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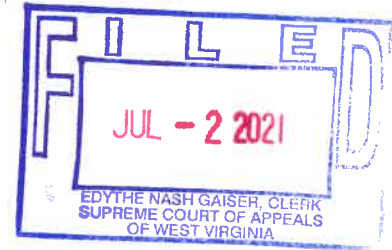
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY,
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER,
and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
Derivatively on behalf of The Tierney Corporation
and The Leatherwood Company,**

Plaintiffs,

v.

Kanawha County Circuit Court
Civil Action No. 18-C-90
Judge Joanna Tabit



**ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co;
DOUGLAS WOLOSHIN, Individually and in his
capacity as a director and officer of The Tierney
Corporation and the Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
partnership; and THE TIERNEY
CORPORATION, a West Virginia corporation,
a nominal defendant, THE LEATHERWOOD
COMPANY, a West Virginia corporation,
a nominal defendant,**

Defendants.

TO: CHIEF JUSTICE EVAN JENKINS

DEFENDANTS' MOTION TO REFER TO BUSINESS COURT DIVISION

Nominal defendants The Tierney Corporation and The Leatherwood Company, together
with defendants Ann Tierney Smith, C. Matthew S. Tierney, Douglas Woloshin, and Duane Morris

LLP respectfully move to refer this case to the Business Court. *See* W. Va. Trial Ct. R. 29.06. This motion is filed at the express instruction of Judge Joanna Tabit.

The principal claims in this shareholder derivative case “involve matters of significance to the transactions, operations, or governance” of business entities. W. Va. Tr. Ct. R. 29.04(a)(1). Indeed, this very case (originally filed as Civil Action No. 17-C-346) was previously referred to the Business Court, where it was assigned to the Honorable Paul Farrell. Exh. A (Original Referral Order). Judge Farrell dismissed the case in 2018 after concluding that the shareholders had not complied with the necessary pre-suit requirements for initiating a shareholder derivative action. Exh. B, at 8 (Original Dismissal Order). Judge Farrell’s Original Dismissal Order invited the Plaintiffs to make a demand on the shareholders and directors, which is what led to the current litigation. *Id.* at 8 n.8.

This referral motion is supported by all the reasons that justified granting the original referral. Moreover, at a June 24, 2021 hearing, the Honorable Joanna Tabit declined to rule on a variety of pending motions and instead expressly urged the parties to seek a Business Court referral, stating unequivocally that the case is an appropriate fit for the Business Court both because of the nature of the claims and because of Judge Farrell’s familiarity with the case and the issues. Exh. C (Hrg. Trans., June 24, 2021).¹

DISCUSSION

I. This case—a complex shareholder derivative action—is a perfect fit for the Business Court.

¹ Trial Court Rule 29.06(a)(1) requires this Motion to identify any additional related actions. On June 28, 2021, Plaintiffs filed an additional related action in the United States District Court for the District of Columbia. *See Tierney et al. v. Tierney et al.*, No. 1:21-cv-01714 (D.D.C.) (filed June 28, 2021).

Commenced as a self-described shareholder derivative action, this case directly involves the “internal affairs of a commercial entity” and “shareholder derivative claims.”² The “Amended Verified Shareholder Derivative Complaint” contains seven counts, 152 numbered paragraphs, and a six-paragraph prayer for relief. Exh. D (Amended Verified Shareholder Derivative Complaint). It is brought by a board member and shareholders of the defendant The Tierney Corporation against other board members and shareholders of the same company, seeking relief on behalf the Tierney Corporation and the defendant Leatherwood Company, both West Virginia corporations. *Id.*

This case squarely qualifies as “business litigation.” W. Va. Tr. Ct. R. 29.04. *First*, this case has already been referred to the Business Court once. *See* Exh. A. After being referred to the Business Court in 2017, Judge Paul Farrell explained that the Plaintiffs had “not alleged with particularity the lack of independence or disinterestedness of a majority of the Tierney Corporation’s Board of Directors and shareholders as of the filing of the Complaint.” Exh. B, at 8. Judge Farrell concluded that the Plaintiffs had “fail[ed] to satisfy Rule 23.1” and that their “Complaint must be dismissed in its entirety.” *Id.* Judge Farrell’s Original Dismissal Order invited Plaintiffs to “mak[e] a formal demand on the directors and shareholders to explain or investigate the actions Plaintiffs challenge.” Exh. B, at 8 n.8. Plaintiffs thereafter made that formal demand, which is precisely what gave rise to the current litigation.

Second, the Honorable Joanna Tabit, to whom this matter is currently assigned, recently declined to hear argument on a variety of pending motions and instructed the parties to file this motion after expressly finding that the Business Court is the appropriate forum for the resolution of this case. With a variety of motions pending, Judge Tabit convened a hearing on June 24, 2021. Judge Tabit began by observing that this case “begs the question. Why is this in front of me? And

² <http://www.courts.wv.gov/lower-courts/business-court-division/pdf/sampleForms/AttorneyMotiontoReferForm.pdf>

why has someone not referred this to business court?” Exh. C, at 5:21-24. Based on the procedural history, Judge Tabit noted that “Judge Farrell is intimately familiar with the issues in this case.” *Id.* at 6:1-2. With respect to the subject matter, Judge Tabit explained that “this is a shareholder derivative suit. This is a breach of contract case. These are precisely the types of cases that the business court is envisioned to hear, has heard as it relates to this case.” *Id.* at 7:1-4. Judge Tabit observed that she was “not up to speed of Judge Farrell, who actually presided and decided these [earlier] motions.” *Id.* at 7:13-14. She instructed the parties to “have Judge Farrell give it another shot.” *Id.* at 7:19. After inquiring as to the parties’ positions, Judge Tabit stated her candid view that “this case needs to be in business court . . . That’s why these specialty courts are designed to resolve these matters more quickly. And it seems to me that that’s appropriate.” *Id.* at 9:7-8, 13-16. Judge Tabit concluded the hearing by instructing the undersigned to file this motion, *id.* at 12:2-8, and specifically finding that the business court is “an appropriate forum for the resolution of this case.” *Id.* at 13:3.

Third, all the counts contained in the complaint directly involve “matters of significance to the transactions, operations, or governance” among business entities, their officers, directors, and shareholders. W. Va. Tr. Ct. R. 29.04(a)(1). Count I alleges a statutory claim for the removal of two directors of the Tierney Corporation pursuant to W. Va. Code § 31D-8-809 and to bar them from reelection. Exh. D. ¶¶ 103-07. Count II asserts a “derivative claim for breach of fiduciary duty, gross negligence, mismanagement, self-dealing, and corporate waste” against two directors, one an officer of the Tierney Corporation. *Id.* ¶¶ 108-14. Count III asserts derivative claims for breach of fiduciary duty in connection with excessive legal billing and personal conflict of interest against a director of the Tierney Corporation and the law firm for which he works. *Id.* ¶¶ 115-25. Counts IV, V, and VI allege derivative negligence, breach of contract, and unjust enrichment

claims against a director of the Tierney Corporation and the law firm for which he works. *Id.* ¶¶ 126-47. Finally, Count VII alleges a statutory claim for inspection of records by shareholders and directors, or alternatively, a claim for court-ordered inspections, pursuant to W. Va. Code §§ 31D-16-1602 through 16-1605. *Id.* ¶ 148-52.

Fourth, the dispute unquestionably “presents commercial . . . 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.” W. Va. Tr. Ct. R. 29.04(a)(2). A court with “specialized knowledge or expertise” is particularly critical in this case because shareholder derivative lawsuits are infrequent in Circuit Courts, more complex (both factually and legally) than the everyday civil action and involve the application of unique provisions of substantive and procedural law. *Id.*

The procedural rules applicable to this derivative case are complex and hardly routine in Circuit Court. For one thing, the complaint itself is subject to the special pleading requirements of West Virginia Rule of Civil Procedure 23.1 (“Derivative Actions by Shareholders”), which imposes heightened pleading standards on derivative action plaintiffs that are not applicable in any other civil action. *See, e.g.*, W. Va. R. Civ. P. 23.1 (“The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the director[s] or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff’s failure to obtain the action or for not making the effort.”). Rule 23.1 also imposes special standing requirements on shareholder derivative plaintiffs. *See id.* (“The derivative action may not be maintained if it appears that the plaintiff does not fairly and

adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.”).

The substantive law governing shareholder derivative cases is no less complex and is also rarely applied in Circuit Courts. The Supreme Court of Appeals recently indicated that, given the unusual nature of shareholder derivative cases, it looks to decisions of the Chancery Court of Delaware, “a court of ‘specialized expertise’ in these matters.” *Manville Pers. Injury Settlement Trust v. Blankenship*, 231 W. Va. 637, 645, 749 S.E.2d 329, 337 (2013). Thus, this case will likely involve the frequent examination and application of specialized legal principles developed in Delaware courts. In addition, the complaint expressly invokes rarely used statutory mechanisms that govern the removal of corporate directors, *see* W. Va. Code § 31D-8-809, and the rights of shareholders to inspect corporate records, *see* W. Va. Code §§ 31D-16-1602 through 16-1605.

Fifth and finally, the principal claims do not involve any of the categories which are specifically excluded from the Business Court by Rule 29.04(a)(3).

II. This motion is timely because complex and dispositive legal issues will require judicial resolution at the motions to dismiss stage.

This motion to refer should be decided now. Under Trial Court Rule 29.06, a motion to refer “shall be filed after the time to answer the complaint has expired,” and the motion may be “filed sooner” upon a showing of “good cause.” W. Va. Tr. Ct. R. 29.06(a)(2).

Assuming for the sake of argument that “good cause” is required because the parties have moved to dismiss in lieu of answering, the standard is easily met here. Substantial and complex legal claims and defenses—including dispositive issues—will require judicial resolution *before* an answer is ever filed (if one is filed at all). For example, the nominal defendant Companies have filed a motion to dismiss this case based upon the application of the Business Judgment Rule and have negotiated an alternative proposed settlement. Under well-settled principles of derivative

litigation, these are issues which can and should appropriately be resolved before an answer is ever filed. *See* Exh. E (Motion to Dismiss (without exhibit) and Memorandum of Law in Support).

Given the unique posture of this case as a shareholder derivative action, the motion to dismiss will *require* the presiding judicial officer to resolve significant legal questions due in no small part to the heightened pleading standard imposed by Rule 23.1. *See, e.g., Mercier v. Blankenship*, 662 F. Supp. 2d 562 (S.D. W. Va. 2009) (granting motion to dismiss shareholder derivative action in a 16-page published opinion applying identical federal Rule 23.1). As the *Mercier* decision shows, a ruling on a Rule 23.1 motion to dismiss may be dispositive of the case.


On the other hand, waiting until *after* motions to dismiss are ruled upon by the Circuit Court would significantly frustrate the purpose of referring business litigation to the Business Court. Failing to refer the case at this stage would also be inefficient, potentially wasting limited judicial and litigant resources.³

CONCLUSION

For these reasons, the motion to refer this case to the Business Court should be granted.

**The Tierney Corporation and
The Leatherwood Company**

By Counsel:


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³ As required by Trial Court Rule 29.06(a)(1), the docket sheet is attached as Exhibit F.

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Lewis Clark Tierney III; Christopher Scott Tierney; Kenna Tierney 2000 Irrevocable Trust, Carolyn Kenna Tierney, Co-Trustee; Carolyn Kenna Tierney Griesemer; and Carol K. Tierney 2000 GST Trust, Carol K. Tierney, Trustee, each individually and derivatively on behalf of The Tierney Corporation and The Leatherwood Company, Plaintiffs

vs.) Civil Action No. 17-C-346 (Kanawha County)

Ann Tierney Smith, individually and in her capacity as a director and officer of The Tierney Corporation and The Leatherwood Co.; C. Matthew S. Tierney, individually and in his prior capacity as a director and officer of The Tierney Corporation and The Leatherwood Co.; Douglas Woloshin, individually and in his capacity as a director and officer of The Tierney Corporation and The Leatherwood Co.; Duane Morris, LLP, a Delaware limited liability partnership; and The Tierney Corporation, a West Virginia corporation, a nominal defendant; and The Leatherwood Company, a West Virginia corporation, a nominal defendant, Defendants

The Chief Justice of the Supreme Court of Appeals has been advised that Defendant Ann Tierney Smith, by counsel Carte P. Goodwin, Joseph Ward, and the law firm of Frost Brown Todd LLC; Defendant C. Mathew S. Tierney, by counsel J. Mark Adkins, and the law firm of Bowles Rice LLP; and Defendants Douglas Woloshin and Duane Morris, LLP, by counsel Benjamin L. Bailey, Michael B. Hissam, Isaac R. Forman, J. Zak Ritchie, and the law firm of Bailey & Glasser, have filed a motion to refer the above-referenced case to the Business Court Division pursuant to Rule 29 of the West Virginia Trial Court Rules ("TCR"). Defendants The Tierney Corporation and The Leatherwood Company, by counsel Robert B. Allen, Michael T. Chaney, and the law firm of Kay Casto & Chaney PLLC, filed a response in support of the motion to refer.

Upon careful review and consideration of the motion and the response thereto, the Chief Justice has determined that the principal claims in the action involve matters of significance to the transactions, operations, or governance between business entities as required by TCR 29.04(a)(1). The mere fact that the action involves individuals does not, of itself, exclude the case from eligibility. The Chief Justice has further determined that specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy as required by TCR 29.04(a)(2), and the motion to refer should therefore be granted.

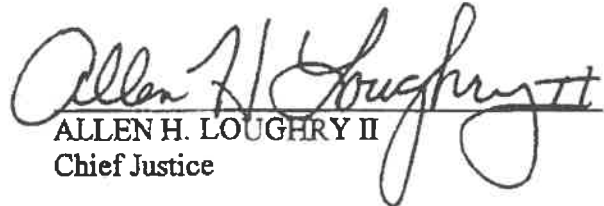
It is hereby ORDERED that the motion to refer this action to the Business Court Division is granted, and this order shall be transmitted to the Honorable Christopher C. Wilkes, Chair of the Business Court Division, for assignment of a presiding judge and such other actions as are

EXHIBIT A

necessary to effectuate the provisions of TCR 29.

It is further ORDERED that a copy of this ORDER be transmitted to the Central Office of the Business Court Division; the Honorable Charles E. King Jr., Judge of the Thirteenth Judicial Circuit, and to the Clerk of the Circuit Court of Kanawha County, who is to provide copies of the same to all parties of record or their counsel.

ENTERED: JULY 12, 2017


ALLEN H. LOUGHERY II
Chief Justice

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF KANAWHA COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 31st
DAY OF July 2017
CATHY S. GATSON
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 7/31/17
Certified copies sent to:
— court of record
— parties
— other (please indicate)
By: [Signature]
— certified/1st class mail
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**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION—WEST VIRGINIA SUPREME COURT OF APPEALS**

**LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY;
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER,
And CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
Derivatively on behalf of The Tierney Corporation
And The Leatherwood Company,**

Plaintiffs,

v.

**Civil Action No. 17-C-346
The Honorable Paul T. Farrell
Presiding Judge: Business Court Div.**

**ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co.;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co.;
DOUGLAS WOLOSHIN, Individually and in his
Capacity as a director and officer of The Tierney
Corporation and The Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
Partnership, and THE TIERNEY CORPORATION,
a West Virginia corporation, a nominal defendant,
THE LEATHERWOOD COMPANY, a West
Virginia corporation, a nominal defendant,**

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

This matter came before the Court on October 20, 2017, on consideration of Defendant Ann Tierney Smith's Motion to Dismiss, Defendant C. Matthew S. Tierney's Motion to Stay, or, in the Alternative, to Dismiss, and Defendants Duane Morris LLP and Douglas Woloshin's Motion to Dismiss. Plaintiffs appeared by counsel, Brian R. Swiger and Vivian H. Basdekis of Jackson Kelly, PLLC. Defendant Smith appeared by counsel, Joseph M. Ward of Frost Brown Todd, LLC. Defendants Duane Morris LLP and Woloshin appeared by counsel, Isaac R. Forman

of Bailey & Glasser, LLP. Defendant Matthew Tierney appeared by counsel, Andrew C. Robey of Bowles Rice LLP and Philip Collier of Stites & Harbison. The nominal defendants, The Tierney Corporation and The Leatherwood Company (the "Companies"), appeared by counsel, Robert Allen of Kay Casto & Chaney, PLLC.

Plaintiffs Lewis Clark Tierney, Christopher Scott Tierney, Carolyn Kenna Tierney Griesemer, and the Kenna Tierney 200 Irrevocable Trust (through Carolyn Kenna Tierney, Trustee) and the Carol K. Tierney 200 GST Trust (through Carol K. Tierney, Trustee) brought this derivative shareholder action alleging claims, individually and on behalf of The Tierney Corporation and The Leatherwood Company (the "Companies"), against Defendants, both individually and in their official capacities.¹

Plaintiffs filed their Verified Shareholder Derivative Complaint ("Complaint") on March 10, 2017, in the Kanawha County Circuit Court.² Plaintiffs list factual scenarios in effort to support claims that the Individual Defendants have breached duties of good faith, loyalty, and due care. The Complaint argues that the director has failed to act in the best interest of the corporations. The Complaint cites Woloshin's conflict of interest as the cause of excessive legal fees. Plaintiff asserts that, by using voting agreements to control votes on the Board, that defendants Smith, Matt Tierney, and Woloshin have abdicated their individual responsibilities to weigh all relevant facts and consider the best interests of the Companies and all shareholders to whom they owe fiduciary duties. The Complaint cites the sale of the "Leatherwood Horse Farm" to President Smith and the purchase of the Tazewell County property from President Smith as an act of self-dealing and in breach of their duty to act in good faith. The Complaint alleges seven counts against Defendants: (I) Removal of Directors (against Smith and Woloshin); (II) Breach

¹ The Leatherwood Company is a subsidiary of The Tierney Corporation.

² It is important to note that this suit seeks to redress wrongs made against the corporations themselves, not the rights the minority shareholders hold individually.

of Fiduciary Duty, Gross Negligence, Mismanagement, Self-Dealing, and Corporate Waste; (III) Breach of Fiduciary Duty (against Woloshin); (IV) Negligence (against Duane Morris and Woloshin); (V) Breach of Contract (against Duane Morris and Woloshin); (VI) Unjust Enrichment (against Duane Morris and Woloshin); and (VII) Inspection of Records by Shareholders and Directors. The Complaint prays for money damages, an accounting for the Companies' alleged losses, the removal and bar of Smith and Woloshin from the Companies' Boards, an inspection of the Companies' records, attorney's fees, and costs.

On June 8, 2017, Defendants filed their several Motions. Following referral to the Business Court Division, this Court issued a briefing schedule on July 12, 2017. After receiving the parties' motions and responses, the Court heard oral argument on October 20, 2017.

Generally, a motion to dismiss should be granted only where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996). The Supreme Court of Appeals of West Virginia has advised that motions to dismiss are viewed with disfavor and that lower courts should rarely grant such motions. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008); citing *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605-06, 245 S.E.2d 157, 159 (1978). For the purpose of evaluating motions to dismiss, complaints must be "construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978); *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). However, where it "appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" the courts may grant a motion to dismiss to weed out unfounded suits. Syl. pt. 3, in

part, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977); *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003).

Here, Defendants Motions to dismiss are based, *inter alia*, upon Plaintiffs' failure to adequately plead futility as required by Rule 23.1 of the West Virginia Rules of Civil Procedure.

Rule 23.1 requires that plaintiffs asserting derivative claims allege in their Complaint

with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the director or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

W. Va. R. C. P. 23.1. Plaintiffs do not allege that they made such a demand on the directors; therefore, they must demonstrate the "reasons for . . . not making the effort."

Prior to filing this action, Plaintiffs did not demand that the Companies investigate their claims or prosecute those claims against the individual Defendants, nor did Plaintiffs provide to Defendants a written description of the claims or the evidence supporting their claims. Plaintiffs argue that the futility of a demand on the Board is evident on the face of the Complaint and that their allegations of the Individual Defendants' self-dealing satisfies the first prong of the test for determining demand futility. Plaintiffs also argue, in response to the motion, but nowhere in the Complaint, that Patricia Tierney is aligned with Defendants and thus, a majority of the Board would have been hostile to their demand.

Here, Plaintiff alleges that such a demand would be "presumptively futile because each of the Individual Defendants is antagonistic, adversely interested, or involved in the challenged conduct.... lacks objectivity and cannot be expected to reach a truly independent and

disinterested decision about whether to institute and vigorously prosecute this action against themselves for the wrongful acts at issue.”

