Act and the West Virginia Water Pollution Control Act and the regulations promulgated thereunder, and the appointment of a special receiver to address ERP's existing and unabated violations of its mining permits and surface mining and water pollution control laws and to bring ERP's permits into compliance with the same.

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2. Contemporaneously therewith, DEP filed *Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction and Temporary and Preliminary Appointment of a Special Receiver* (the "Motion"). Therein, DEP requested the entry of temporary restraining order immediately enjoining ERP's continuing violations of the terms and conditions of its mining and water pollution control permits and the West Virginia Surface Coal Mining and Reclamation Act and the West Virginia Water Pollution Control Act and the rules promulgated thereunder, pending a hearing to consider entry of a preliminary injunction. The motion also sought the immediate appointment of a special receiver pending a hearing to consider the preliminary appointment of a special receiver.

3. That same day, DEP filed *Plaintiff's Motion for an Ex Parte Telephonic or Video Hearing to Consider its Motion for Temporary Restraining Order and Temporary Appointment of a Special Receiver* (the "Ex Parte Motion").

4. Kanawha Circuit Court Judge Joanna Tabit set an expedited telephonic hearing on DEP's Motions for the following day, Friday, March 27, 2020.

5. Upon consideration of DEP's Motion and related pleadings, and after submission of argument by the undersigned counsel, as well as counsel for certain other interested third-parties, Judge Tabit granted DEP's request for the temporary appointment of a special receiver and a temporary restraining order enjoining ERP's continued violations of West Virginia's mining and water laws from the bench. Judge Tabit's decision, and relief granted therein, was reduced to an Order and entered that same day.

6. The March 27 Order is limited in its relief; neither DEP's request for preliminary injunction nor the preliminary appointment of a special receiver has been adjudicated.

7. The parties submit that the remaining issues at hand — the injunctive relief and the appointment of a special receiver on both a preliminary and permanent basis in accordance with DEP's

pending Motion and the underlying Complaint — present novel commercial issues, of a high level of complexity, and issues in which the specialized treatment of the Business Court Division is likely to improve the likelihood of a fair and reasonable resolution.¹

8. Accordingly, the parties now jointly seek referral of this matter to the Business Court Division. The parties have attached an accurate copy of the operative pleadings, Motions, and the March 27 Order in support of this Joint Motion.²

Legal Standard

In order to obtain a referral to the Business Court Division, the proceedings must involve “Business Litigation,” a term defined by Trial Court Rule 29.04(a) as one or more pending actions in which:

- (1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
- (2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and
- (3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic

¹ With those issues remaining, Judge Tabit intimated during the March 27 hearing that she was inclined to refer this action to the Business Court Division *sua sponte*. Indeed, Judge Tabit’s March 27 Order contemplates the possible referral of this matter to Business Court Division. Order at ¶ 44. However, given the complete shutdown of the Kanawha County Judicial Annex due to COVID-19 cases identified therein, Judge Tabit requested that the parties, if so inclined, jointly move for the referral of this matter to the Business Court Division.

² Given the complete shutdown of the Kanawha County Judicial Annex as a result of COVID-19, and the limited resources available to its court staff at present, this Joint Motion is submitted to this Court without the inclusion of a docket sheet. The undersigned with supplement this Joint Motion, if requested, with a docket sheet once created. However, the undersigned aver that they have included all documents presently filed and before the Kanawha County Circuit Court as an attachment to this Joint Motion.

relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

Argument

DEP and ERP submit that this action constitutes Business Litigation within the meaning of Rule 29.04(a) that should be heard and determined by the Business Court Division.

DEP's principal claims present matters of significance to the governance of ERP, inasmuch as DEP seeks the appointment of a special receiver under W. Va. Code § 53-6-1 to assume control over ERP's assets, operations, and affairs. Specifically, DEP seeks the appointment of a special receiver to take control of ERP's properties, assets, and operations; to operate ERP's mining sites and water discharge outlets in compliance with its mining permits and applicable law, with funding to be provided by ERP's surety company and; to sell and liquidate ERP's properties and assets not otherwise needed in connection with operations to provide additional funding to comply with its permits and applicable law. Given the breadth of the special receiver's powers, this action involves ERP's governance at its most fundamental level.

Moreover, this action involves a high level of complexity, novel issues, and significant commercial issues in terms of the appointment of a special receiver and the establishment of the receivership estate, at the behest of a state agency, and the enforcement of ERP's legal obligations under the State's environmental laws. Neither DEP nor, to its knowledge, any other State agency, has sought the appointment of a special receiver under W. Va. Code § 53-6-1, much less one with the powers to control a vast commercial enterprise such as ERP's. As a result, this action may be expected to involve the court in the business, operating, and financial decision-making of a working coal company that may reasonably be expected to involve some of the most complex, novel, and significant commercial issues for which the Business Court was created.