The problem with this argument is that Plaintiffs focus on the disinterested position of the individual defendants, and not the Board as a whole. The Board, at the time of the filing of the Complaint, was comprised of five individuals and only two of them are defendants in the action.

From 2015 until October 2016, the Board consisted of Defendant Smith, Defendant Matthew Tierney, Defendant Woloshin, Plaintiff Lewis Tierney, and Clayton Rogers. In October 2016, Defendant Matthew Tierney retired from the Board and was replaced by Patricia Tierney. Thus, from approximately October 2016 until March 10, 2017, when the Complaint was filed, the Board consisted of Smith, Woloshin, Lewis Tierney, Patricia Tierney, and Rogers. At least one Plaintiff has served on the Board continuously from 2000 to present, with Griesemer serving from 2000 to 2015 and Lewis Tierney serving from 2015 to present.

Defendants Smith and Matthew Tierney and their families own approximately 47 percent of The Tierney Corporation. Smith and her family own approximately 27 percent, and Matthew Tierney and his family own approximately 21 percent. All Plaintiffs own stock in the Tierney Corporation. Collectively, Plaintiffs own 21 percent of the shares in The Tierney Corporation. The remaining shares are held by approximately 20 separate shareholders, with none owning more than 4.11 percent. Neither the Plaintiffs, nor the individual Defendants and their families, own a majority of shares of the Tierney Corporation. Defendants Smith and Woloshin represented a minority on the board in March 2017. Plaintiffs alleged no facts about the lack of independence of a majority of The Tierney Corporation board.

Accordingly, the Complaint admits that the named defendants constitute a minority (2 of 5) of the Board of Directors and accordingly an attempt to request a suit from the board is not presumptively futile as alleged by the Complaint.

Plaintiffs respond by referencing paragraphs 11, 14, 63, and 64 of the Complaint. Paragraph 11 does generally allege that a majority of the Board lacks objectivity but fails to show how. Paragraph 14 claims that 3 of 5 of the Board members are defendants, however Defendant (and at one point Secretary) Matthew Tierney retired in October of 2016, five months prior to the filing of this action. Plaintiffs' response to the instant motions allege that "it is reasonably doubtful that" his replacement, Pat Tierney, Defendant Tierney's wife, "would take any position adverse to him or individual defendants." However, the Complaint does not address his replacement and whether she was biased.

Paragraphs 63-64 of the Complaint allege that Smith, Tierney, and Woloshin entered into a voting agreement but fails to explain what the agreement was and doesn't allege that Matthew Tierney's successor was also a party to the agreement. Plaintiffs' counsel conceded at oral argument that Plaintiffs have never seen the agreement and that Plaintiffs have merely speculated about its existence. Pleading with particularity requires more.

Further, the Complaint does not address any effort to bring the matter to the majority shareholders. Plaintiffs contend that the language of Rule 23.1, that is, "if necessary," only requires such a demand when a *separate statutory provision* makes it necessary. The Court rejects Plaintiffs' interpretation that Rule 23.1 means that a demand on shareholders is only required if there is additional substantive law governing the derivative action. This interpretation has not been adopted in West Virginia and, following inquires at the October 20, 2017 hearing, this Court has concluded that there is no basis to determine that a demand on shareholders here

would have been futile, Defendants do not own a majority of The Tierney Corporation's shares, so a demand on shareholders would not be *per se* futile. Further, because The Tierney Corporation has only about two dozen shareholders, notice or a request to these shareholders to take the actions Plaintiffs desire would not be impracticable or cost-prohibitive.

The 1888 West Virginia Case of *Rathbone v. Parkesburg Gas Co.*, requires derivative plaintiffs to first exhaust reasonable efforts to obtain redress through controlling authorities of the corporation before bestowing standing to bring suit on behalf of himself or other stockholders. 31 W. Va. 798 (1888). The reasoning for this doctrine is explained as follows.

It may be stated, however, as a rule equally well established, that redress for a wrong against the corporation should be obtained by the corporation itself, through its regularly appointed agents; and it is only in case the corporation has been dissolved or disabled from proceeding on its own behalf, by reason of the misconduct or disability of its agents, that the shareholders may themselves proceed in chancery for the protection of their equitable rights. 1 Mor. Priv. Corp. § 239; *Moore v. Schoppert*, 22 W. Va. 282, 291. Ordinarily, the directors of a corporation have complete power to control its action, and to decide whether it shall enter into litigation or not. The shareholder, therefore, cannot obtain the interposition of the courts without showing that the directors are either unwilling or unable to bring suit on behalf of the corporation. And, even where the directors or the ordinary managing officers are at fault, it does not necessarily follow that the corporation is disabled from procuring justice for itself; for the majority of the shareholders in corporate meeting having supreme authority under the charter to manage the corporate affairs, whenever it is possible to obtain justice by calling a meeting of the shareholders and removing the offending officers and electing new ones, this remedy must be pursued.

...

It is not always the duty of the managing agents of a corporation to go to law immediately, whenever a wrong has been done to the corporation. The advisability of suing for redress, and the time and manner of proceeding, are largely intrusted to their judgment; and it is their duty to give the corporation the benefit of their best judgment in this respect. The refusal of the agents to institute legal

proceedings on behalf of the corporation, even when requested by its shareholders, may possibly be a judicious exercise of the discretion conferred upon them. This discretionary power confided to the agents cannot be usurped by the shareholders, and therefore the courts will not interfere at the suit of a shareholders to redress an injury suffered by the corporation, merely because its managing agents have in good faith refused to begin a suit. In order to entitle a shareholder to sue he must show, either that the managing agents are themselves the authors of the wrong, or that their refusal to bring suit in the name of the corporation is an act of bad faith, or an abuse of the discretionary power vested in them. Even this rule is subject to this qualification: The directors and agents of the corporation are inferior to and under the control of a majority of the shareholders. Consequently, when the directors refuse to discharge their duty, they may be removed or controlled by a majority of the shareholders. Thus, in order to confer upon a shareholder the right to sue, in a case in which the primary right is in the corporation, he must not only show that the directors are in default or wrongfully refuse to sue, but he must show that a majority of the shareholders have been appealed to, and that they are also guilty of misconduct, or willfully and wrongfully refuse to act in the matter.

Rathbone v. Parkersburg Gas Co., 31 W. Va. 798 (1888).

Because Plaintiffs have not alleged with particularity the lack of independence or disinterestedness of a majority of the Tierney Corporation's Board of Directors and shareholders as of the filing of the Complaint, they fail to satisfy Rule 23.1. Accordingly, Plaintiffs' Complaint must be dismissed in its entirety.³

Finally, the Court notes Matthew Tierney's alternative request to stay this action pending the Companies' appointment of a Special Litigation Committee to investigate the allegations in the Verified Complaint. As a result of the Court's conclusions above and dismissal of all of Plaintiffs' claims, a determination on this request is not necessary and, therefore, the Court will DENY AS MOOT Matthew Tierney's request for a stay.

³ In dismissing Plaintiffs' suit, the Court notes that this holding does not prevent Plaintiffs from subsequently complying with West Virginia law and making a formal demand on the directors and shareholders to explain or investigate the actions Plaintiffs challenge.


THEREFORE, based on the foregoing Findings and Fact and Conclusions of Law, it is hereby ORDERED that:

1. Defendant Smith's Motion to Dismiss is GRANTED;
2. Defendants Duane Morris and Woloshin's Motion to Dismiss is GRANTED IN PART as to its request for dismissal and DENIED IN PART AS MOOT as to its request to strike Plaintiffs' jury demand for their shareholder derivative claims.
3. Defendant Matthew Tierney's Motion to Stay, or, in the Alternative, to Dismiss is GRANTED IN PART as to its request for dismissal and DENIED IN PART AS MOOT as to its request for a stay;
4. Plaintiff's Verified Complaint is hereby DISMISSED in its entirety; and

This being a final order, the Clerk is directed to remove the above-captioned case from the active docket and place it amongst the causes ended. The Clerk shall distribute an attested copy of this order to the resolution judge, Charles Carl, III, at the Hampshire County Judicial Center, P.O. Box 856, 50 South High Street, Suite 6, Romney, WV 26757; The Business Court Division at the Berkeley County Judicial Center, Suite 2100, 380 W. South Street, Martinsburg, WV 25401; all counsel of record; and any *pro se* parties.

IT IS SO ORDERED.

Dated: Dec 7, 2017



HONORABLE PAUL T. FARRELL
CIRCUIT COURT JUDGE BUSINESS
COURT DIVISION

1 IN THE CIRCUIT COURT OF KANAWHA COUNTY

2 WEST VIRGINIA

3 LEWIS CLARK TIERNEY, III;
4 CHRISTOPHER SCOTT TIERNEY;
5 KENNA TIERNEY 2000 IRREVOCABLE TRUST,
6 Carolyn Kenna Tierney, Co-Trustee;
7 CAROLYN KENNA TIERNEY GRIESEMER;
8 and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each
Individually and Derivatively on
behalf of The Tierney Corporation
and The Leatherwood Company,

9 Plaintiffs,

10 v.

CIVIL ACTION NO.:
18-C-90

11 ANN TIERNEY SMITH, Individually and in
12 her capacity as a director and officer
of The Tierney Corporation and The
13 Leatherwood Co.; C. MATTHEW S. TIERNEY,
Individually and in his prior capacity
14 as a director and officer of the Tierney
Corporation and The Leatherwood Co.;
15 DOUGLAS WOLOSHIN, Individually and in
his capacity as a director and officer
16 of The Tierney Corporation and The
Leatherwood Co.; DUANE MORRIS, LLP,
17 a Delaware limited liability
partnership; and THE TIERNEY
18 CORPORATION, a West Virginia
corporation, a nominal defendant, THE
19 LEATHERWOOD COMPANY, a West Virginia
corporation, a nominal Defendant,

20 Defendants.

21 MOTIONS HEARING

22 Transcript of the proceedings held before the
23 Honorable Joanna I. Tabit, Judge, in the above-styled
24 matter on Thursday, the 24th day of June, 2021.

APPEARANCES

(All appeared via Microsoft Teams.)

On behalf of the Plaintiffs:

M. SHANE HARVEY, ESQUIRE
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On behalf of the Defendant Ann Tierney Smith:

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On behalf of the Defendants The Tierney Corporation and the
Leatherwood Company:

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APPEARANCES CONTINUED

On behalf of the Defendant C. Matthew S. Tierney:

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On behalf of the Defendants Duane Morris, LLP, and
Douglas Woloshin:

ISAAC R. FORMAN, ESQUIRE
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1 P R O C E E D I N G S

2 (Thursday, June 24, 2021, 1:02 p.m.)

3 THE COURT: Good afternoon.

4 And, counsel, we are on the record in the Tierney
5 case. I am not even going to call the case. I'm going to
6 allow counsel of record to note their appearances on the
7 record. And please identify -- for the court reporter
8 particularly -- the parties that you're representing.

9 And we'll begin with the plaintiffs, Mr. Harvey.

10 MR. HARVEY: Yes, Your Honor.

11 Shane Harvey here on behalf of the plaintiffs.
12 Also with me is Vivian Basdekis, who's been involved in
13 this case since the beginning, and may, from time to time,
14 correct me when I get things wrong.

15 THE COURT: You're on mute, Ms. Basdekis. But,
16 welcome. We haven't seen you in a while.

17 MS. BASDEKIS: Good afternoon, Judge.

18 THE COURT: We haven't seen anybody in a while except
19 maybe Mr. Forman.

20 MR. WARD: Your Honor, this is Joe Ward. I'll go next.
21 Representing Ann Tierney Smith, the first listed defendant.

22 MR. ALLEN: Judge, this is the Bob Allen. I'm here
23 with Pam Deem and Mike Chaney. We represent the
24 corporations, the Tierney Corporation and the Leatherwood

1 Corporation.

2 THE COURT: Thank you.

3 MR. ADKINS: Your Honor, good afternoon. This is
4 Mark Adkins on behalf of Matthew S. Tierney, defendant.

5 MR. FORMAN: Good afternoon, Your Honor. Isaac Forman
6 on behalf of defendants Douglas Woloshin and Duane Morris.

7 MR. COLLIER: Good afternoon, Judge. Phil Collier here
8 on behalf the defendant, Matt Tierney.

9 THE COURT: Is that everybody? We got everybody
10 covered?

11 All right. Folks, first, this is an old case.
12 This is an '18 case. I don't know why we haven't gathered
13 sooner than this. Typically we send out letters once cases
14 are sent to us and referred to us to get a scheduling
15 order. And I'll note that none of you-all had contacted
16 the Court to get a scheduling order either. So I can tell
17 how anxious you were to get this before the Court.

18 But I got a lot of motions in front of me. And I
19 got an application for expedited production of documents.
20 I got a bunch of motions to dismiss, and a motion for court
21 approval of settlement. I looked at it. But you know
22 what? It all begs the question. Why is this in front of
23 me? And why has someone not referred this to business
24 court? And of course I can do that on my own motion.

1 Because Judge Farrell is intimately familiar with the
2 issues in this case.

3 MR. HARVEY: Your Honor, I'm not sure. I'm not sure if
4 you were even on the business court when this was filed
5 back in 2018.

6 THE COURT: I was on the business court, Mr. Harvey,
7 when it was filed. I am not on the business court now.
8 I'm on the mass litigation panel.

9 MR. FORMAN: I'll do my best to answer that, Judge.

10 When the complaint in this case was filed -- I
11 think if you pull up the first complaint that was filed in
12 this case, it actually bears the heading of the business
13 court at the top. There's an amended complaint.

14 THE COURT: There is.

15 MR. FORMAN: But the very first order purported to have
16 been filed in the business court -- which we all know you
17 can't actually do -- there has to be a referral -- my
18 suggestion --

19 THE COURT: So let me ask you this question, then, at
20 the outset.

21 Does anybody want to make a motion to refer this
22 case to business court? Or let me ask it this way. Is
23 there any objection to referring this case to business
24 court? I mean, when you look at the business court rules,

1 obviously this is a shareholder derivative suit. This is a
2 breach of contract case. These are precisely the types of
3 cases that the business court is envisioned to hear, has
4 heard as it relates to this case. And I'm seeing
5 allegations that there is likely to be a third derivative
6 suit filed.

7 MR. HARVEY: Your Honor, I guess the plaintiffs'
8 view -- Vivian, correct me if I'm wrong -- is that this
9 matter has been pending for quite some time. Your Honor is
10 already somewhat up to speed, having read all the pleadings
11 in this case.

12 THE COURT: I'm up to speed of a weekend, Mr. Harvey.
13 I'm not up to speed of Judge Farrell, who actually presided
14 and decided these motions, is and was. And that's why it
15 seems to me -- if you want an expedited resolution, and you
16 want the best answer that you can get -- because I'm seeing
17 these motions to dismiss, and I'm seeing there's reference
18 to what Judge Farrell did. Why don't we just have
19 Judge Farrell give it another shot, and see if,
20 procedurally, the plaintiffs have done what plaintiffs are
21 supposed to do under the law and proceed that way?

22 And I'll ask. Is there going to be a third
23 derivative suit filed irrespective of what happens and how
24 this case is resolved, either in my court or the business

1 court?

2 MR. HARVEY: Your Honor, it depends on what the
3 documents that we seek show. If those documents show that
4 our demand in this case was wrongfully refused, what we
5 would like to do is amend our current complaint to include
6 a claim for wrongful refusal. I don't know that I would
7 call that a third suit, so much as an amendment of our
8 current suit to bring that claim.

9 THE COURT: Okay. I understand. Thank you.

10 All right. Let me ask counsel -- and we can go
11 party by party -- as to whether or not there is any
12 objection to referring this matter to business court.
13 Because, to me, it sounds that business court -- these
14 matters were already considered. This case -- the
15 substance of this case -- and the procedural background of
16 this case was already considered by Judge Farrell. And it
17 seems to me it's appropriate for him to espouse on these
18 issues as they now present.

19 I'll start with you, Mr. Harvey.

20 MR. HARVEY: Your Honor, we would prefer that it remain
21 with you and move forward. But I can't say that at this
22 moment that I have a good reason for objecting to your
23 proposal under the law. That's the simplest I can answer
24 it.

1 THE COURT: I appreciate that.

2 Mr. Forman?

3 MR. FORMAN: I can tell you that we would probably not
4 file any opposition if the Court were to make a referral
5 motion.

6 THE COURT: Well, let me ask it this way. Does anybody
7 want to? Because here's where we are, folks. This case
8 needs to be in business court. Got 700 cases right now. I
9 am backed beyond up by virtue of COVID. And I want to keep
10 my criminal cases -- and I know you all want me to keep
11 civil cases moving. And I'm sure you appreciate that you
12 want prompt resolution of this case. And the best way to
13 do that -- look at the business court rules. That's why
14 these specialty courts are designed to resolve these
15 matters more quickly. And it seems to me that that's
16 appropriate.

17 Given that background and the fact that the --
18 actually the rules, as it relates to filing this type of
19 motion, much more contemplative of attorneys doing it as
20 opposed to judges as it relates to service and the like.
21 I'm just telling you logistically, it is not an easy thing
22 for my office to do.

23 That being said, what's -- let me hear -- is
24 your -- do we have anybody that would move that the

1 Court -- that this matter be referred to business court?

2 I'll consider any verbal motions. I am inviting
3 any motions at this time.

4 Nobody wants it to go to business court? Do
5 you-all want a decision or do you not want a decision? I'm
6 just a little bit confused. Because the case has been
7 lingering for three years. Do you-all want anybody to do
8 anything?

9 Because I know that my law clerk reached out to
10 you in December. You-all reached out to her and said, "I
11 need a hearing date." Sent you an e-mail in December.
12 Nobody calls our office until late April, early May. So I
13 don't know what's going on here. I'm trying to get you
14 where you need to be. Do you not want to be there?

15 MR. HARVEY: I would say, Your Honor, that to the
16 extent this case is lingering, it's not because of any
17 inaction by Your Honor.

18 This case was filed in 2018 demanding an
19 investigation --

20 THE COURT: Oh, I know. And we had the report that all
21 Arie Spitz did, and that took a long time.

22 MR. HARVEY: Right. You got it, Your Honor.

23 THE COURT: I get it. I understand.

24 MR. ALLEN: Judge, can you hear me?

1 THE COURT: I can hear you, Mr. Allen.

2 MR. ALLEN: All right.

3 THE COURT: You got that big long table, though. I can
4 barely see you.

5 MR. ALLEN: We did that on purpose, quite frankly. I
6 look better that way.

7 Nobody's got their client preset. And I'm sure
8 that's probably a little bit of an issue here with regard
9 to the decision to go to the business.

10 You know, if nobody has an objection, we can make
11 a motion to have it removed to the business court. We're
12 nominal defendants in this case. You know, the corporation
13 is supposed to be the beneficiary -- what plaintiffs are
14 doing and whatever. You know? We want this case resolved.
15 It's cost us hundreds of thousands of dollars in legal
16 fees, and the cost of an investigator. And it's having a
17 really adverse impact on the corporation and its ability to
18 function as it should.

19 So, you know, if you think -- and what I hear you
20 telling us is this case is going to get revolved a whole
21 lot quicker if we get it over to business court. I'm going
22 to accept that, and even without talking to my client and
23 run the risk of a -- I don't know how to put it -- but any
24 way -- not a very favorable conversation -- we'll make the

1 motion.

2 THE COURT: I appreciate that, Mr. Allen. And I will
3 direct you to make that motion promptly subsequent to this
4 hearing. And of course, if you-all will refer to trial
5 court 29.06 as it relates to motions that are referred to
6 business court and the business litigation, there's a
7 process in which you can file necessary responses and/or
8 memorandum and opposition to the extent that you so desire.
9 And the chief justice will ultimately make the
10 determination.

11 And, Mr. Allen, I appreciate you-all doing that.
12 And I think you already, in essence, have your motion
13 written as it related to -- as I reviewed the concise
14 history of the case that you provided in your motion to
15 approve settlement, it looks like it's set forth there.

16 Obviously we need to reference the past action
17 before Judge Farrell. And I'm assuming that you would want
18 a transcript of these proceedings as well?

19 MR. ALLEN: Yes. And if the Court has no objection, I
20 hope -- I'm going to lean on your shoulder a little bit in
21 the motion for sake of --

22 THE COURT: Oh, absolutely. And you absolutely lean on
23 it and -- you can lean on my broad shoulders, Mr. Allen.

24 And if you are ordering a copy of the

1 transcript -- which I understand you to be -- that
2 transcript will also reflect the fact that I think it's an
3 appropriate forum for resolution of this case.

4 MR. ALLEN: And a speedy resolution.

5 THE COURT: Speedy. Absolutely.

6 MR. ALLEN: Which my client really wants.

7 THE COURT: I understand. I understand.

8 And I'll tell you-all. If you would have gotten
9 this case in front of me in 2018, I would have done it
10 in -- well, I was on business court then, so I probably
11 would have kept it.

12 All right. But anyway.

13 So, Mr. Allen, you'll get that filed, say, in the
14 next -- let's get that filed in the next 10 days.

15 MR. ALLEN: I will do that.

16 THE COURT: And could you prepare an order just
17 reflecting the proceedings today. And to the extent that
18 you'd like to prepare an order saying that Judge Tabit
19 encouraged said motions, that's fine. But that would be an
20 order directing yourself and any parties. And of course
21 any parties that would want to join in that motion filed by
22 the Tierney Corporation and the Leatherwood Company,
23 you-all would be free to do that within that time frame as
24 well.

1 MR. ALLEN: Sounds good.

2 THE COURT: All right. I appreciate that.

3 Is there anything further at this time, counsel?

4 MR. HARVEY: Nothing from plaintiffs, Your Honor.

5 MR. FORMAN: I have nothing further.

6 MR. ALLEN: 15 minutes, Judge. You allowed an hour for
7 us.

8 THE COURT: Once I looked at it, I knew what needed to
9 be done with it, and it didn't take an hour.

10 MR. ALLEN: I understand.

11 THE COURT: Talk about speedy resolution. Justice
12 delayed is justice denied; right?

13 Thank you-all very much.

14 (The hearing concluded at 1:14 p.m.)

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1 STATE OF WEST VIRGINIA,

2 COUNTY OF KANAWHA, to wit:

3 I, Christopher A. Salyers, Official Court
4 Reporter of the Circuit Court of Kanawha County,
5 West Virginia, do hereby certify that the foregoing is a
6 true and correct transcript of the proceedings had in LEWIS
7 CLARK TIERNEY, III, CHRISTOPHER SCOTT TIERNEY,
8 KENNA TIERNEY 2000 IRREVOCABLE TRUST, Carolyn Kenna
9 Tierney, Co-Trustee, CAROLYN KENNA TIERNEY GRIESEMER, and
10 CAROL K. TIERNEY 2000 GST TRUST, Carol K. Tierney, Trustee,
11 each individually and derivatively on behalf of The Tierney
12 Corporation and The Leatherwood Company, v. ANN TIERNEY
13 SMITH, individually and in her capacity as a director and
14 officer of The Tierney Corporation and The Leatherwood Co.;
15 C. MATTHEW S. TIERNEY, individually and in his prior
16 capacity as a director and officer of the Tierney
17 Corporation and The Leatherwood Co.; DOUGLAS WOLOSHIN,
18 individually and in his capacity as a director and
19 officer of The Tierney Corporation and The Leatherwood
20 Co.; DUANE MORRIS, LLP, a Delaware limited liability
21 partnership; and THE TIERNEY CORPORATION, a West Virginia
22 corporation, a nominal defendant, THE LEATHERWOOD COMPANY,
23 a west Virginia corporation, a nominal Defendant, Civil
24 Action No. 18-C-90, on Thursday, June 24th, 2021, as

1 stenographically reported by me in machine shorthand.

2 I hereby certify that the transcript within meets
3 the requirements of the Code of the State of West Virginia,
4 Section 51-7-4, and all rules pertaining thereto as
5 promulgated by the Supreme Court of Appeals.

6 Given under my hand this 29th day of June, 2021.

7 

8 _____
9 Christopher A. Salyers
10 Official Court Reporter
11 Circuit Court of Kanawha County,
12 West Virginia
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LEWIS CLARK TIERNEY, III;)
CHRISTOPHER SCOTT TIERNEY;)
KENNA TIERNEY 2000 IRREVOCABLE)
TRUST, Carolyn Kenna Tierney, Co-Trustee;)
CAROLYN KENNA TIERNEY GRIESEMER;)
and CAROL K. TIERNEY 2000 GST TRUST,)
Carol K. Tierney, Trustee, Each Individually and)
Derivatively on behalf of The Tierney Corporation)
and The Leatherwood Company,)

Plaintiffs,

v.

Civil Action No. 18-C-90
Judge Tabit

ANN TIERNEY SMITH, Individually and in)
her capacity as a director and officer of The)
Tierney Corporation and The Leatherwood Co.;)
C. MATTHEW S. TIERNEY, Individually and)
in his prior capacity as a director and officer of)
The Tierney Corporation and the Leatherwood Co.;)
DOUGLAS WOLOSHIN, Individually and in his)
capacity as a director and officer of The Tierney)
Corporation and the Leatherwood Co.; DUANE)
MORRIS, LLP, a Delaware limited liability)
partnership; and THE TIERNEY)
CORPORATION, a West Virginia corporation.)
a nominal defendant, THE LEATHERWOOD)
COMPANY, a West Virginia corporation,)
a nominal defendant,)

Defendants.

AMENDED VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

Plaintiffs, Lewis Clark Tierney, III ("Lewis Tierney"), Christopher Scott Tierney ("Christopher Tierney"), the Kenna Tierney 2000 Irrevocable Trust, Carolyn Kenna Tierney Co-Trustee ("Kenna Tierney"), Carolyn Kenna Tierney (now Griesemer),¹ and Carol K. Tierney 2000 GST Trust, Carol K. Tierney, Trustee (together "Carolyn Kenna Tierney Griesemer" and collectively, "Plaintiffs"), individually and derivatively on behalf of nominal defendants, The

¹ In 2007, Mrs. Carolyn Kenna Tierney remarried and is now known as Carolyn Tierney Griesemer.

Tierney Corporation ("The Tierney Corporation") and The Leatherwood Company ("The Leatherwood Company") together, "Companies", by counsel, bring this Amended Verified Shareholder Derivative Complaint and allege upon information and belief as follows:

NATURE AND SUMMARY OF THE ACTION

1. Arising from the operative facts as alleged in detail herein, this is a common-law, shareholder derivative action under *Felsenheld v. Bloch Bros. Tobacco Co.*, 119 W. Va. 167, 192 S.E. 545 (1937) and its progeny, brought on behalf of The Tierney Corporation, a closely-held family corporation, and The Leatherwood Company, its subsidiary, against certain members of the Companies' Boards of Directors (the "Board"), certain of their executive officers (the "Officers") and/or majority shareholders (collectively, the "Individual Defendants," as defined below), and their legal counsel, Duane Morris LLP ("Duane Morris"), seeking to remedy breaches of fiduciary duties, conflict of interest, corporate waste and misuse of corporate assets, improper withholding of information, and other misconduct.

2. Beginning in 2001 and continuing to the present (the "Relevant Period"), the Individual Defendants, who are the controlling shareholders of the Companies, have managed the parent company and its subsidiary for their own interest and personal profit to the exclusion of the shareholders as a whole. In addition, the Individual Defendants have disregarded their obligations and fiduciary duties to the shareholders as a whole by misapplying or wasting corporate assets, including permitting grossly excessive legal fees to be paid to the Executive Director of the Company, and have performed illegal, oppressive, or fraudulent acts without any legitimate business purpose, ultimately frustrating the reasonable expectations of the shareholders and jeopardizing the continued viability of both Companies.

3. The Tierney Corporation and The Leatherwood Company are nominal defendants only. They are named as defendants (i) because of the requirement in W. Va. Code § 31D-8-809(c) that a shareholder name the corporation in any proceeding where the plaintiff seeks the removal of (and bar from reelection) directors for fraud, dishonest conduct, or gross abuse of authority and discretion, and (ii) because this is a derivative action by shareholders, as authorized by West Virginia common law, the West Virginia Business Corporation Act, and Rule 23.1 of the West Virginia Rules of Civil Procedure. For the reasons set forth herein, Plaintiff seeks the removal of defendants Douglas Woloshin (“Woloshin”) and Ann Tierney Smith (“Smith”), and to bar each of them from reelection.

4. Furthermore, given the documented history of self-dealing and selfish management by the Individual Defendants and their hostility toward the shareholders, Plaintiffs request that this Court enter an order barring retaliation, in any form, by the Individual Defendants against Plaintiffs and other shareholders. Plaintiffs also request inspection of records pursuant to their statutory rights and seek an accounting of all transactions by the Individual Defendants, including itemized billing statements for the legal and administrative service fees charged by defendants Woloshin and Duane Morris, and an award of compensatory and punitive damages, and other equitable and legal relief, including the costs and expenses of this litigation and reasonable attorneys’ fees, as justified by the evidence adduced in this matter.

5. Moreover, Plaintiffs bring this action after making a written demand on January 26, 2018 on the Companies’ Boards of Directors and shareholders pursuant to Rule 23.1 of the West Virginia Rules of Civil Procedure.

JURISDICTION AND VENUE

6. This Honorable Court has jurisdiction over the subject matter of this action pursuant to West Virginia Code § 51-2-2. As discussed in greater detail below, this shareholder derivative action involves negligence and breaches of fiduciary duty, which have proximately resulted in damages exceeding \$3,000,000 for the nominal defendants.

7. Defendants Tierney Corporation and The Leatherwood Company are West Virginia corporations that transact business in West Virginia, and thus, are subject to the jurisdiction of this Honorable Court and State, and are governed by West Virginia law.

8. Venue is proper in the Circuit Court of Kanawha County, West Virginia, pursuant to W. Va. Code § 56-1-1(2) because Defendants Tierney Corporation and The Leatherwood Company are corporations organized under the laws of this State with their principal office and executive officers located outside of this state, and thus, “the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management.” W. Va. Code § 56-1-1(2), in part.

THE OFFICERS AND DIRECTORS OF TIERNEY CORPORATION

9. Since its formation in the early 1900s, Tierney Corporation has been a closely-held family corporation. Today, Tierney Corporation is primarily owned by three families. Of the 21,931 total shares, Ann Tierney Smith and family own 27 percent; C. Matthew S. Tierney and family own 21 percent; and the heirs and family of L. Clark Tierney, Jr. own 21 percent. The three families together own 69.3 percent of the company. All remaining shares are held by 20 separate shareholders, with none owning more than 4.11 percent.

10. The Tierney Corporation Board is comprised of five members. The current Board consists of President Barclay de Wet ("Barclay de Wet"), who is the daughter of Defendant Smith, Defendant Smith, who is former Executive Committee officer and 2000-2017 President, Defendant Woloshin, Patricia Cinson Tierney ("Pat Tierney"), and Lewis Tierney.

11. While The Tierney Corporation Board is comprised of five members, three members are or were also Executive Committee officers. Upon information and belief, President Barclay de Wet, Executive Director Woloshin, and Pat Tierney currently serve on the Executive Committee. When C. Matthew S. Tierney ("Matt Tierney") retired from the Board in October 2016, he was replaced on the Boards of both Companies, as Secretary, and as an officer on the Executive Committee by his wife, Pat Tierney. Upon information and belief, former President Defendant Smith was replaced as President and as an officer on the Executive Committee by her daughter, Barclay de Wet, in or about December 2017.

12. The Tierney Corporation is a non-complex holding company that receives passive revenue from a small number of assets and does not require day-to-day management from the Companies' Officers. Instead, third-party specialists, like UBS, manage the Companies' stock portfolios. These professional services are completely outsourced to third-party legal and financial advisors. Despite outsourcing the entire operation to Duane Morris and UBS, Officers Smith and Matt Tierney have each drawn an annual salary of \$295,000 as executive compensation, and in addition, they each received additional benefits totaling \$65,000, including healthcare and a pension. Neither Smith nor Matt Tierney regularly performed services or devoted substantial time to the Companies, nor do they have any particular qualifications or abilities with respect to the compensation received.

13. Executive Director Woloshin has never been a shareholder of Tierney Corporation. Although Tierney Corporation's by-laws provide that board members must be company shareholders, as an exception to the by-laws approved annually by the Board, Woloshin was nominated and has served as a non-family Board member and Executive Committee Officer since 2000, when defendant Smith took control of the Company. While acting in his capacity as a Board member and Executive Director of the Company, Woloshin, an attorney with Duane Morris, has operated under severe conflicts of interest that have never been remedied during the entire period in which he has been serving as President Smith's longtime personal lawyer and as the Companies' outside legal advisor.

TIERNEY CORPORATION AND LEATHERWOOD'S HISTORY

14. Tierney Corporation has its origins in two companies owned and operated by Colonel Laurence E. Tierney, Sr. from the early 1900s until being sold during World War II. Col. Tierney owned the Tierney Land Company and Tierney Mining Company in Stone, Kentucky, and was involved in the management of many other coal and fuel entities in the region. Following his death and over time, the Company was involved in a variety of businesses including owning and operating radio and television entities in Charleston, West Virginia, under the leadership of Col. Tierney's younger son, Lewis Tierney.

15. For many years, from the mid-1970s until 1995, both entities were operated by Flat Top National Bank. In the 1990s, L. Clark Tierney Jr. ("Clark Tierney") served as President of Tierney Corporation and oversaw both entities with involvement from his cousin, Ann Tierney Smith, and his younger brother, Matt Tierney. Clark Tierney's death in 2000 created a leadership vacuum that was filled by Smith, who remained the President until December 2017.

Matt Tierney served as Secretary on the Executive Committee until his retirement in October 2016.

16. Tierney Corporation also owns approximately 62 percent of The Leatherwood Company, another Tierney family corporation, with the remaining 38 percent of The Leatherwood Company owned by Smith and her family. Historically, The Leatherwood Company, formerly known as The Leatherwood Land Company, generally operates in a manner similar to The Tierney Corporation. At all times relevant, Smith, Woloshin, and until his recent retirement Matt Tierney, have also served as the sole directors and officers of The Leatherwood Company.

17. In 2001, following Clark Tierney's death, The Tierney Corporation added Carolyn Kenna Tierney, his widow, as a member of the Board. Although a board member, Carolyn Kenna Tierney was not paid a salary and was not a member of the Executive Committee. She was also denied a seat on the board of The Leatherwood Company. Carolyn Kenna Tierney Griesemer served on the Board from 2001 until 2015 when she stepped down and her son, Plaintiff Lewis Tierney, replaced her. Lewis Tierney represents the shares originally owned by L. Clark Tierney Jr. on the Board today.

18. Over the past two decades, the focus of The Tierney Corporation and Leatherwood Company has been to diversify revenue away from coal with the hope that the next generation of shareholders would continue to benefit from the Companies. Efforts at diversification have involved investing in revenue-producing real estate, medical technology, opening two upscale restaurants, and creating a commercial and residential development.

19. However, these investments and opportunities, where made, have been compromised by the Individual Defendants' self-dealing, corporate mismanagement, and waste.

The best revenue-producing assets have been and are being sold to cover company expenses, and a grossly and excessively disproportionate percentage of revenue has been allocated to legal and administrative service fees for the personal benefit of Woloshin and his firm, Duane Morris, not for the benefit of the Companies as a whole or their shareholders. In addition, one of the revenue-producing opportunities—the commercial and residential development—was never initiated despite the exchange of The Leatherwood Company’s best revenue-producing asset for Defendant Smith’s horse farm property that, as represented by Smith and Woloshin, was required to break ground on the project.

THE PARTIES

20. Plaintiff Lewis Tierney is and was at all times relevant a shareholder of The Tierney Corporation stock. Since February 2016, Lewis Tierney has been a member of the Board of Directors of The Tierney Corporation. Lewis Tierney currently resides in New York, New York.

21. Plaintiff Christopher Tierney is and was at all times relevant a shareholder of Tierney Corporation stock. Christopher Tierney currently resides in Denver, Colorado.

22. Plaintiff Kenna Tierney 2000 Irrevocable Trust, Carolyn Kenna Tierney (now Griesemer) Co-Trustee, is and was at all times relevant a shareholder of Tierney Corporation stock, with its address at 1600 Broadway, Denver, Colorado 80202.

23. Plaintiff Carolyn Kenna Tierney (now Griesemer) is and was at all times relevant a shareholder of Tierney Corporation stock, and resides in Denver, Colorado.

24. Plaintiff Carol K. Tierney 2000 GST Trust, Carol K. Tierney Trustee is and was at all times relevant a shareholder of Tierney Corporation stock, with its address at 2101 E. 7th Avenue Parkway, Denver, Colorado 80206.

25. Nominal defendant The Tierney Corporation is a corporation organized and existing under the laws of West Virginia since 1912 with its principal executive offices located at 505 9th Street, N.W., Suite 1000, Washington, D.C. 20004.

26. Nominal defendant The Leatherwood Company is a corporation organized and existing under the laws of West Virginia since 1945 with its principal office executive offices located at 505 9th Street, N.W., Suite 1000, Washington, D.C. 20004.

27. Defendant Smith served as President of The Tierney Corporation from 2000 to December 2017 and as a Board member since 1972. Smith has also served as a director and executive officer of Leatherwood since 1972. Smith is a resident and citizen of Paris, Kentucky.

28. Prior to his retirement in October 2016, Defendant Matt Tierney had served as Secretary of The Tierney Corporation since 2000 and as a member of the Board since 1972. Matt Tierney had also served as a director and executive officer of The Leatherwood Company from 2000 until his retirement. He is a resident and citizen of Lexington, Kentucky.

29. Defendant Woloshin has served as Executive Director of The Tierney Corporation and a member of the Board since 2000, although he has never been a shareholder of the Company. Woloshin, an attorney and member of the District of Columbia bar, has been the managing partner of the Washington, D.C. office of Defendant Duane Morris since 2004. At all times relevant, while acting as an Officer on behalf of The Tierney Corporation, Woloshin has also served as a member of the Executive Committee, as President Smith's personal lawyer, and as outside legal counsel to The Tierney Corporation and The Leatherwood Company. Upon information and belief, Woloshin is a resident and citizen of Arlington, Virginia.

30. Defendant Duane Morris is an international law firm headquartered in Philadelphia, Pennsylvania. Since 2001 to the present, Duane Morris, through its attorney

Woloshin and, more recently, Reid Avett, has provided legal and/or administrative services to The Tierney Corporation and The Leatherwood Company. During this time, despite the Companies having no mergers, acquisitions, or other significant legal proceedings, legal and/or administrative service expenses charged by Duane Morris have been, at a minimum, 24.3 percent of the Company's total revenue. In 2014, legal and/or administrative service expenses reached to a staggering 51.3 percent of total revenue without any reasonable justification for the expense. Most recently, actual legal and/or administrative service expenses charged by Duane Morris have been in excess of 645 percent of the budgeted annual legal expenses (as estimated by Woloshin).

31. Collectively, Defendants Smith, Matt Tierney, and Woloshin are referred to herein as the "Officers" and/or the "Individual Defendants" with respect to both Companies.

DUTIES OF THE INDIVIDUAL DEFENDANTS

32. Pursuant to W. Va. Code § 31D-8-830, each of the Individual Defendants, when discharging the duties as a director of the Board, shall act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation.

33. By reason of their positions as directors and officers of the Companies and because of their ability to control the business and corporate affairs of The Tierney Corporation and The Leatherwood Company, the Individual Defendants owed The Tierney Corporation and The Leatherwood Company and their shareholders fiduciary obligations of good faith, loyalty, and due care, and were and are required to use their utmost ability to control and manage the Companies in a fair, just, honest, and equitable manner.

34. Pursuant to W. Va. Code § 31D-8-831 and § 31D-8-842, the Individual Defendants were and are required to act in furtherance of the best interests of The Tierney Corporation and The Leatherwood Company and their shareholders so as to benefit all

shareholders equally and not in furtherance of their personal interest or benefit. Each director and officer owes to The Tierney Corporation, The Leatherwood Company, and their respective shareholders the highest obligations of fair dealing and the fiduciary duty to exercise good faith and diligence in the administration of the affairs of the Companies and in the use and preservation of their property and assets.

35. The Individual Defendants, because of their positions of control and authority as directors and/or officers of the Companies, were able to and did, directly and/or indirectly, exercise control over the wrongful acts complained of herein.

36. During the Relevant Period, each of the Individual Defendants was the agent of each of the other Individual Defendants and of the Companies, and was at all times acting within the course and scope of such agency.