Further, DEP's claims in this action do not involve any consumer litigation, employee suits, domestic relations, criminal cases, eminent domain or condemnation, or administrative disputes³ with government organizations and regulatory agencies. *See* W. Va. T.C.R. 29.04(a)(3).

Finally, the parties agree that the appointment of a special receiver, the establishment of a receivership estate, and the enforcement of ERP's legal obligations thereunder involve issues that should be resolved in a judicious and timely fashion that can best be accomplished by referral of this matter to the Business Court Division.

In light of these complicated governance, operational and commercial issues presented in this case, the parties submit that this case meets the criteria for referral under Rule 29.04(a) of the West Virginia Trial Court Rules. Accordingly, the parties join in requesting that this matter be referred to the Business Court Division.

Request for Expedited Review

Rule 29 of the West Virginia Trial Court Rules permits referral to the Business Court Division, by Motion, "after the time to answer the complaint has expired." W. Va. T.C.R. 29.06(a)(2). However, "[f]or good cause shown to the Chief Justice, the motion may be filed sooner." *Id.* This Joint Motion has been submitted before the expiration of ERP's time to answer the complaint. However, the parties submit that good cause exists to allow this Joint Motion to proceed because the undersigned are in agreement that the expeditious referral of this matter to the Business Court Division is in the best interest of all parties.

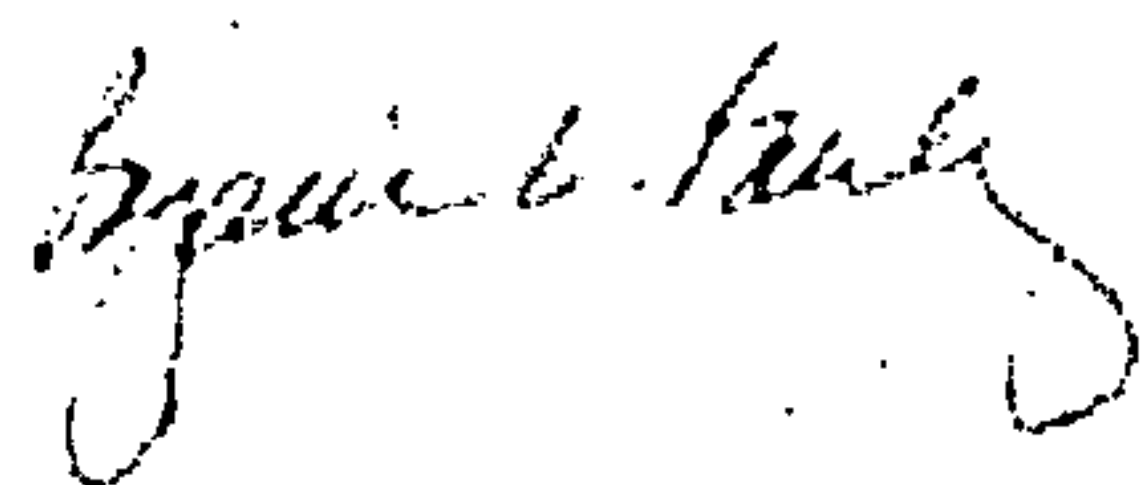
Moreover, the parties seek expedited review of this Joint Motion and hereby request that the Chief Justice grant this Joint Motion to Refer without the need for responses, pursuant to W. Va. T.C.R.

³ This action does not involve an "administrative dispute" as contemplated by West Virginia Trial Court Rule 29.04(a)(3). DEP has issued various notices of violation and orders to ERP. ERP has not heretofore disputed the notices of violation and orders and has consented to the relief requested in this action, at least on a temporary basis.

29.06(a)(4). The sole defendant in this action does not object to, and is in support of (as evidenced by this Joint Motion), this matter's referral to the Business Court Division. Given the parties' agreement that it is in their best interests to facilitate the Business Court Division's ability to expeditiously consider and resolve this matter, the parties jointly submit that the filing of responsive papers to this Joint Motion will unnecessarily delay the proceedings. Accordingly, the parties submit that good cause exists for the Chief Justice to waive the filing of responsive papers to this Joint Motion.