37. To discharge their duties, the Individual Defendants were required to exercise reasonable and prudent supervision over the management, policies, practices and controls of the financial affairs of the Companies. By virtue of such duties, the Individual Defendants were required, among other things, to:

- a. Conduct the affairs of the Companies in an efficient, business-like manner;
- b. Ensure that the Companies were operated and managed in a diligent, honest, and prudent manner in compliance with all applicable laws;
- c. Refrain from wasting the Companies' assets or unduly benefiting themselves at the expense of the Companies or their minority shareholders;
- d. Maintain and implement an adequate system of internal controls over all aspects of The Tierney Corporation and Leatherwood Company's business and administration;

e. Act in furtherance of the best interests of The Tierney Corporation and The Leatherwood Company and all of their respective shareholders, and not in furtherance of their own personal interests; and

f. Remain informed as to The Tierney Corporation and The Leatherwood Company's operations, and upon receipt of notice or information of imprudent or unsound conditions or practices, to make reasonable inquiry, to make disclosures, and to take steps to correct such conditions or practices to comply with the charter and bylaws of The Tierney Corporation and The Leatherwood Company and all applicable laws.

38. In addition, as Officers, the Individual Defendants assumed heightened obligations through their participation on the Executive Committee.

39. Pursuant to W. Va. Code § 31D-8-842, each Officer, when performing in his or her official capacity, shall act: (i) in good faith, (ii) with the care that a person in a like position would reasonably exercise under similar circumstances; and (iii) in a manner the officer reasonably believes to be in the best interests of the corporation.

40. Upon information and belief and as alleged in detail herein, the Individual Defendant Officers completely abdicated their fiduciary duties and instead allowed Smith and Woloshin to engage in illegal and imprudent conduct for their personal benefit at the expense of the Company.

41. The conduct of the Individual Defendants, who exercise domination and control through the Executive Committee and the Board, involves a knowing and culpable violation of their obligations as directors and officers of The Tierney Corporation and The Leatherwood Company.

42. Pursuant to W. Va. Code § 31D-8-831, the decisions of directors of a corporation

are voidable where the challenged conduct consisted of or was the result of:

(A) action not in good faith; or

(B) a decision

(i) which the director did not reasonably believe to be in the best interests of the corporation, or

(ii) as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(C) a lack of objectivity due to the director's familiar or financial relationship with, or lack of independence due to domination or control of the director by another person having a material interest in the challenged conduct; or

(D) a sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making or causing to be made appropriate inquiry when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need for inquiry; or

(E) receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

W. Va. Code § 31D-8-831.

SUMMARY OF THE INDIVIDUAL DEFENDANTS' MISMANAGEMENT AND GROSS NEGLIGENCE

43. Unbeknownst to Plaintiffs until late 2016, from 2001 to the present, the Individual Defendants consciously refused to exercise their fiduciary duties to oversee the affairs of The Tierney Corporation and its affiliate, The Leatherwood Company. The Individual Defendants' continuing, willful, and knowing breaches of their fiduciary duties, as alleged below, threaten the Companies' present and continuing viability and profitability for future shareholders of the family corporations.

***Withholding Information from the Board Members Who Are Not Officers
and Refusing Access to Corporate Financial Information***

44. Following his election to the Board in February 2016, Plaintiff Lewis Tierney began requesting information and corporate records to learn about the Company and its finances.

45. Pursuant to W. Va. Code § 31D-16-1605(a), Plaintiff Lewis Tierney, as a director of The Tierney Corporation “is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director’s duties as a director, including duties as a member of a committee” W. Va. Code § 31D-16-1605(a) in part.

46. Pursuant to W. Va. Code § 31D-16-1602(a)-(b), Plaintiffs as shareholders of the Companies are “entitled to inspect, during regular business hours at the corporation’s principal office, any of the records of the corporation described in § 31D-16-1601(e)²” upon proper notice at least five business days in advance, and in addition, if the request is made in good faith and described with reasonable particularity, shareholders are entitled to inspect:

(1) Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under [§ 31D-16-1602(a)] of this article;

² The corporate records described in W. Va. Code § 31D-16-1601(e) include the following:

- (1) Its articles or restated articles of incorporation and all amendments to them currently in effect;
- (2) Its bylaws or restated bylaws and all amendments to them currently in effect;
- (3) Resolutions adopted by its board of directors creating one or more classes or series of shares and fixing their relative rights, preferences and limitations if shares issued pursuant to those resolutions are outstanding;
- (4) The minutes of all shareholders’ meetings, and records of all action taken by shareholders without a meeting, for the past three years;
- (5) All written communications to shareholders general within the past three years, including the financial statements furnished for the past three years under section one thousand six hundred twenty [§ 31D-16-1620] of this article; and
- (6) A list of the names and business addresses of its current directors and officers.

(2) Accounting records of the corporation; and

(3) The record of shareholders.

W. Va. Code § 31D-16-1602 (a)-(b), in part.

47. In response to Plaintiff Lewis Tierney's requests for inspection of records, Defendant Woloshin has provided prior annual reports, but virtually none of the current records that are required to be shared with all Board members to oversee management, including for instance, year-to-date financials, status of the Companies' nearly tapped-out credit line, information as to the growing liabilities which are believed to exceed \$24 million, and other relevant data.

48. Despite multiple attempts, Lewis Tierney's efforts to obtain reasonable access to all pertinent corporate records in his capacity as a Board member have been thwarted.

49. For instance, in correspondence dated March 12, 2016, Lewis Tierney sent a written request to President Smith requesting copies of the last five years of annual reports and annual budgets, a current list of shareholders, the Company's by-laws, an overview of current revenue streams and a summary of contract terms, a revenue breakdown by type (e.g., like-kind exchange, gas, coal, portfolio dividends, portfolio stock sale) over the last five years, and an end-of-year "amount due" for any stock-based loans issued to The Tierney Corporation or The Leatherwood Company. The information received in response, however, was incomplete and inadequate to provide a Board member with reasonable information and omitted, among other things, up-to-date figures on loans outstanding.

50. To date, despite subsequent attempts, Plaintiffs still have not been given appropriate access to pertinent corporate records and current, up-to-date financials.

***Duane Morris' Excessive Legal Billing, Woloshin's Conflict of Interest,
and Fiscal Mismanagement of the Individual Defendants***

51. Since 2001 to the present, Duane Morris, through its attorneys Woloshin and at a later date, Reid Avett, has provided legal and/or administrative services as outside counsel to The Tierney Corporation and The Leatherwood Company.

52. At all times relevant, Woloshin was acting on behalf of both Companies as Executive Director while at the same time serving as outside counsel to The Tierney Corporation and The Leatherwood Company and as personal attorney to Smith. Since 2004, Woloshin has been the managing partner of defendant Duane Morris' Washington, D.C. office.

53. Upon information and belief, and from 2001-2016 specifically, Woloshin and Duane Morris have billed and collected in excess of \$15,058,525 in legal and/or administrative service fees despite the small size and non-complex nature of the business and despite the Companies having no mergers, acquisitions, or other significant legal proceedings. During this same time period, the Companies have compiled liabilities greater than \$22,000,000.

54. Upon information and belief, the nature of the legal and/or administrative service work performed by Woloshin involved predominantly basic corporate work and the difficulties involved and responsibilities assumed in the work were minimal.

55. Upon information and belief and subject to further discovery, it appears that from 2004 to 2016, legal and/or administrative service expenses charged by Duane Morris have been, at a minimum, 32.9 percent of The Tierney Corporation's total revenue, which excessive legal billing constitutes a waste or mismanagement of corporate assets.

56. Unbeknownst to Plaintiffs at the time, The Tierney Corporation and The Leatherwood Company jointly paid Duane Morris approximately \$1.37 million for legal and/or administrative service fees in 2014, which represented approximately 43.9 percent of total

revenue. Upon information and belief, these fees did not include an additional \$80,000 in 2014 to Duane Morris for associate or staff fees. The total legal line in 2014 was \$1.6 million, which fees reached to a staggering 51.3 percent of The Tierney Corporation's total annual revenue.

57. Upon information and belief, the legal and/or administrative service costs in 2013 and 2014 averaged \$64 per share, while during the same time shareholders received only \$43 per share on average including the special dividend.

58. Recently it has been discovered that actual legal and/or administrative service expenses charged by Woloshin and Duane Morris have been in excess of 645 percent of the annual budgeted legal expenses that Woloshin prepared.

59. Upon information and belief, Duane Morris was notified of Lewis Tierney's findings on the excessive billing in or about 2016 and then Duane Morris agreed to a fixed-fee arrangement.

Illegal Voting Agreement for Board Decisions

60. Upon information and belief, in or about August 2016, Lewis Tierney first discovered that Defendants Smith, Matt Tierney, and Woloshin had entered into a written voting agreement as to all matters, including Board and Executive Committee votes, which agreement has been in effect since in or about 2008 or earlier.

61. Upon information and belief, by using a voting agreement to control votes on the Board or Executive Committee, the Individual Defendants abdicated their individual responsibilities to weigh all relevant factors and consider the best interests of the Companies and all shareholders to whom they owe fiduciary duties, and rendered the other Board members' votes meaningless and illusory.

Acts of Self-Dealing

62. The Individual Defendants engaged in a self-serving transaction to the detriment of the shareholders of the Companies. Through the acts of the Individual Defendants, The Leatherwood Company executed a questionable transaction for the Companies' shareholders by valuing the Leatherwood Horse Farm property improperly and buying an option and then the property from then-President Smith when there was no commitment to use the property for commercial development and before obtaining a commitment from the Virginia Department of Transportation to proceed with a highway interchange on the property. Additionally, all of this was done without the knowledge of or a vote from The Tierney Corporation Board or shareholders.

63. Without obtaining an up-to-date or reasonable appraisal of the property and without any legitimate business purpose, the Individual Defendants unnecessarily agreed that The Leatherwood Company would pay Smith \$600,000 up front for an option to purchase property in Tazewell County, Virginia, despite no bids or clear interest in the property from third parties. Further, there was no effort to market or sell the property to any third party, and thus paying \$600,000 for an option alone (which was separate and apart from the money eventually paid for the property) was unreasonable and constitutes a faithless act of self-dealing.

64. The Tierney Corporation Board did not vote on the transaction to purchase the option.

65. Subsequently, on April 2, 2010, the Individual Defendants caused The Leatherwood Company to exercise the option and purchase the Tazewell property from then-President Smith for a stated purchase price of \$4.6 million.

66. Defendant Woloshin never shared with The Tierney Corporation or its Board any

proof of the valuation of former President Smith's property being worth \$4.6 million despite requests for this information and Woloshin's stated intent to follow-up and provide such information.

67. The transaction was completed by trading a like-kind exchange property (a Walgreens Pharmacy in West Palm Beach, Florida) using a valuation from 2006 (prior to the collapse of the U.S. real estate market) without vote or even notification of the sale to The Tierney Corporation Board in 2009.

68. By relying upon a stale appraisal and engaging in self-dealing, the Company effectively gave away a valuable income-producing asset returning 8.33 percent annually (the Walgreens in West Palm Beach, Florida) in exchange for property as to which the Individual Defendants have never formulated a business plan or commenced commercial activity.

69. This unconscionable, self-serving transaction occurred at an outrageous sales price in Tazewell County for a mere 169.8 acres.

70. Upon information and belief, the transaction at \$4.6 million is the fourth highest *overall* transaction value in Tazewell County in the years analyzed between January 2010 and December 2015. For example, based on public records, there was a transaction in Tazewell County which involved a \$13.2 million transaction value, but that was for approximately 16,000 acres; in other words, that money was to obtain acreage that is approximately one hundred times the acreage obtained here. On a price per-acre comparison, the buyers there paid \$825 per acre; whereas here, President Smith's self-interested transaction occurred at the price of \$30,624.26 per acre.

The Executives Are Actively Liquidating the Company

71. Upon information and belief, The Tierney Corporation has been liquidating and

selling revenue-producing assets (e.g., including like-kind exchanges) to cover operating expenses, but Woloshin refuses to acknowledge this, costing The Tierney Corporation and The Leatherwood Company shareholders thousands of dollars in lost income and related potential tax benefits.

72. Upon information and belief, Defendant Woloshin is eroding tangible corporate assets. For example, the stock portfolio, based on 2009 stock assets, is worth approximately \$4 million less than it should be at this time and has not participated in the bull market run over the last three years.

73. Plaintiffs have discovered that Colorado State Bank and Trust wrote a letter, dated February 14, 2011, to the Company's then-auditors, Goodman & Company, regarding the Company's classification of the "special dividend" as a liquidating dividend given that The Tierney Corporation and The Leatherwood Company sold assets (stock and like-kind exchanges) to make the payment to shareholders.

74. Unbeknownst to Plaintiffs at the time, on November 7, 2012, Woloshin admitted in an email regarding a Special Directors' meeting that proceeds from like-kind exchange properties owned by Leatherwood were used to pay a "special dividend" and mentioned that this is in keeping with the Company's objective of delivering asset value in "the most friendly tax environment."

75. Unbeknownst to Plaintiffs at the time, as of 2014, The Tierney Corporation used the stock portfolio to generate revenue and had nearly tapped its \$24 million credit line, but Woloshin did not report the liabilities and amount due on the line of credit until months later in the 2014 annual report. At the time that Board decisions were being made in 2014, the Board members did not know how much money was being borrowed.

76. Upon information and belief, and unbeknownst to Plaintiffs at the time, the reactive decline in value of the stock portfolio and heavy reliance on debt threaten the Companies' future viability.

Multiple Auditors and Director Woloshin's Attempt to Eliminate Annual Audits

77. As an additional red flag, Plaintiffs have discovered that, over the years, the Company has churned through several auditors, most recently under the guise of cost control:

Kamerow, Weintraub & Swain (1997 to 2003)
Gerson, Preston, Robinson & Co. (2004 to 2006)
Goodman & Company, Dixon Hughes Goodman (2007 to 2012)
The Nair Group (2014 to the Present)

78. Upon information and belief, the auditor groups listed above reported directly to Woloshin and not to the Board since 2001, in violation of GAAP standards. Upon information and belief, beginning in 2001, the annual audit was never presented to the entire Board despite repeated requests from directors Carol Tierney Griesemer and Clayton Rogers, a Board member until his passing, to do so. The audit results were only distributed to the entire Board in advance of the annual meeting of the shareholders, many months later.

79. Unbeknownst to Plaintiffs at the time, in or about June 2008, Woloshin attempted to eliminate entirely the annual audit and recommended a review rather than a full audit. Carolyn Kenna Tierney Griesemer convinced Matt Tierney to vote "no," and the recommendation was turned down.

80. This is yet another example of the Individual Defendants' attempts to manipulate the financials and other aspects of the Companies in order to hide their gross and faithless self-dealing. Pursuant to Rule 23.1 of the West Virginia Rules of Civil Procedure, each of the Plaintiffs certifies that (i) he or she was a shareholder or member at the time of the transaction of

which the Plaintiff complains, and (ii) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

PLAINTIFFS MADE A WRITTEN DEMAND ON THE COMPANIES'
BOARD OF DIRECTORS AND SHAREHOLDERS

81. Since becoming a Board member of Tierney Corporation in February 2016, Lewis Tierney has become aware of the Individual Defendants' misuse of corporate assets and their disregard of mandatory procedures required by the Companies' by-laws, which findings Lewis Tierney expressed to the three Executive Committee Officers.

82. In late October 2016, Lewis Tierney attempted to schedule a meeting with the Individual Defendants to discuss his recent investigation and discoveries concerning these matters but never heard back from any of the Individual Defendants regarding his request. Despite Lewis Tierney's attempt to spur the Individual Defendants to provide redress, his efforts were ultimately unsuccessful.

83. On March 10, 2017, Plaintiffs filed a shareholder derivative action on behalf of The Tierney Corporation and The Leatherwood Company against the same Defendants for *inter alia*, self-dealing, conflict of interest, mismanagement and waste of corporate assets, breaches of fiduciary duties, and wrongful withholding of information. (Civil Action No. 17-C-346.)

84. Defendants filed motions to dismiss and a hearing was conducted on October 20, 2017 in front of Judge Paul T. Farrell of the Kanawha County Circuit Court Business Court Division. Although Plaintiffs argued that the futility exception to the demand requirement was satisfied, Judge Farrell indicated during the hearing that he wanted to avoid the possibility of any potential procedural impediment going forward in the case. Judge Farrell referenced the savings statute and indicated that Plaintiffs' claims could be reasserted upon demand.

85. On December 7, 2017, Judge Farrell entered an Order granting the Defendants' motions to dismiss as to the demand requirement only. The decision expressly provided that it did not reach the merits of the claims, and the Court expressly stated that Plaintiffs could re-file their claims after making a demand.

86. On December 12, 2017, The Tierney Corporation sent out a notice on behalf of the Board for the 2017 Annual Meeting of the Corporation's Shareholders (the "Annual Meeting"), to be held on December 22, 2017. The letter was signed by then-President Defendant Smith.

87. The notice laid out the purposes of the meeting as follows:

- a. to elect Directors of the Corporation to act until the next Annual Meeting of Shareholders or until their successor(s) are elected and qualified;
- b. to amend the Corporation's By-Laws to conform the notice provisions thereof with West Virginia law; and
- c. to conduct such other business as may be necessary or advisable.

88. Contrary to what the letter said, the Board of Directors as a whole did *not* call the Annual Meeting as is required under the By-Laws, Article II, Section 2. Instead, the Executive Committee called the meeting under the guise of the Board of Directors, which is not permissible under the By-Laws.

89. When Plaintiff Lewis Tierney made note at the Annual Meeting that the shareholder meeting was improperly called, and that it was not in fact authorized and called by the Board as represented and instead by the Executive Committee, Reid Avett, Counsel for The Tierney Corporation, and Isaac Forman, Counsel for Duane Morris, commented that is how The Tierney Corporation has always done things.

90. In addition, Lewis Tierney made a request at the meeting that the shareholders authorize a shareholder derivative action and initiate suit against the Individual Defendants for the reasons stated herein. Instead, Lewis was informed that the request would not be granted during the meeting and was directed that the request needed to be handled differently and in writing.

91. In response to the Annual Meeting on December 22, 2017, Plaintiffs made a written demand on the boards and shareholders of The Tierney Corporation and The Leatherwood Company on or about January 26, 2018 to institute this action pursuant to Rule 23.1 of the West Virginia Rules of Civil Procedure. A copy of the original Verified Shareholder Derivative Complaint (“Complaint”), which was filed on or about January 29, 2018, but not served, was enclosed in the demands to ensure that the nature of the claims sought against the Individual Defendants was described with particularity. A copy of the demand letters are attached hereto and made a part hereof as **Exhibit A**.

92. On February 9, 2018, newly-elected President de Wet sent Plaintiff Lewis Tierney a letter stating she received the January 26 demand letter and will “take seriously my responsibility to guide The Tierney Corporation in a responsible and independent investigation of your complaints.” A copy of the letter is attached hereto and made a part hereof as **Exhibit B**.

93. However, on March 1, 2018, President de Wet sent a letter related to this lawsuit to the shareholders, alleging Plaintiffs’ demand letters and Complaint contain “misstatements” and falsehoods, emphasizing twice that \$350,000 in legal fees had already been incurred by the Companies in this lawsuit, and stating “continued litigation threatens to engulf the Company in a legal morass with little end in sight.” A copy of this letter is attached hereto and made a part hereof as **Exhibit C**.

94. President de Wet's statements to the shareholders demonstrated her negative opinions on Plaintiffs' demand despite not becoming President until December 2017, not having conducted any investigation into the allegations, and promising in the same letter to "investigate these allegations thoroughly" in a "responsible and independent investigation."

95. In order to address the multiple inaccuracies presented in President de Wet's March 1, 2018 letter, Lewis Tierney sent a letter to the shareholders on or about May 3, 2018 to May 5, 2018. This letter included information about the allegations of the Complaint to help shareholders further understand the nature of the Individual Defendants' wrongdoing.

96. Furthermore, on April 20, 2018, President de Wet sent a letter to the shareholders providing a brief update on the status of her investigation into the allegations raised by Plaintiffs' demand letters. Despite communicating to shareholders that she intends to guide the Company in a "responsible and independent investigation," it was not communicated how such an independent investigation is to be conducted. All President de Wet communicated in this letter to shareholders was that initial requests to the relevant parties seeking more information related to the allegations had been sent out to be "followed up with more specific requests in the future." A copy of this letter is attached hereto and made a part hereof as **Exhibit D**.

97. Moreover, on April 20, 2018, President de Wet sent a letter to Wanda Z. Rogers, wife to Clayton Rogers and executor of his estate, copying Tierney Corporation shareholders. In the letter, President de Wet again reiterated her negative opinions on Plaintiffs' demand despite not becoming President until December 2017, not having conducted any investigation into the allegations, and promising in the same letter to investigate these allegations thoroughly in a "responsible and independent investigation." In addition, President de Wet stated she "intends to review all available evidence before reaching any conclusions or making any recommendations

to the Board or the shareholders.” President de Wet’s statements related to how she intends to conduct her own personal investigation are made despite the fact Plaintiffs also sent a demand letter to the shareholders, a demand separate from that made on the Board. A copy of this letter is attached hereto and made a part hereof as **Exhibit E**.

98. Additionally, President de Wet, daughter of Defendant Smith, sent a four-page letter of questions and requests for clarification to Plaintiffs’ counsel on April 20, 2018 asking for information regarding the allegations in the Complaint to begin conducting an investigation.

99. Despite the allegations becoming known to the Defendants when the original shareholder derivative action was filed in or about March 2017, and despite the demands being sent at the end of January 2018, President de Wet delayed asking Plaintiffs’ counsel for information on the allegations until April 20, 2018.

100. To date, no clear plan has been communicated to Plaintiffs on how the issues are to be thoroughly and independently investigated or when such investigation is expected to be completed and no dates have been set for either a Board or shareholder meeting to address or vote on the January 2018 demands.

101. The Defendants and Board have had a reasonable amount of time to investigate the allegations known to them since March 2017, when the original shareholder derivative action was filed, and the Defendants, Board and shareholders have had reasonable opportunity to respond to Plaintiffs’ demand.

102. Plaintiffs, who jointly represent the shares originally owned by L. Clark Tierney Jr. on the Board, fairly and adequately represent the interests of the shareholders similarly situated in enforcing the Companies’ rights. Plaintiffs have the capacity to vigorously and conscientiously prosecute this derivative action and are free from economic interests that are

antagonistic to the interests of the shareholders. In bringing this action, Plaintiffs have retained legal counsel to pursue all viable claims on behalf of, and for the benefit of, the Companies to redress the Individual Defendants' breaches of fiduciary duties.

COUNT I
FOR REMOVAL OF DIRECTOR PURSUANT TO W. VA. CODE § 31D-8-809
AND TO BAR FROM REELECTION
(AGAINST DEFENDANTS SMITH AND WOLOSHIN)

103. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 102 with the same force and effect as if fully set forth here.

104. Pursuant to W. Va. Code § 31D-8-809(a), a circuit court may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that: (1) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation; and (2) removal is in the best interest of the corporation. *See* W. Va. Code § 31D-8-809(a).

105. Collectively, Plaintiffs hold more than ten percent (10%) of the outstanding shares of The Tierney Corporation.

106. Upon information and belief and as alleged herein, Defendants Smith and Woloshin are directors who have engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the Companies, and their removal is in the best interest of the Companies.

107. For the reasons set forth herein, Plaintiffs seek the removal of Defendants Smith and Woloshin and to bar each from reelection pursuant to W. Va. Code § 31D-8-809.

COUNT II
**DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY, GROSS NEGLIGENCE,
MISMANAGEMENT, SELF-DEALING, AND CORPORATE WASTE**

108. Plaintiff's repeat and reallege each allegation contained in paragraphs 1 through 107 with the same force and effect as if fully set forth herein.

109. The Individual Defendants, in their roles as executive officers and directors of The Tierney Corporation and The Leatherwood Company, participated in the acts of mismanagement alleged herein, or acted in reckless disregard of the facts known to them, and failed to exercise due care to prevent the additional extraordinary and imprudent expenditures of money and waste of corporate assets, with the resulting dilution of the shareholders' interest in the Companies.

110. The Individual Defendants became aware, or should have become aware, of the facts alleged herein including, among others, that corporate assets were being wasted or used for the personal benefit of the Individual Defendants, with respect to:

(a) Agreeing to pay Smith a \$600,000 option to purchase and subsequently causing Leatherwood Company to exercise the option and purchase the Smith property for a stated price of \$4,600,000, without vote or even notification of the sale to The Tierney Corporation Board in 2009;

(b) Permitting excessive over-billing for legal and/or administrative services, which fees (approximately \$11,185,000 for the past fourteen years) benefited Woloshin and Duane Morris to the detriment of the Companies and their shareholders;

(c) Actively liquidating the revenue-producing assets of the Companies to cover operating expenses;

(d) Violating the requirements of the Companies' by-laws with respect to the

governance of the Companies and the rights of all shareholders;

(e) Improperly withholding information and refusing access to the Companies' financials from Board members who are not Officers;

(f) Illegally using a voting agreement for Board decisions;

(g) Allowing conflicts of interest;

(h) Engaging in acts of self-dealing for the personal benefit of the Individual Defendants.

111. The Individual Defendants, however, did nothing to correct these acts and thereby breached their duty of care, loyalty, accountability and disclosure to the shareholders of Tierney Corporation and to the Companies themselves.

112. The Individual Defendants have been responsible for the gross mismanagement of the Companies, and self-dealing, as described herein.

113. By virtue of the Individual Defendants' breach of their fiduciary duties, the Companies have suffered damages in an amount not less than \$3,000,000 in the form of (a) loss of present and future business opportunities; (b) reductions by Moody's and Standard & Poor's of their ratings on debt service, thereby requiring the Companies to pay more on its indebtedness than it otherwise would have to pay; (c) irreparable harm to their reputation and standing in the business and investment community; (d) restriction of their ability to obtain credit; and (e) the decline in the value of their shares.

114. As a result of the matters complained of herein, the Companies have been damaged in an amount in excess of \$3,000,000.

COUNT III
**AGAINST DEFENDANT WOLOSHIN FOR BREACH OF FIDUCIARY DUTY IN CONNECTION
WITH EXCESSIVE LEGAL FEES AND HIS PERSONAL CONFLICT OF INTEREST**

115. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 114 with the same force and effect as if fully set forth here.

116. At all times relevant, Woloshin had a conflict of interest in that, at the same time that he was the Executive Director of both Companies, he was also personally profiting from the excessive legal and/or administrative service fees he billed on behalf of himself and his firm, Duane Morris.

117. With respect to the legal and/or administrative service fees, Woloshin had a duty to act for the Companies' benefit and best interests, while subordinating his own personal interests.

118. Upon information and belief, Woloshin willfully, knowingly, and maliciously breached his fiduciary duty as Executive Director by overbilling the Companies for legal and/or administrative services, for his own personal benefit and the profit of his firm, Duane Morris.

119. Upon information and belief, Woloshin willfully, knowingly, and maliciously breached his fiduciary duty as Executive Director of the Companies by allocating increasingly excessive percentages of total revenue to legal and/or administrative service expenses, despite no significant legal needs.

120. Upon information and belief, Woloshin willfully, knowingly, and maliciously breached his fiduciary duty as Executive Director of the Companies by withholding information concerning the actual legal and/or administrative service expenses.

121. Upon information and belief, Woloshin willfully, knowingly, and maliciously breached his fiduciary duty as Executive Director of the Companies through ongoing fiscal

mismanagement, which included billing nearly 60 percent of annual legal expenses in the final months of each year, even after Woloshin's estimated budget for the Companies' annual legal expenses had already been surpassed and even though the Companies did not require any extraordinary legal and/or administrative services at the end of each year.

122. Upon information and belief, Woloshin's conduct was in bad faith and departs from the standards of good faith and fair dealing which are inherent in the concept of a fiduciary relationship.

123. Upon information and belief, Woloshin intentionally misled the Companies and their shareholders by withholding material information concerning the legal and/or administrative services and the excessive legal billing.

124. Woloshin either knew or should have known at the time of his actions and representations, that the legal and/or administrative service fees were unreasonable and excessively large, to the detriment of the Companies.

125. Woloshin's breach of fiduciary duty in connection with his excessive legal and/or administrative service fees, his conflict of interest, and selfish management of the Companies for his personal benefit and for the benefit of Duane Morris have caused the Companies' damages.

COUNT IV
EXCESSIVE LEGAL FEES AS NEGLIGENCE
(AGAINST DEFENDANTS DUANE MORRIS AND WOLOSHIN)

126. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 125 with the same force and effect as if fully set forth here.

127. From 2001 to the present, Woloshin and Duane Morris have acted as outside legal counsel to the Companies, establishing an attorney-client relationship.

128. Upon information and belief, Defendant Duane Morris and Woloshin breached their professional duty and obligation to the Companies by charging an exorbitant, excessive, and unreasonable fee for the legal and/or administrative services rendered.

129. Defendants' actions as described above constitute breach of professional duty.

130. As a result of these wrongful acts, as alleged herein, the Companies have been harmed and continue to be harmed, and are entitled to damages in an amount to be determined at trial.

COUNT V
EXCESSIVE LEGAL FEES AS A BREACH OF CONTRACT
(AGAINST DEFENDANTS DUANE MORRIS AND WOLOSHIN)

131. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 130 with the same force and effect as if fully set forth here.

132. From 2001 to the present, Woloshin and Duane Morris have acted as outside legal counsel to the Companies, establishing a contractual attorney-client relationship, whether express or implied (the "Agreement").

133. The Agreement is a valid and enforceable contract supported by adequate consideration, and was offered by Woloshin and Duane Morris and voluntarily accepted by The Tierney Corporation and The Leatherwood Company.

134. All conditions precedent to the enforcement of the Agreement have been satisfied.

135. The Companies have performed their obligations under the Agreement, and have paid the legal and/or administrative service fees billed pursuant to the Agreement.

136. Upon information and belief, contrary to the terms of the Agreement and professional standards of conduct, Woloshin and Duane Morris have padded and overbilled the Companies for the actual services rendered.

137. Woloshin and Duane Morris' acts, as described above, constitute a material breach of Agreement and the contractual duties owed to the Companies.

138. To date, however, Woloshin and Duane Morris have not cured their breach.

139. As a direct and proximate result of Woloshin and Duane Morris' material breach of the Agreement, and due to their professional negligence, gross negligence, or willful misconduct, the Companies have suffered an actual loss and are entitled to compensatory damages in an amount to be determined at trial.

COUNT VI
IN THE ALTERNATIVE, UNJUST ENRICHMENT
(AGAINST DEFENDANTS DUANE MORRIS AND WOLOSHIN)

140. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 139 with the same force and effect as if fully set forth here.

141. Upon information and belief, the total fees Duane Morris collected from the Companies from 2001 to 2016 exceed \$15.4 million.

142. Should it be determined that an enforceable contract with respect to the matters asserted above did not exist, the Companies nonetheless paid Duane Morris an amount not less than \$15.4 million under circumstances that they reasonably expected to receive comparable value and/or to be charged only a fair and reasonable cost for the services actually received.

143. The actual fee that Duane Morris obtained (and which was paid for by the Companies) is unreasonably excessive in violation of, and invalid and unenforceable under Rule 1.5 of the West Virginia Rules of Professional Conduct.

144. Defendants received and benefited from the fees the Company paid for legal and/or administrative services as described in this complaint. Should the Court determine that the Duane Morris and Woloshin have not breached an express or implied contract, the Court

should alternatively find that Duane Morris and Woloshin are liable to the Companies under the law of *quantum meruit* or unjust enrichment.

145. “[I]f benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value.” *Realmark Devs., Inc. v. Ranson*, 208 W.Va. 717, 722, 542 S.E.2d 880, 885 (2000). Unjust enrichment is based upon equitable principals and is sometimes referred to as “restitution, a contract implied in law, quasi-contract, or an action in *assumpsit*,” but it is an action at law for which the remedy is money damages. *See Realmark Devs., Inc. v. Ranson*, 214 W.Va. 161, 164, 588 S.E.2d 150, 153 (2003).

146. Duane Morris and Woloshin have been unjustly enriched by taking possession of fees that exceed the fair and reasonable cost for the services rendered in connection with the representation of the Companies and the excessive fees have not been repaid.

147. Under the law of unjust enrichment, Duane Morris and Woloshin should be required to repay the money they have wrongfully billed the Companies, plus interest and costs representing the benefit of the use of such money.

COUNT VII
STATUTORY CLAIM FOR INSPECTION OF RECORDS BY SHAREHOLDERS AND DIRECTORS,
OR IN THE ALTERNATIVE, CLAIM FOR COURT-ORDERED INSPECTION,
PURSUANT TO W. VA. CODE §§ 31D-16-1602 THROUGH 16-1605

148. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 147 with the same force and effect as if fully set forth here.

149. Plaintiff Lewis Tierney has in good faith made a proper demand for inspection of records by a director, pursuant to § 31D-16-1605, reasonably related to the performance of his

duties as a director. Despite demand and after a reasonable time, however, Plaintiff Lewis Tierney has not been given access to inspect and copy the records and documents requested.

150. Plaintiffs, as shareholders of the Companies, have in good faith made a proper demand for inspection of records by a shareholder, pursuant to § 31D-16-1602, in good faith and for a proper purpose, with reasonable particularity, and directly connected with his purpose as a shareholder. Despite demand and after a reasonable time, however, Plaintiffs have not been given access to inspect and copy the records and documents requested.

151. Pursuant to W. Va. Code § 31D-16-1604, “[i]f a corporation does not allow a shareholder who complies with [§ 31D-16-1602(a)] to inspect and copy any records required by that subsection to be available for inspection, the circuit court may summarily order inspection and copy of the records demanded at the corporation’s expense upon application of the shareholder.”

152. Pursuant to the statute, W. Va. Code § 31D-16-1604(b), “[i]f a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with subsections (b) and (c), section one thousand six hundred two [§ 31D-16-1602] of this article may apply to the circuit court for an order to permit inspection and copying of the records demanded.” W. Va. Code § 31D-16-1604(b). Under these circumstances, “[t]he circuit court shall dispose of an application under this subsection on an expedited basis.” *Id.*

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs demand judgment as follows:

A. Granting judgment against each Defendant in favor of The Tierney Corporation and The Leatherwood Company for the amount of damages sustained by The Tierney Corporation and The Leatherwood Company as a result of the breaches of fiduciary duty and other misconduct by each Defendant;

B. Granting, on an expedited basis, court-ordered inspection of records by shareholders, pursuant to W. Va. Code § 31D-16-1604, and requiring that a full accounting be made in granting judgment against each Defendant for the amount of the total financial losses to The Tierney Corporation and The Leatherwood Company as a result of the acts complained of;

C. Granting judgment against each Defendant in favor of The Tierney Corporation and The Leatherwood Company for all consequential damages suffered by the Companies;

D. Ordering that Defendants Smith and Woloshin be removed and barred from reelection to the Boards of The Tierney Corporation and Leatherwood Company and any respective committees as authorized by W. Va. Code § 31D-8-809(a) for his/her fraud, dishonest conduct, or gross abuse of authority and discretion and because removal is in the best interests of the Companies;

E. Awarding to Plaintiffs the costs and disbursements of this action, including reasonable attorneys', accountants' and experts' fees, and costs and expenses; and

F. Granting such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury for all claims so triable.

Respectfully submitted,

**LEWIS CLARK TIERNEY, III,
CHRISTOPHER SCOTT TIERNEY,
KENNA TIERNEY 2000
IRREVOCABLE TRUST, CAROLYN
KENNA TIERNEY GRIESEMER, and
CAROL K. TIERNEY 2000 GST
TRUST**, Each individually and derivatively
on behalf of The Tierney Corporation and
The Leatherwood Company

By Counsel

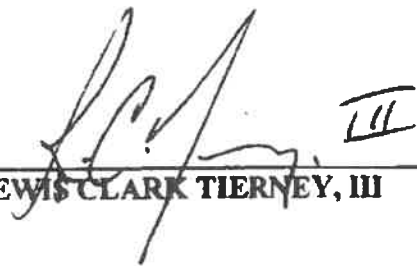


Brian R. Swiger (WV Bar No. 5872)
Vivian H. Basdekis (WV Bar No. 10587)
Chelsea A. Creta (WV Bar No. 13187)
JACKSON KELLY PLLC
P.O. Box 553
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Facsimile: (304) 340-1051
Email: brswiger@jacksonkelly.com
vhbasdekis@jacksonkelly.com
chelsea.creta@jacksonkelly.com
Counsel for Plaintiffs

VERIFICATION

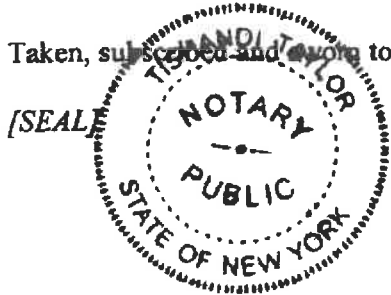
**STATE OF NEW YORK
COUNTY OF NEW YORK, TO WIT:**


I, **Lewis Clark Tierney, III**, being first duly sworn, depose and say that I am a Plaintiff and shareholder in the within action; that I have read the foregoing **Amended Verified Shareholder Derivative Complaint** and am familiar with the contents thereof; that the facts and allegations contained therein are true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.



LEWIS CLARK TIERNEY, III

Taken, subscribed and sworn to before me this 10th day of May, 2018.





Notary Public

My commission expires: 08-14-2021.

TISHANDI T TAYLOR
NOTARY PUBLIC-STATE OF NEW YORK
No. 01TA6363109
Qualified in Kings County
My Commission Expires 08-14-2021

VERIFICATION

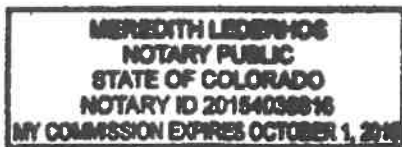
**STATE OF COLORADO;
COUNTY OF DENVER, TO WIT:**

I, **Christopher Scott Tierney**, being first duly sworn, depose and say that I am a Plaintiff and shareholder in the within action; that I have read the foregoing **Amended Verified Shareholder Derivative Complaint** and am familiar with the contents thereof; that the facts and allegations contained therein are true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.


CHRISTOPHER SCOTT TIERNEY

Taken, subscribed and sworn to before me this 10 day of May, 2018.

[SEAL]



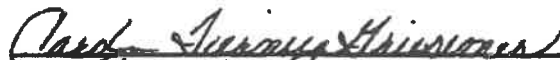

Notary Public

My commission expires: 10/1/19.

VERIFICATION

STATE OF FLORIDA
COUNTY OF Charlotte, TO WIT:

I, Carolyn Tierney Griesemer, being first duly sworn, depose and say that I am a Plaintiff and shareholder in the within action; and further, that I am an authorized representative of the *Carol K. Tierney 2000 GST Trust*, Carol K. Tierney, Trustee, a Plaintiff and shareholder in the within action; that I have read the foregoing **Amended Verified Shareholder Derivative Complaint** and am familiar with the contents thereof; that the facts and allegations contained therein are true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.


CAROLYN TIERNEY GRIESEMER,
Individually and as Trustee of the Carol K. Tierney
2000 GST Trust

Taken, subscribed and sworn to before me this 10th day of May, 2018.

[SEAL]

Nick Obirik
Notary Public
State of Florida
My Commission Expires 10/24/2021
Commission No. GG 142511




Notary Public

My commission expires: 10-24-21.

VERIFICATION

**STATE OF FLORIDA,
COUNTY OF Charlotte, TO WIT:**

I, Carolyn Tierney Griesemer, who am one and the same with Carolyn Kenna Tierney, being first duly sworn, depose and say that I am Co-Trustee and an authorized representative of the Kenna Tierney 2000 Irrevocable Trust, a Plaintiff and shareholder in the within action; that I have read the foregoing **Amended Verified Shareholder Derivative Complaint** and am familiar with the contents thereof; that the facts and allegations contained therein are true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.


CAROLYN TIERNEY GRIESEMER,
who is one and the same with Carolyn Kenna
Tierney, Co-Trustee of the Kenna Tierney 2000
Irrevocable Trust

Taken, subscribed and sworn to before me this 10th day of May, 2018.

[SEAL]

Nick Obirek
Notary Public
State of Florida
My Commission Expires 10/24/2021
Commission No. GG 142511


Notary Public

My commission expires: 10-24-21.



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E-mail Address: brswiger@jacksonkelly.com
Writer's Fax No.: 304-340-1130
Direct Dial No.: 304-340-1317

January 26, 2018

Barclay DeWet
President of the Board of Directors
The Tierney Corporation

Dear Ms. DeWet:

The undersigned has been retained by Lewis Clark Tierney, III, a current shareholder of The Tierney Corporation. Lewis has held his shares continuously since they were acquired. A copy of the Official Shareholder List, dated April 29, 2016, demonstrating such ownership is enclosed.