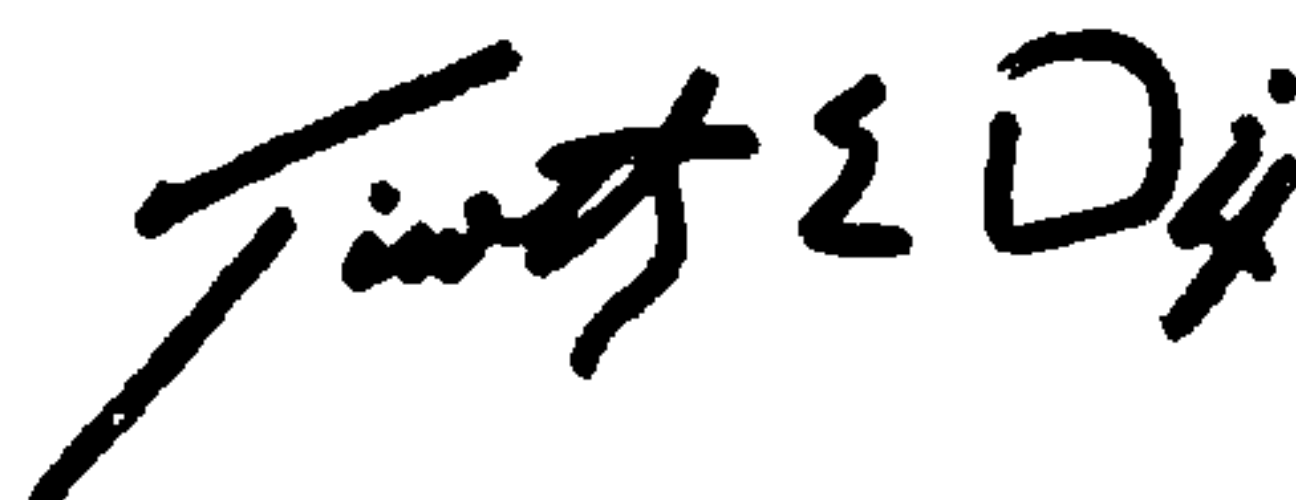
WHEREFORE, the undersigned hereby moves, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 1st day of April 2020.



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*Counsel for Defendant ERP Environmental Fund,
Inc.*

*Motion for Admission Pro Hac Vice under West
Virginia Rules of Professional Conduct Rule
5.5(c)(4) pending in the Circuit Court for
Kanawha County.*

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CERTIFICATE OF SERVICE

I, Benjamin L. Bailey, do hereby certify that on this 1st day of April, 2020, I have served the foregoing "Joint Motion to Refer Case to Business Court Division," with attachments, by either hand delivery or first class mail to each of the parties in this case listed below:

Edythe Nash Gaiser, Clerk of Court
Supreme Court of Appeals of West Virginia
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

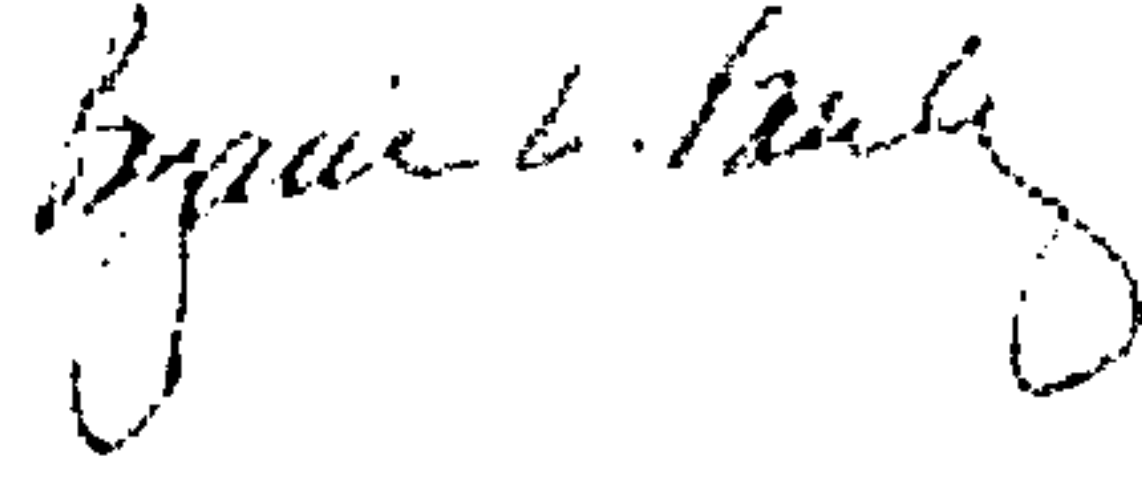
Kanawha County Circuit Clerk's Office
Kanawha County Judicial Building
111 Court Street
Charleston, WV 25301

Hon. Joanna Tabit
Kanawha County Circuit Court
Kanawha County Judicial Building
111 Court Street
Charleston, WV 25301

Business Court Division
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FILED
2020 APR -8 AM 8:15
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Timothy E. Dixon, Esquire
Clarke Investments, LLC
9801 Michaels Way
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A handwritten signature in cursive script, appearing to read "Benjamin L. Bailey".

Benjamin L. Bailey