I am writing to demand on behalf of Lewis that The Tierney Corporation and Leatherwood Company commence a claim against its executive officers, including former President Ann Tierney Smith, former Secretary Charles Matthew Tierney, and Executive Director Douglas Woloshin, for *inter alia*, self-dealing, conflict of interest, mismanagement and waste of corporate assets, breaches of fiduciary duties, and wrongful withholding of information. While Lewis is unaware of all the facts which give rise to the Companies' claim because evidence supporting such claim is currently in the hands of the corporation and those against whom the claim must be brought, Lewis is aware of the facts summarized below and more fully set forth in the enclosed Complaint, which establishes The Tierney Corporation and Leatherwood Company's claim against those defendants and that the claim should be pursued in the best interest of the shareholders.

Following counsel's investigation of the available record and the records provided to Lewis by the company, the factual record developed to date reveals that defendants did not comply with their legal duties in several respects. A detailed summary of the defendants' mismanagement is set forth in the Complaint and includes fiscal mismanagement and fraudulent legal fees, use of an illegal voting agreement for Board decisions, acts of self-dealing, and wrongful withholding of information from Board members who are not officers, among other misconduct.

These acts, taken as a whole, demonstrate that defendants, in breach of their legal duties, have wasted corporate assets and breached their fiduciary duties, which acts give rise to a viable legal claim on behalf of The Tierney Corporation and Leatherwood Company, and which require

Barclay DeWet
January 26, 2018
Page 2

redress. Consequently, Lewis hereby demands that The Tierney Corporation and Leatherwood Company initiate suit against the above-named persons for the causes of action stated herein and seek to recover losses to the corporation in the approximate amount of not less than \$3,000,000.

As established above, the magnitude of loss to the Companies and the significant likelihood of its recovery in light of applicable insurance maintained by The Tierney Corporation far outweighs any cost to the Companies of proceeding with this claim.

Please note that Lewis and the Plaintiffs listed in the Complaint brought this shareholder derivative action on behalf of The Tierney Corporation and The Leatherwood Company on March 10, 2017 against the named executive officers. On December 7, 2017, Judge Paul Farrell issued an Order dismissing Plaintiffs' Complaint due to the absence of a pre-suit demand upon the board of directors and the shareholders—thus dismissing the case on a procedural issue. It is important to note that Judge Farrell did not address any of the merits of the case in his Order, instead expressly permitting Plaintiffs to re-file after the demand requirement had been fulfilled. A similar demand letter has been contemporaneously delivered to The Tierney Corporation and Leatherwood Company shareholders requesting that the shareholders instruct the board to initiate suit.

Please also note that on January 17, 2018, Lewis sent an email to Reid Avett, Douglas Woloshin, and Patricia Tierney requesting information pursuant to his rights as a shareholder for the purposes of sending this letter. The requested information included the most recent shareholder lists for both Companies, including names and addresses, as well as a list of the current composition of The Leatherwood Company Board of Directors. Because we have not yet received a response, this letter has been sent to the Board members we are aware of at this time. We will forward this letter to any additional Board members once we receive updated information.

Please inform me when the demand will be presented to the Board and when I will be informed of whether The Tierney Corporation and The Leatherwood Company will proceed with the claim detailed in this letter. I am available at the convenience of you or your counsel should you have any questions regarding this demand.

Very truly yours,



Brian R. Swiger

BRS
Enclosure

cc: The Tierney Corporation Board of Directors
The Leatherwood Company Board of Directors
Bob Allen, Counsel for The Companies



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E-mail Address: brswiger@jacksonkelly.com
Writer's Fax No.: 304-340-1130
Direct Dial No.: 304-340-1317

January 26, 2018

To the Shareholders of The Tierney Corporation
and The Leatherwood Company

The undersigned has been retained by Lewis Clark Tierney, III, a current shareholder of The Tierney Corporation. Lewis has held his shares continuously since they were acquired. A copy of the Official Shareholder List, dated April 29, 2016, demonstrating such ownership is enclosed.

I am writing to demand on behalf of Lewis that the shareholders instruct The Tierney Corporation's Board of Directors and The Leatherwood Company's Board of Directors to commence a claim against its executive officers, including former President Ann Tierney Smith, former Secretary Charles Matthew Tierney, and Executive Director Douglas Woloshin, for *inter alia*, self-dealing, conflict of interest, mismanagement and waste of corporate assets, breaches of fiduciary duties, and wrongful withholding of information. While Lewis is unaware of all the facts which give rise to the Companies' claim because evidence supporting such claim is currently in the hands of the corporation and those against whom the claim must be brought, Lewis is aware of the facts summarized below and more fully set forth in the enclosed Complaint, which establishes The Tierney Corporation and Leatherwood Company's claim against those defendants and that the claim should be pursued in the best interests of the shareholders.

Following counsel's investigation of the available record and the records provided to Lewis by the company, the factual record developed to date reveals that defendants did not comply with their legal duties in several respects. A detailed summary of the defendants' mismanagement is set forth in the Complaint and includes fiscal mismanagement, fraudulent legal fees, use of an illegal voting agreement for Board decisions, acts of self-dealing, and wrongful withholding of information from Board members who are not officers, among other misconduct.

These acts, taken as a whole, demonstrate that defendants, in breach of their legal duties, have wasted corporate assets and breached their fiduciary duties, which acts give rise to a viable legal claim on behalf of The Tierney Corporation and Leatherwood Company, and which require redress. Consequently, Lewis hereby demands that the shareholders instruct the Board of Directors to commence and the Companies to initiate suit against the above-named persons for

To the Shareholders of The Tierney Corporation
and The Leatherwood Company
January 26, 2018
Page 2

the causes of action stated herein and seek to recover losses to the Companies in the approximate amount of not less than \$3,000,000. Additionally, Lewis demands that the shareholders vote to remove former President Ann Tierney Smith and Executive Director Douglas Woloshin and elect successors to fill any resulting vacancies pursuant to Article III, Section 4 of the By-laws.


As established above, the magnitude of loss to the Companies and the significant likelihood of its recovery in light of applicable insurance maintained by The Tierney Corporation far outweigh any costs to the Companies of proceeding with this claim.

Please note that Lewis and the Plaintiffs listed in the Complaint brought this shareholder derivative action on behalf of The Tierney Corporation and The Leatherwood Company on March 10, 2017 against the named executive officers. On December 7, 2017, Judge Paul Farrell issued an Order dismissing Plaintiffs' Complaint due to the absence of a pre-suit demand upon the board of directors and the shareholders—thus dismissing the case on a procedural issue. It is important to note that Judge Farrell did not address any of the merits of the case in his Order, instead expressly permitting Plaintiffs to re-file after the demand requirement had been fulfilled. A similar demand letter has been contemporaneously delivered to The Tierney Corporation and Leatherwood Company Board of Directors requesting that the board vote to initiate suit.

Please also note that on January 17, 2018, Lewis sent an email to Reid Avett, Douglas Woloshin, and Patricia Tierney requesting information pursuant to his rights as a shareholder for the purposes of sending this letter. The requested information included the most recent shareholder lists for both Companies, including names and addresses, as well as a list of the current composition of The Leatherwood Company Board of Directors. Because we have not yet received a response, this letter has been sent to the shareholders we are aware of at this time. We will forward this letter to any additional shareholders once we receive updated information.

Please inform me when a special meeting will be called to vote upon the demand and when I will be informed of whether The Tierney Corporation and The Leatherwood Company will proceed with the claim detailed in this letter. I am available at the convenience of you or your counsel should you have any questions regarding this demand.

Very truly yours,



Brian R. Swiger

BRS
Enclosure

cc: The Tierney Corporation Board of Directors
The Leatherwood Company Board of Directors
Bob Allen, Counsel for The Companies

THE TIERNEY CORPORATION

c/o Douglas Woloshin

505 9th Street, N.W., Suite 1000, Washington, D.C. 20004

(202) 776-7831

February 9, 2018

Mr. Lewis Tierney
244 East 86th Street, #24
New York, NY 10028

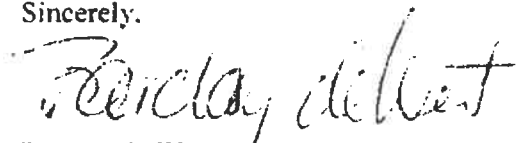
Lewis –

I was forwarded your January 17, 2018 email to Reid Avett, Doug Woloshin, and Patricia Tierney, and asked to respond on behalf of the group. I apologize for this delayed response: Matthew Tierney suffered a severe heart attack last month which has required his wife's near constant attention and has limited my ability to confer with the executive committee in responding to your request. In any event, attached are the current shareholder lists, dated January 22, 2018. The executive committee is taking your other requests under advisement and will be in touch as appropriate.

I have also received your lawyer's demand letter from January 26, and can assure you that I take seriously my responsibility to guide The Tierney Corporation in a responsible and independent investigation of your complaints. It is my intention to alert the shareholders to this development, to conduct an initial investigation of your lawyers' allegations, and to follow up with you and the shareholders with a more comprehensive assessment of my view on the companies' most appropriate response.

I intend to respond to your demand in short order, but because I am new to this job, and because your wide-ranging allegations are fairly different from your earlier complaint, I hope that you will allow me some time to get my bearings and will contact me before taking any further action. Ultimately, I hope that we can work together to ensure that an appropriate investigation takes place which enables the board and the shareholders to make an informed decision with respect to your complaints.

Sincerely,



Barclay de Wet

EXHIBIT

B

THE TIERNEY CORPORATION

505 9th Street, N.W., Suite 1000, Washington, D.C. 20004

March 1, 2018

Dear Shareholder,

It is my pleasure and honor to introduce myself as the new President of The Tierney Corporation (the "Company"). For over 23 years, this company prospered under the steady hand of my mother, Ann Tierney Smith. During her tenure, the company distributed over \$21 million to the shareholders in the form of dividends, always working to do so in the most tax efficient manner. Since 2010, my mother's tenure saw an annualized return in our stock portfolio of over eleven percent, the receipt of over \$4 million in proceeds from our coal, gas, and timber reserves, the maintenance of our 1031 exchange portfolio, and substantial initial steps in the development of a large piece of commercial and residential real estate held by The Leatherwood Company which, if successful, promises to exponentially increase the amount of value that we will return to the shareholders in the coming years. Mom has left big shoes to fill, but I am honored to serve as President and assure you that I am up to the challenge.

Regretfully, the transition to ownership and management by the fourth generation of Colonel Tierney's heirs has not been without obstacles. As you will see in the enclosed reports, director Lewis Tierney filed a lawsuit last year in which he made a number of serious allegations regarding the management of our companies. That lawsuit was dismissed by the Court, but forced the Company to incur over \$350,000 in legal fees. What's more, Lewis recently brought a second lawsuit raising many of the same allegations. You may already have received a separate letter from attorney Brian Swiger, enclosing a copy of this second lawsuit; I want to take this opportunity to correct some misstatements in Mr. Swiger's letter and to assure you that I take seriously my responsibility to guide The Tierney Corporation in a responsible and independent investigation of Lewis' complaints.

First, Mr. Swiger alleges that his first lawsuit was dismissed on a purely procedural basis. This is simply not true. The first lawsuit was dismissed because Lewis and his lawyers illegally filed their lawsuit without first bringing it to the attention of the management and the shareholders. Far from a procedural technicality, the law requires that you and I be given an opportunity to exercise our own business judgment before being dragged into potentially expensive and risky lawsuits. Indeed, Lewis and his lawyers appear to have repeated that process, by filing their second lawsuit again without allowing us an opportunity to weigh in on these important matters. This second lawsuit is similar to the first but it appears Lewis has acknowledged that their minority shareholder oppression claim was not only factually incorrect but was legally deficient; that claim appears to be dropped from the second lawsuit.

Second, Mr. Swiger alleges that the Company refused requests for information regarding its operations. This, too, is false. Both before and during their first lawsuit, Lewis and his lawyers ignored repeated overtures and offers to provide access to our business records. The majority of Lewis' requests could be fulfilled by Lewis reviewing the Company's past annual reports to shareholders – documents which the Company sends to each of us every year.

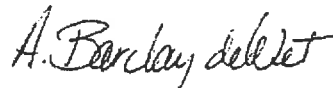
Third, Mr. Swiger insinuates that there are insurance policies which will protect the companies from the risks of litigation. This is false. Although we maintain directors and officers insurance, our policy does not cover claims for lawsuits – like these – which are filed by directors against other directors. Our By-laws require that the Company indemnify directors and officers against claims such as those raised in this lawsuit, so every dollar that the Company, its directors or its officers incur in litigation is a dollar that cannot be used in the Company's operations or distributed to you.



Finally, and most importantly, Mr. Swiger contends that his investigation revealed violations of the law. As your President, I will investigate these allegations thoroughly, hopefully in cooperation with Lewis, in order to put the Company and its shareholders in a position to make an informed decision on how to respond to Lewis' demand. If necessary, I will look to outside investigators to help with the process. And I will do so with an eye toward maximizing value for the shareholders, sensitive to the fact that Lewis Tierney's lawsuits have already cost The Tierney Corporation hundreds of hours of directors' and officers' time and more than \$350,000 in legal fees, and that continued litigation threatens to engulf the Company in a legal morass with little end in sight.

As I stated above, I intend to guide the Company in a responsible and independent investigation of Lewis' complaints. Should you have any questions about any of the above, please do not hesitate to contact me either at 859-340-2285 or b Barclay.tierneycorp@gmail.com.

The Tierney Corporation was founded over 100 years ago in 1912 when William Howard Taft was president. After 18 other U.S. presidents, the Company has an established legacy of maximizing value for its shareholders - a legacy which I am committed to preserve. I look forward to helping ensure that the Company will continue that legacy for the next 100 years.



Ann Barclay de Wet
President

THE TIERNEY CORPORATION

505 9th Street, N.W., Suite 1000, Washington, D.C. 20004

April 20, 2018

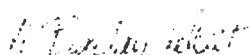
Dear Shareholder,

I am writing to provide you a brief update on the status of my investigation into the allegations raised in the second lawsuit filed earlier this year by Lewis Tierney and Carolyn Kenna Tierney Greisemer.

As you will recall from my correspondence of March 1, 2018, I promised you that as the President of The Tierney Corporation, I would guide the Company in a responsible and independent investigation of allegations in the Complaint. To that end, I have sent out initial requests to relevant parties seeking information related to those allegations. I have enclosed copies of all of those requests for your review. As you will see, this includes a request to Lewis and Carol's attorney seeking clarification and greater detail about their allegations. As these are preliminary requests, they will be followed up with more specific requests in the future.

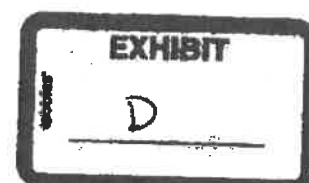
Please do not hesitate to contact me if you have any questions regarding these requests or if you have any information that you think I should know about the allegations in the Complaint and that you think would benefit my inquiry. You can contact me at (859) 340-2285 or barclay.tierneycorp@gmail.com.

Sincerely,



Barclay de Wet
President
The Tierney Corporation

Enclosures



THE TIERNEY CORPORATION

505 9th Street N.W., Suite 1000, Washington, D.C. 20004

April 20, 2018

Wanda Z. Rogers
8003 Old Trail Drive
Durham, NC 27712

Re The Tierney Corporation and The Leatherwood Company

Dear Wanda:

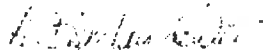
I hope all is well with you. I wish I could be writing you regarding more pleasant matters, but as you are no doubt aware by now, Lewis Tierney and Carol Tierney Griesemer have filed another lawsuit and made a demand on The Tierney Corporation and its shareholders, after their last lawsuit was dismissed. I have enclosed a copy of the demand, dated January 26, 2018, and the new Verified Shareholder Derivative Complaint ("Complaint") for your reference. As the newly-elected President of The Tierney Corporation, it is my intention and duty to guide the company in a responsible and independent investigation of the allegations outlined in their Complaint. To that end, and as Clayton's wife and executor of his estate, I ask that you please provide me with any information you may have that relate to the allegations in their Complaint.

If there is someone that has been assisting you with Clayton's affairs and that you think may be better suited to handle this request, please let me know who that may be and whether I can reach out to them directly. Please note that I have made a similar request to the other parties involved in this matter, including a request to Lewis and Carol's attorney seeking clarification and greater detail regarding their allegations. Accordingly, this is simply a preliminary request and may be followed up with more specific requests in the future.

I take seriously my obligations to the Company and its shareholders and want to ensure that I have a thorough understanding of the facts before taking or recommending any action with respect to the new Complaint. I look forward to your response and hope that we can find a time to discuss the matter in person at the appropriate juncture once I've had an opportunity to review the facts and evidence produced in connection with this inquiry. As I noted, I intend to review all available evidence before reaching any conclusions or making any recommendations to the Board or the shareholders. Thus, I may have follow up questions as information comes in from you and other sources.

If you should have any questions regarding my request, please feel free to write me at the above address or send me an email at barclay.tierneycorp@gmail.com. In advance, thank you for your attention to this matter.

Sincerely,



Barclay de Wet
President
The Tierney Corporation

cc Shareholders The Tierney Corporation

EXHIBIT

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY;
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER;
and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
Derivatively on behalf of The Tierney Corporation
and The Leatherwood Company,

Plaintiffs,

v.

Civil Action No. 18-C-90
(Judge Tabit)

ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co.;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co.;
DOUGLAS WOLOSHIN, Individually and in his
capacity as a director and officer of The Tierney
Corporation and The Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
partnership; and THE TIERNEY
CORPORATION, a West Virginia corporation,
a nominal defendant, THE LEATHERWOOD
COMPANY, a West Virginia corporation,
a nominal defendant,

Defendants.

**MOTION TO DISMISS OF THE TIERNEY
CORPORATION AND THE LEATHERWOOD COMPANY**

Come now nominal defendants The Tierney Corporation and The Leatherwood Company, by
their counsel, Robert B. Allen and Michael T. Chaney, of Kay Casto & Chaney PLLC, and move this
honorable Court to dismiss this shareholder derivative action pursuant to Rule 12(b)(6) or Rule 23.1
of the West Virginia Rules of Civil Procedure. In support thereof, The Tierney Corporation and The
Leatherwood Company rely upon and incorporate by reference their *Memorandum Of Law In*

Support Of "Motion To Dismiss Of The Tierney Corporation And The Leatherwood Company" filed contemporaneously herewith and Motion Exhibit 1 attached to this motion.

WHEREFORE, nominal defendants The Tierney Corporation and The Leatherwood Company respectfully request that the Court enter an Order dismissing this civil action with prejudice, denying Plaintiffs' claims for relief as a matter of law, and granting any additional relief the Court deems proper.

Respectfully Submitted,

THE TIERNEY CORPORATION
and THE LEATHERWOOD COMPANY

BY COUNSEL



ROBERT B. ALLEN (WV Bar No.110)
MICHAEL T. CHANEY (WV Bar No. 697)
KAY CASTO & CHANEY PLLC
707 Virginia Street, East, Suite 1500
Charleston, WV 25301
Telephone: (304) 345-8900
Facsimile: (304) 345-8909

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY;
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER;
and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
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and The Leatherwood Company,

Plaintiffs,

v.

Civil Action No. 18-C-90
(The Honorable Joanna I. Tabit)

ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co.;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co.;
DOUGLAS WOLOSHIN, Individually and in his
capacity as a director and officer of The Tierney
Corporation and The Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
partnership; and THE TIERNEY
CORPORATION, a West Virginia corporation,
a nominal defendant, THE LEATHERWOOD
COMPANY, a West Virginia corporation,
a nominal defendant,

Defendants.

CERTIFICATE OF SERVICE

I, ROBERT B. ALLEN, counsel for Defendants, The Tierney Corporation and The
Leatherwood Company, do hereby certify that on this the 13th day of July, 2020, the foregoing
“*Motion to Dismiss of The Tierney Corporation and The Leatherwood Company*” has been
served upon counsel of record by placing a true and exact copy thereof in the U. S. Mail, postage
prepaid, addressed as follows:

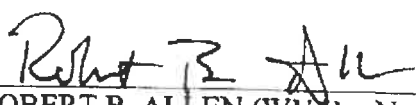
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Jackson Kelly PLLC
P.O. Box 553
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Frost Brown Todd LCC
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J. Mark Adkins, Esq.
Bowles Rice LLP
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(Counsel for C. Matthew S. Tierney)

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Louisville, KY 40202-3352
(Counsel for C. Matthew S. Tierney)

Michael B. Hissam, Esq.
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Hissam Forman Donovan Ritchie PLLC
P. O. Box 3983
Charleston, WV 25339
*(Counsel for Duane Morris, LLP
and Douglas Woloshin)*


ROBERT B. ALLEN (WV Bar No. 110)
KAY CASTO & CHANEY PLLC
707 Virginia Street, East, Suite 1500
P. O. Box 2031
Charleston, WV 25327
(304) 345-8900

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY;
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER;
and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
Derivatively on behalf of The Tierney Corporation
and The Leatherwood Company,

Plaintiffs,

v.

Civil Action No. 18-C-90
(Judge Tabit)

ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co.;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co.;
DOUGLAS WOLOSHIN, Individually and in his
capacity as a director and officer of The Tierney
Corporation and The Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
partnership; and THE TIERNEY
CORPORATION, a West Virginia corporation,
a nominal defendant, THE LEATHERWOOD
COMPANY, a West Virginia corporation,
a nominal defendant,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
“MOTION TO DISMISS OF THE TIERNEY CORPORATION
AND THE LEATHERWOOD COMPANY”**

Come now nominal defendants The Tierney Corporation and The Leatherwood Company
(at times collectively referred to herein as the “Companies”), by their counsel, Robert B. Allen
and Michael T. Chaney, of Kay Casto & Chaney PLLC, and submit this memorandum of law in
support of *Motion To Dismiss Of The Tierney Corporation And The Leatherwood Company*

("Motion"), requesting, for the reasons stated herein, that this Court dismiss the claims asserted in the *Amended Verified Shareholder Derivative Complaint* filed in this action on May 13, 2018 ("Amended Complaint").

I. Introduction

All of the claims asserted in this action are derivative claims which belong exclusively to the Companies. The Plaintiff shareholders are just nominal parties that have no right, title or interest in the derivative claims. An independent investigator retained by the Companies has determined that pursuing the claims asserted in this derivative action is not in the best interests of the Companies and has recommended that the Companies seek dismissal of those claims. An overwhelming majority of shareholders of the Companies voted to accept the independent investigator's recommendation to seek dismissal of the claims. Accordingly, the Plaintiffs have not stated a claim upon which relief may be granted under Rule 12(b)(6) of the WVRCP. As set forth below, even if the claims could survive dismissal under Rule 12(b)(6) they should, nevertheless, be dismissed for failure of Plaintiffs to meet the heightened pleading standard of Rule 23.1 of the WVRCP.

II. Statement Of Pertinent Background

A. General Background Of The Companies

The Companies are West Virginia corporations that are owned and controlled by descendants of Colonel Lawrence Tierney. (Amended Compl. at ¶ 7). During the Relevant Period¹, Defendant Douglas Woloshin ("Doug Woloshin"), an attorney and member of the District of Columbia bar, and his law firm Defendant Duane Morris, LLP ("Duane Morris"), an

¹ The term "Relevant Period" is defined in the Plaintiffs' Amended Complaint as: "Beginning in 2001 and continuing to the present." (Amended Compl. at ¶ 2).

international law firm, provided legal and administrative services to the Companies. (Amended Compl. at ¶¶ 29-30)

The outstanding shares of The Tierney Corporation are primarily owned by three families in the following percentages: (1) Defendant Ann Tierney Smith (“Ann Smith”) and family own 27%; (2) Defendant C. Matthew S. Tierney (“Matthew Tierney”) and his family own 21%; and (3) the Plaintiffs (heirs and family members of L. Clark Tierney, Jr.) own 21%. (Amended Compl. at ¶ 9). The percentage of shares held by the three families is 69.3%. (*Id.*). The remaining outstanding shares of The Tierney Corporation are held by 20 separate shareholders with none owning more than 4.11% percent. (*Id.*).

From 2001 until December 2017, Ann Smith served as President of The Tierney Corporation. During the Relevant Period, The Tierney Corporation’s Board of Directors (the “Board”) consisted of five members, three members of which also serve on its Executive Committee. (Amended Compl. at ¶ 10). From 2001 until 2015, the Board consisted of Ann Smith, Matthew Tierney, Doug Woloshin, Plaintiff Carolyn Kenna Tierney Griesemer (“Carol Griesemer”), and Clayton Rodgers. (Amended Compl. at ¶¶ 11, 17, 29, 78). In 2015, Carol Griesemer’s son, Plaintiff Lewis Tierney II (“Lewis Tierney”), replaced her on the Board. Thus, from 2015 until October 2016, the Board consisted of Ann Smith, Matthew Tierney, Doug Woloshin, Lewis Tierney, and Clayton Rodgers. (*Id.* at ¶ 17). From 2001 to 2016, Ann Smith, Matthew Tierney, and Doug Woloshin also served on the Executive Committee. In October 2016, Matthew Tierney retired from the Board and Executive Committee and he was replaced by his wife, Patricia Tierney (“Pat Tierney”), both as a director and Executive Committee member. (*Id.* at ¶¶ 10-11). In December 2017, Ann Smith stepped down as President and her daughter, Barclay de Wet (“President de Wet”), was elected in her place. (*Id.* at ¶ 11). At the same time,

President de Wet was elected to fill the empty seat on the Board created by the passing of Clayton Rodgers. (Amended Compl. at ¶¶ 10-11, 78).

The Tierney Corporation owns 62% of the stock in The Leatherwood Company. Plaintiffs are not shareholders in The Leatherwood Company. (Amended Compl. at ¶ 16). The remaining 38% of stock in The Leatherwood Company is owned by Ann Smith and her family. (*Id.*). At times relevant up until 2016, the members of the Board of Directors of The Leatherwood Company were Ann Smith, Matthew Tierney, and Doug Woloshin. (*Id.* at ¶ 16). Matthew Tierney retired from the Board of Directors in 2016 and he was replaced by Pat Tierney. (*Id.*).

III. Procedural History

A. First Derivative Action

On March 10, 2017, Plaintiffs filed a *Verified Shareholder Derivative Complaint* in the Circuit Court of Kanawha County, West Virginia, styled *Lewis Clark Tierney, III, et al. v. Ann Tierney Smith, et al.*, Civil Action No. 17-C-346 (the “First Derivative Action”). By Administrative Order of the Supreme Court of Appeals of West Virginia dated July 12, 2017, the First Derivative Action was referred to the Business Court Division. By order entered by Judge Paul T. Farrell dated December 7, 2017, the First Derivative Action was dismissed because Plaintiffs failed to allege with particularity the lack of independence or disinterestedness of a majority of the Tierney Corporation's Board of Directors and shareholders as of the filing of the First Derivative Action sufficient to excuse, as futile, the demand requirement of Rule 23.1 of the West Virginia Rules of Civil Procedure. (*Id.*)

B. This Derivative Action

On January 26, 2018, Lewis Tierney, by and through his legal counsel, sent separate demand letters to President de Wet, in her capacity as President of The Tierney Corporation, and to the shareholders of The Tierney Corporation ("Demand Letters"). (See Amended Compl. at ¶¶ 5, 91 and Exhibit A). A *Verified Shareholder Derivative Complaint* ("Complaint") was enclosed with the Demand Letters. (*Id.*). The Demand Letters demanded that the Companies commence claims against the Defendants asserting the claims set forth in the Complaint which were substantially the same claims that were asserted in the First Derivative Action. (*Id.*) A mere three (3) days later, on January 29, 2018, Plaintiffs filed the Complaint ("Second Derivative Action")². The Complaint was not served.

In a letter dated February 9, 2018 from President de Wet to Lewis Tierney, she stated that she was taking seriously her "responsibility to guide The Tierney Corporation in a responsible and independent investigation of your complaints." (See Amended Compl. at Exhibit B). In a subsequent letter to the shareholders dated March 1, 2018, President de Wet again promised that she was taking seriously her "responsibility to guide The Tierney Corporation in a responsible and independent investigation of Lewis' complaints." (See Amended Compl. at Exhibit C).

² As stated previously, the Plaintiffs are not shareholders of The Leatherwood Company. Therefore, in filing this derivative action, Plaintiffs are attempting to pursue what is referred to as a "double derivative" action. There is no conclusive legal authority in West Virginia on the issue of whether a "double derivative" action is permissible under West Virginia corporate law. Accordingly, since the Plaintiffs are not shareholders of The Leatherwood Company, it is not clear under West Virginia law whether or not the Plaintiffs have standing to assert derivative claims on behalf of The Leatherwood Company. The Companies' independent investigator, Arie Spitz, has opined that a "double derivative" action is permissible under West Virginia corporate law. The Companies assume, for purposes of this Motion, that Mr. Spitz's opinion on that issue is correct. In so doing, the Companies do not intend to waive the right to later assert any defense based upon lack of standing of the Plaintiffs to assert derivative claims on behalf of The Leatherwood Company.

On April 20, 2018, President de Wet sent a letter to the shareholders communicating the status of her independent investigation of the claims set forth in the Demand Letters. (See Amended Compl. at ¶ 91 and Exhibit D). In that letter, President de Wet advised:

As you will recall from my correspondence of March 1, 2018, I promised you that as the President of The Tierney Corporation, I would guide the Company in a responsible and independent investigation of allegations in the Complaint. To that end, I have sent out initial requests to relevant parties seeking information related to those allegations. I have enclosed copies of all of those requests for your review. As you will see, this includes a request to Lewis and Carol's attorney seeking clarification and greater detail about their allegations. As these are preliminary requests, they will be followed up with more specific requests in the future.

(See Amended Compl. at ¶ 91 and Exhibit E). On May 13, 2018, less than a month after President de Wet's April 20th letter, Plaintiffs filed the Amended Complaint to incorporate the Demand Letters.³ The Amended Complaint was served upon the parties. Lewis Tierney and Carol Griesemer did not respond to President de Wet's request for clarification and greater detail about Plaintiffs' allegations prior to the filing of the Amended Complaint.

On July 9, 2018, Defendants Duane Morris and Doug Woloshin filed a motion to dismiss and combined memorandum of law in support. On July 11, 2018, the Companies filed an answer to the Amended Complaint. On the same day Defendant Ann Smith and Defendant Matthew

³ Generally, the claims asserted in the Amended Complaint are: (1) a statutory claim to remove Ann Smith and Doug Woloshin as directors (Count I); (2) breach of fiduciary duty, gross negligence, mismanagement, self-dealing and corporate waste claims against all individual defendants (Count II); (3) a breach of fiduciary duty claim against Doug Woloshin (Count III); (4) a negligence claim against Duane Morris and Doug Woloshin (Count IV); (5) a breach of contract claim against Duane Morris and Doug Woloshin (Count V); (6) an unjust enrichment claim against Duane Morris and Doug Woloshin (Count VI); and (7) a statutory claim for inspection of records by shareholders (Count VII). (See generally Amended Compl.) Many of the allegations asserted in support of the claims are broadly stated, vague and conclusory. (See generally Amended Compl.). The most significant allegations asserted in support of the claims with any level of specificity are that: (1) the individual Defendants allegedly permitted Ann Smith to engage in self-dealing with the Companies in connection with an option agreement that was ultimately consummated in 2009 whereby Leatherwood Horse Farm, which was owned by Ann Smith, was purchased by The Leatherwood Company whereby Leatherwood Horse Farm was exchanged for a Walgreens property located in West Palm Beach; and (2) Defendants Doug Woloshin and Duane Morris allegedly overbilled the Companies for legal and administrative fees and the individual Defendants allegedly wrongfully permitted those legal and administrative charges to be paid by the Companies.

Tierney filed separate motions to dismiss and memoranda of law. All of the previously filed motions to dismiss are still pending.

C. Independent Investigation

At the time of the filing of the Amended Complaint, all of the directors of The Tierney Corporation were either a party to this action or related to a party. Even so, after the filing of the Amended Complaint, President de Wet, out of an abundance of caution and in an effort to avoid the appearance of any impropriety, made every effort to attempt to constitute, from the Board, an independent special litigation committee of disinterested directors to investigate Plaintiffs' claims. As a result of family relationships, President de Wet was unable to identify any currently serving directors that were disinterested or any disinterested persons that were willing to be appointed to serve as independent directors. After determining that the formation of an independent special investigation committee would be futile, President de Wet determined that the Companies needed to retain an outside independent investigator. To that end, President de Wet identified and vetted a number of attorneys to conduct an independent investigation. After identifying and interviewing potential independent investigators, Arie M. Spitz ("Mr. Spitz"), an attorney with the law firm of Dinsmore & Shohl LLP ("Dinsmore"), was retained in November 2018 to: (1) perform an independent investigation of the claims asserted in the Amended Complaint; and (2) provide a report and recommendation as to whether the Companies should pursue the derivative claims or seek their dismissal. On May 19, 2020, Mr. Spitz issued a report of his independent investigation which consisted of a seventy-three (73) page written report, attached as Motion Exhibit 1,⁴ and an appendix consisting of more than 2,100 pages of supporting documents ("Dinsmore Report").

⁴ Motion Exhibit 1 referenced in this Memorandum, which is the Dinsmore Report exclusive of the Appendix, is attached to the Motion.

Mr. Spitz and other attorneys with Dinsmore conducted an extensive investigation that took over a year and a half to complete. As part of the independent investigation, Mr. Spitz and his team: (1) reviewed and analyzed over 21,000 documents; (2) conducted interviews and submitted follow up questions to the parties and witnesses; (3) reviewed responses to additional follow up questions from Ann Smith and Doug Woloshin; (4) reviewed additional documents provided by Duane Morris; (5) reviewed submission statements and exhibits from legal counsel for the parties; and (6) conducted legal research relating to the claims asserted in the Amended Complaint. (*See* Motion Exhibit 1, Pages 6-7). The Companies and the Defendants cooperated fully and completely with the investigation and provided all information and documentation requested. (*See generally*, Motion Exhibit 1).

The Dinsmore Report contains a full summary of Mr. Spitz's factual findings and provides a thorough analysis of the viability of each claim asserted in the Amended Complaint. (*See* Motion Exhibit 1, Pages 7-30). The Dinsmore Report further contains a full and extensive legal analysis of the claims asserted in the Amended Complaint. (*See* Motion Exhibit 1, Pages 30-72). A significant portion of the claims asserted in the Amended Complaint relate to what is referred to as the "horse-farm" transaction between Ann Smith and The Leatherwood Company. With respect to those claims, Mr. Spitz concluded that "the allegations will not survive application of the statute of limitations or the safe harbor rule." (*See* Motion Exhibit 1, Pages 54-60). Mr. Spitz also concluded that most of the claims against Duane Morris would also not survive the application of the statute of limitations. (*See* Motion Exhibit 1, Pages 31-54; 63; 64-70). Of the claims that could be pursued, Mr. Spitz opined that the Companies could potentially recover \$246,651.63. (*Id.*). With respect to potential recovery, Mr. Spitz stated:

While it may be possible for the companies to recover this portion of the fees paid to Duane Morris, there are significant downsides to

such a pursuit: the companies will have to incur the cost of funding the litigation and will not be able to recover these costs; the litigation is likely to be lengthy and will continue to impact the companies' ability to conduct business operations both due to the time that will need to be devoted to the litigation as well as the negative impact the litigation has on the relationship between Duane Morris and the companies; and there is no guarantee that the claims will be successful.⁵

(See Motion Exhibit 1, Page 1). Accordingly, Mr. Spitz found that pursuing the claims asserted in the Amended Complaint was not in the best interest of the Companies and he recommended that the Companies seek dismissal of all of those claims. (See Motion Exhibit 1, Page 1 and 72-73).

D. Shareholder Approval Of Independent Investigator's Recommendation To Seek Dismissal Of The Claims Asserted In The Amended Complaint.

On May 20, 2020, President de Wet, as President of The Tierney Corporation, pursuant to the By-laws of the company and West Virginia law, mailed to all shareholders of record a notice of a special shareholder meeting to be held on May 30, 2020 ("Notice of Special Meeting"). The Notice of Special Meeting stated that the purpose of the meeting was to consider and vote on a resolution to accept Mr. Spitz's recommendation to reject Plaintiffs' demands and direct the Board to take all actions necessary to seek dismissal of the Second Derivative Action. The Notice of Special Meeting was transmitted to the shareholders with a cover letter from President de Wet. In the cover letter, President de Wet informed the shareholders that: (i) Mr. Spitz's independent investigation had concluded; (ii) the Dinsmore Report had been submitted to the Executive Committee for its review; (iii) the Dinsmore Report concludes that pursuing the

⁵ In 2017, after the dismissal of the First Derivative Action, individual director defendants made substantial claims for mandatory indemnification pursuant to the By-laws of the Companies. The Dinsmore report concludes that it is very likely that the directors will be successful in defending the claims in the Second Derivative Action. If that is the case, there will be further indemnification claims that the Companies will be obligated to pay. The amounts of the past indemnification claims paid and the anticipated new indemnification claims will undoubtedly exceed any potential amount recovered in connection with the claims asserted in the Amended Complaint.

claims asserted in the Second Derivative Action is not in the best interest of the Companies; and (iv) Mr. Spitz, as independent legal counsel to the Companies, recommends that the Companies seek dismissal of the Second Derivative Action.

The special shareholder meeting was held on May 30th as noticed and 20,346 shares were represented either in person or by proxy, which amounts to 93% of the total outstanding shares, thus, constituting a quorum. ("Special Shareholder Meeting"). Prior to the Special Shareholder Meeting, any shareholder that requested a copy of the Dinsmore Report was provided a copy of the report.⁶ Of the shares participating at the Special Shareholder Meeting, 14,542 shares voted in favor of the resolution to seek dismissal of the claims asserted in this derivative action, which amounts to 71% of the total participating shares and 66% of all outstanding shares. Of the 20,346 shares that were voted, 5,054 could be considered "independent shares".⁷ Of those 5,054 "independent shares", 3,878 voted in favor of the dismissal resolution, which amounts to 77% of the participating "independent" shares. The vast majority of the shares that voted against dismissal were held by the Plaintiffs, the Plaintiffs' immediate family members, or trusts held for the benefit of Plaintiffs or their family members.

A Special Meeting of the Board of Directors was held immediately following the Special Shareholder Meeting. During that special meeting, the Board of Directors authorized President de Wet to take all actions necessary to seek dismissal of the Second Derivative Action pursuant to the resolution adopted by the shareholders during the Special Shareholder Meeting.

IV. Legal Standard

A. Rule 12(b)(6) Standard

⁶ Only the 73 page report was provided to requesting shareholders. The appendix was not provided out of a concern for protecting certain confidential documentation and potentially privileged information contained therein.

⁷ For the purposes of this Memorandum, the term "independent shares" means: (i) shares held by persons or trusts that are not parties; (ii) shares held by persons who are not immediate family members of a party; or (iii) shares held by trusts established for the benefit of persons who are not parties or immediate family members of parties.

West Virginia law is well-settled that a court “may dismiss a pleading for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The purpose of a motion to dismiss under WVRCP 12(b)(6) is to ‘test the formal sufficiency of the complaint,’” enabling courts to “weed out unfounded suits.” *Collia v. McJunkin*, 178 W. Va. 158, 160, 358 S.E.2d 242, 243 (1987); *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104, n.17 (1996). Although a trial court is to construe the complaint in the light most favorable to the plaintiff, and its allegations are to be taken as true, *John W. Lodge Distrib. Co. v. Texaco*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978), the court should dismiss “the complaint [if] it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Napier v. Napier*, 211 W. Va. 208, 211, 564 S.E.2d 418, 421 (2002).

The Supreme Court of Appeals of West Virginia, in *Forshey v. Jackson*, recognized that:

[I]n ruling upon a motion to dismiss under Rule 12(b)(6), a court may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice.⁸

Forshey v. Jackson, 222 W. Va. 743, 747, 671 S.E.2d 748, 752 (2008) (internal citations omitted). Within the context of a shareholder derivative action, the United States District Court for the Western District of Virginia considered the report of a special investigator in deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure even though it was not annexed to the complaint. See generally *Rose v. Bozworth, et al*, 2015 WL 4662152 (W.D.Va.). In *Rose*, it appears that the special investigator’s report was considered by the court

⁸ Without question, the Dinsmore Report is material to the allegations in the Amended Complaint relating to the investigation of the claims set forth in the Demand Letters and the Amended Complaint. (See Amended Compl. at ¶¶ 94, 96, 97, 100 and 101).

in order to determine if the corporation acted appropriately in investigating the derivative plaintiff's claims. Likewise, this Court may consider the Dinsmore Report in deciding this motion to dismiss even though it is not annexed to or incorporated into the Amended Complaint.⁹

B. Rule 23.1 Heightened Pleading Standard

"In order to preserve the managerial freedom of corporate directors, Rule 23.1 requires that a shareholder invoking the mechanism of a derivative action plead with particularity either the efforts he has made to obtain the desired relief, or his reasons for not doing so." *Mercier v. Blankenship*, 662 F. Supp. 2d 562, 574 (S.D. W. Va. 2009). This "heightened pleading standard further reinforces the notion that a shareholder derivative suit is an extraordinary procedural device, to be used only when it is clear that the corporation will not act to redress the alleged injury to itself." *Stepak v. Addison*, 20 F.3d 398, 402 (11th Cir. 1994) (quotation omitted). "If a plaintiff only needed to plead generally that the board wrongfully rejected the pre-suit demand, the procedural commands of Rule 23.1 would be substantially undermined, allowing even the most frivolous of suits to proceed following the board's refusal." *Lewis v. Hilton*, 648 F. Supp. 725, 727 (N.D. Ill. 1986).

V. Argument

A. The Amended Complaint Must Be Dismissed Because An Overwhelming Majority Of Shareholders Have Voted That The Companies Should Seek Dismissal Of All Claims Asserted Therein.

The Supreme Court of Appeals of West Virginia has recognized: "A fundamental principle of the law of corporations is that a shareholder derivative action is an equitable

⁹ Alternatively, this Court would also have grounds to dismiss the Amended Complaint under Rule 12(b)(1) of the WVRCP for lack of jurisdiction over the subject matter based upon the Plaintiffs' lack of standing to bring the claims under Rule 23.1 of the WVRCP. Under Rule 12(b)(1) this Court can consider matters outside of the pleadings without converting the Motion to a motion for summary judgment. See *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1473 (4th Cir. 1991). The Companies, in filing this Motion, do not waive the right to, if necessary, later seek dismissal under Rule 12(b)(1) of the WVRCP.

proceeding in which a shareholder asserts, on behalf of the corporation, a claim that belongs to the corporation rather than the shareholder.” *Manville Pers. Injury Settlement Tr. v. Blankenship*, 231 W. Va. 637, 643, 749 S.E.2d 329, 335 (2013) (internal citations omitted). “The shareholder, as a nominal party, has no right, title or interest in the claim itself.” 12B Fletcher Cyc. Corp. § 5908. As such, the Companies are the real parties in interest in this derivative action. *Ross v. Bernhard*, 396 U.S. 531, 538, 539 (1970). The Supreme Court of the United States has recognized “the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991) (internal citation omitted).

In most instances, the decision to pursue or seek dismissal of claims asserted in a derivative action rests with a corporation’s disinterested directors or a special litigation committee established by the disinterested members of a corporation’s board of directors. As previously stated, in this instance, President de Wet, after carefully considering the Companies’ options to undertake a fair and independent investigation of Plaintiffs’ claims, determined that there were not a sufficient number of disinterested directors to form a special litigation committee. As result of that determination, an independent investigator was retained and the decision to pursue or seek dismissal of claims was placed before the shareholders for vote based upon the recommendation of the Companies’ independent investigator, Mr. Spitz, as reflected in the Dinsmore Report.

There is limited guidance under West Virginia law as what should be considered by a court in deciding whether to grant a motion to dismiss a derivative action based upon a vote of a majority of the corporation’s shareholders. The Supreme Court of Appeals of West Virginia,

however, has long recognized that: “The majority of the stockholders of a corporation, in the absence of fraud, have the uncontrollable right to manage the corporate affairs within the powers possessed by such corporation, and a court of equity will not interfere at the suit of a minority to control such corporate action.” *Syllabus, Moore v. Lewisburg & R.E. Ry. Co.*, 80 W. Va. 653, 93 S.E. 762 (1917); *see also Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 63 S.E. 613, 615 (1909). The Appeals Court of Massachusetts, in *Alberti v. Green*, applied Massachusetts Rule of Civil Procedure 23.1 which contains language virtually identical to West Virginia Rule of Civil Procedure 23.1 in addressing the dismissal of a derivative action based upon majority shareholder vote. In so doing, the *Alberti* Court recognized that if a majority of shareholders vote to dismiss a derivative action, it should be dismissed if the vote was found to be “a reasonable and good faith action by the shareholders.” *Aliberti v. Green*, 6 Mass. App. Ct. 41, 45, 372 N.E.2d 534, 537 (1978) (internal citations omitted); *see also, Palley v. Baird*, 356 Mass. 737, 737, 254 N.E.2d 894, 894 (1970); *Braunstein v. Devine*, 337 Mass. 408, 414, 149 N.E.2d 628, 631 (1958). The *Aliberti* Court further stated: “The majority of shareholders are presumed to have acted in good faith and with a consciousness of duty toward the corporation and all its shareholders.” *Aliberti*, 6 Mass. App. Ct. at 46, 372 N.E.2d at 537 (internal citations omitted).

Without question, the claims asserted in this derivative action belong to the Companies. The Plaintiff shareholders, as nominal parties, have no right, title or interest in the claims. As described in Section III.C., *supra*, Mr. Spitz and his team at Dinsmore conducted an extensive independent investigation and legal analysis of the claims asserted in the Amended Complaint. In the end, Mr. Spitz opined that it was not in the best interest of the Companies to pursue the claims asserted in the Amended Complaint and he recommended to the Companies to seek dismissal of all of those claims. As previously stated, at the Special Shareholders Meeting, an

overwhelming majority of the shareholders, even excluding “interested” shareholders, approved the resolution to accept Mr. Spitz’s recommendation. The shareholders were fully justified in accepting Mr. Spitz’s recommendation and, in so doing, they acted reasonably and in good faith in voting to seek the dismissal of all claims asserted in the Amended Complaint. Pursuant to Rule 23.1 of the WVRCP, in order for the Plaintiffs to assert derivative claims they must be able to demonstrate and plead with particularity that the Companies unjustifiably failed to act upon the claims set for in the Demand Letters or that their demands were wrongfully refused. See *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530, 104 S. Ct. 831, 835, 78 L. Ed. 2d 645 (1984); *Morefield v. Bailey*, 959 F. Supp. 2d 887, 892 (E.D. Va. 2013).¹⁰ Rule 23.1 of the WVRCP provides further that: “The [derivative] action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.” Based upon the facts set forth herein, the Plaintiffs cannot allege facts to support that the Companies unjustifiably failed to act upon the claims set for in the Demand Letters or that their demands were wrongfully refused. Accordingly, the claims asserted in this derivative action must be dismissed under Rule 12(b)(6)¹¹ for failure of the Plaintiffs to state a claim upon which relief may be granted. The shareholders have overwhelmingly voted to voluntarily dismiss all claims set forth in the Amended Complaint. As stated above, they did so in good faith reliance on the recommendations of the Companies’ independent investigator. The shareholders’ will must be respected. Accordingly, the Companies, on behalf of their shareholders, request, pursuant to

¹⁰ These case are analyzed under Rule 23.1 of the Federal Rules of Civil Procedure. Rule 23.1 of the WVRCP contains language that is very similar to Rule 23.1 of the Federal Rules of Civil Procedure.

¹¹ Arguably, since the Companies are the real parties at interest, the Companies are entitled to seek court approval to voluntarily dismiss this derivative action pursuant to Rule 41(a)(2) of the WVRCP. See *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981). In filing this Motion, the Companies do not intend to waive the right to seek dismissal under Rule 41(a)(2) of the WVRCP if necessary.

Rule 23.1, that this Court approve the dismissal of all claims and direct the manner of notice that shall be provided to the Companies' shareholders.

B. The Amended Complaint Must Be Dismissed Because Plaintiffs Failed To Satisfy The Heightened Pleading Standard Required by Rule 23.1 of the WVRCP.

Assuming, for the sake of argument, that the Plaintiffs could allege facts sufficient to survive a motion to dismiss under Rule 12(b)(6), this Court would, nevertheless, be required to dismiss the claims for failure of the Plaintiffs to satisfy the heightened pleading standard set forth in Rule 23.1 of the WVRCP for: (i) failure to satisfy the pre-suit demand requirement and (ii) failure to adequately represent the interests of the other shareholders.

Legal arguments in support of dismissal under Rule 23.1 for failure to satisfy the pre-suit demand requirement have already been extensively briefed in the previous motions to dismiss filed in this action. The Companies adopt and incorporate herein those legal arguments. Those legal arguments, however, warrant further expansion and supplementation based upon events that have occurred since the motions to dismiss were filed. Rule 23.1 mandates that the Amended Complaint "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority **and, if necessary**, from the shareholders ..., and the reasons for the plaintiff's failure to obtain the action or for not making the effort." This provision is generally referred to as the demand provision. As has been noted in the previously filed motions to dismiss, President de Wet and the Board were entitled to a presumption that they would be faithful to their fiduciary duties in connection with the investigation of the Plaintiffs' claims. The facts set forth in Section III.B, *supra*, and the previously filed motions to dismiss demonstrate that Plaintiffs did not afford President de Wet and the Board the opportunity to faithfully perform their fiduciary duties in connection with the

investigation prior to the filing of the Complaint or the Amended Complaint. In fact, the Complaint was filed a mere three (3) days after the date of the Demand Letters. Undoubtedly, three (3) days is an insufficient period of time to investigate Plaintiffs' claims. The Amended Complaint was filed less than four (4) months after the date of the Demand Letters. Less than four (4) months was also an insufficient time period for investigation given the nature and extent of Plaintiffs' claims, especially given the lack of response from Lewis Tierney and Carol Griesemer to President de Wet's requests for clarification regarding their claims.

After receipt of the Demand Letters, President de Wet made it abundantly clear that she was taking her obligations to investigate Plaintiffs' claims seriously. President de Wet, after determining that an independent and unbiased investigation could not be conducted internally, retained the services of an independent investigator to investigate Plaintiffs' claims. As has been described in Section III.C., *supra*, Mr. Spitz and his team at Dinsmore conducted an extensive independent investigation of the claims asserted in the Amended Complaint. The Companies and the other Defendants cooperated fully with Mr. Spitz's independent investigation. President de Wet's retention of an independent investigator to conduct an independent investigation and the Companies', and the Defendants' full cooperation with the independent investigation (*See generally* Motion Exhibit 1), demonstrate that the Plaintiffs' demands were taken very seriously and were appropriately acted upon. Under 23.1 of the WVRCP, the Plaintiffs can only assert derivative claims if they can establish that they made demands and that the demands were not appropriately acted upon. As has been demonstrated herein and in the previously filed motions to dismiss, Plaintiffs' demands were appropriately acted upon. Accordingly, the Plaintiffs lack standing under Rule 23.1 to maintain this derivative action because they cannot satisfy the heightened pleading standard of Rule 23.1 of the WVRCP in that regard.

Furthermore, Rule 23.1 of the WVRCP also provides that: “The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” There is no guidance in West Virginia as to what factors should be considered in determining the adequacy of a shareholder’s representation under Rule 23.1. The Ninth Circuit Court of Appeals, in applying Rule 23.1 of the Federal Rule of Civil Procedure, noted and adopted the following non-exclusive list of factors:

Other courts have stated certain factors to determine adequacy of representation [under Rule 23.1]: ‘(1) *indications that the plaintiff is not the true party in interest*; (2) the plaintiff’s unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) *the degree of support received by the plaintiff from other shareholders*; ... (5) the lack of any personal commitment to the action on the part of the representative plaintiff’; (citing *Rothenberg v. Security Management Co.*, 667 F.2d 958, 961 (11th Cir.1982) (citations omitted)), (6) the remedy sought by plaintiff in the derivative action; (7) *the relative magnitude of plaintiff’s personal interests as compared to his interest in the derivative action itself*; and (8) *plaintiff’s vindictiveness toward the defendants*. (citing *Davis v. Comed, Inc.*, 619 F.2d 588, 593–94 (6th Cir.1980)).

(Emphasis added). See *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990). A number of other courts have adopted a similar list of factors to be considered in determining the adequacy of a shareholder’s representation. See, *Aztec Oil & Gas, Inc. v. Fisher*, 152 F. Supp. 3d 832, 843 (S.D. Tex. 2016); *Fink v. Golenbock*, 238 Conn. 183, 205, 680 A.2d 1243, 1256 (1996); *Cattano v. Bragg*, 283 Va. 638, 647, 727 S.E.2d 625, 629 (2012); *Jennings v. Kay Jennings Family Ltd. P’ship*, 275 Va. 594, 602, 659 S.E.2d 283, 288 (2008).

The Plaintiffs represent only shares held by the heirs and family of L. Clark Tierney, Jr. At the Special Shareholder Meeting, only a select few shareholders that are not heirs and family

of L. Clark Tierney, Jr. sided with the Plaintiffs by voting against dismissal of the claims asserted in this derivative action. Thus, it is evident that the Plaintiffs have only a very small degree of support from the other shareholders. Furthermore, the Dinsmore Report reflects that Plaintiff Carol Griesemer had an antagonistic relationship with Defendants Ann Smith, Doug Woloshin and other members of the Board during much of the Relevant Period. The Dinsmore Report further reflects that, when Plaintiff Lewis Tierney replaced his mother, Carol Griesemer, on the Board, that antagonistic relationship not only continued but escalated. Therefore, it is evident from the Dinsmore Report that the Plaintiffs harbor a high level of vindictiveness towards Defendants Ann Smith and Doug Woloshin. By far, the most vocal of the Plaintiffs is Lewis Tierney. As reflected by the Dinsmore Report, Lewis Tierney has a well-demonstrated history of “bad blood” and antagonism towards the Defendants which leads one to question what his true motives are in this derivative action. In that regard, it appears evident that Lewis Tierney’s personal interests in seeing this derivative action move forward are contrary to and outweighed by the other shareholders’ interests. For those reasons, it is evident that the Plaintiffs do not fairly and adequately represent the interests of the shareholders. Accordingly, this derivative action must be dismissed because the Plaintiffs cannot meet the heightened pleading standard of Rule 23.1 of the WVRCP because they have not and cannot establish that they fairly and adequately represent the interests of the shareholders.

V. Conclusion

WHEREFORE, for the reasons set forth herein above, the Companies respectively move this Court to dismiss all claims asserted in the Amended Complaint, with prejudice, and for such other and further relief as this Court deems appropriate.

Respectfully Submitted,

THE TIERNEY CORPORATION
and THE LEATHERWOOD COMPANY

BY COUNSEL.

A handwritten signature in dark ink, appearing to read "Robert B. Allen", is written over a horizontal line.

ROBERT B. ALLEN (WV Bar No.110)
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY;
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER;
and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
Derivatively on behalf of The Tierney Corporation
and The Leatherwood Company,

Plaintiffs,

v.

Civil Action No. 18-C-90
(The Honorable Joanna I. Tabit)

ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co.;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co.;
DOUGLAS WOLOSHIN, Individually and in his
capacity as a director and officer of The Tierney
Corporation and The Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
partnership; and THE TIERNEY
CORPORATION, a West Virginia corporation,
a nominal defendant, THE LEATHERWOOD
COMPANY, a West Virginia corporation,
a nominal defendant,

Defendants.

CERTIFICATE OF SERVICE

I, ROBERT B. ALLEN, counsel for Defendants, The Tierney Corporation and The
Leatherwood Company, do hereby certify that on this the 13th day of July, 2020, the foregoing
“*Memorandum of Law in Support of Motion to Dismiss of the Tierney Corporation and The
Leatherwood Company*” has been served upon counsel of record by placing a true and exact
copy thereof in the U. S. Mail, postage prepaid, addressed as follows:

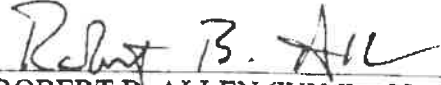
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CASE SCREEN 4

Case number : 18-C-90

Action Log

LEWIS CLARK TIERNEY, III; CHRI vs. ANN TIERNEY SMITH, INDIVIDUAL

Line	Date	Action / Results
1	01/29/18	# CASE INFO SHEET; COMPLAINT; F FEE; RCPT 558442; \$290.00
2	05/15/18	# AMD VERIF SHAREHOLDER DERIVATIVE COMPLAINT W/EXH'S; ISSUED
3		# SUM & 14 CPYS ON AMD C
4	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
5		# LEATHERWOOD CO.
6	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
7		# LEATHERWOOD CO.
8	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
9		# TIERNEY CORP.
10	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
11		# DUANE MORRIS, LLP
12	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
13		# DOUGLAS WOLOSHIN
14	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
15		# C. MATTHEW TIERNEY
16	05/18/18	# LET FR SS DTD 5/16/18; SUM W/RET ON AMD C (5/16/18 SS) AS TO
17		# ANN TIERNEY SMITH
18	05/22/18	# (2) E-CERTS FR SS

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STATE OF MASSACHUSETTS
CLERK OF SUPERIOR COURT
JUL 2 2018
30th
COURT REPORTER
by J. Hughes

FUNCTION = INQUIRE

CASE SCREEN 4

Case number : 18-C-90

Action Log

LEWIS, CLARK TIERNEY, III; CHRI vs. ANN TIERNEY, SMITH, INDIVIDUAL

Line	Date	Action / Results
19	05/29/18	# (2) E-CERTS FR SS
20	05/30/18	# ACCEPTANCE OF SERVICE OF SUM & AMD C (5/24/18 SP) AS TO
21		# TIERNEY CORP.
22	05/30/18	# ACCEPTANCE OF SERVICE OF SUM & AMD C (5/24/18 SP) AS TO
23		# DOUGLAS WOLOSHIN
24	05/30/18	# ACCEPTANCE OF SERVICE OF SUM & AMD C (5/24/18 SP) AS TO
25		# LEATHERWOOD CO. W/COS
26	05/30/18	# ACCEPTANCE OF SERVICE OF SUM & AMD C (5/24/18 SP) AS TO DUANE
27		# MORRIS LLP W/COS
28	06/01/18	# LET FR SS DTD 5/22/18; SUM W/RET ON AMD C (5/22/18 SS) AS TO
29		# LEATHERWOOD CO.
30	06/01/18	# LET FR SS DTD 5/22/18; SUM W/RET ON AMD C (5/22/18 SS) AS TO
31		# LEATHERWOOD CO.
32	06/01/18	# LET FR SS DTD 5/22/18; SUM W/RET ON AMD C (5/22/18 SS) AS TO
33		# TIERNEY CORP.
34	06/12/18	# (2) E-CERTS FR SS
35	06/22/18	@ ENVELOPE FR SS AS TO TIERNEY CORP RET MARKED "INSUFFICIENT ADD
36	06/22/18	@ ENVELOPE FR SS AS TO LEATHERWOOD CO RET MARKED "INSUFFICIENT

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CASE SCREEN 4

Case number : 18-C-90

Action Log

LEWIS CLARK TIERNEY, III; CHRI vs. ANN TIERNEY SMITH, INDIVIDUAL

Line	Date	Action / Results
37		ADDRESS"
38	06/22/18	@ ENVELOPE FR SS AS TO LEATHERWOOD CO RET MARKED "INSUFFICIENT
39		ADDRESS"
40	07/05/18	# RMR AS TO LEATHERWOOD CO. RET MARKED "INSUFFICIENT ADDRESS"
41	07/05/18	# RMR AS TO TIERNEY CORP. RET MARKED "INSUFFICIENT ADDRESS"
42	07/05/18	# RMR AS TO LEATHERWOOD CO. RET MARKED "INSUFFICIENT ADDRESS"
43	07/09/18	# DUANE MORRIS LLP & DOUGLAS WOLOSHIN'S MOT TO DIS & COMBINED
44		# MEMO OF LAW W/COS
45	07/11/18	@ ANN SMITH'S MOT TO DISMISS W/EXH'S & COS
46	07/11/18	@ MEMO OF LAW IN SUPP OF ANN SMITH'S MOT TO DISMISS W/COS
47	07/11/18	@ C. TIERNEY'S MOT TO DISMISS; MEMO IN SUPP OF MOT TO
48		DISMISS W/EXH'S & COS
49	07/11/18	@ ANS OF THE TIERNEY CORP & THE LEATHERWOOD CO TO THE AMD C
50		W/COS
51	07/18/18	@ MOT FOR ADMISSION PRO HAC VICE OF TIMOTHY D THOMPSON
52		W/EXH'S & COS
53	07/18/18	@ MOT FOR ADMISSION PRO HAC VICE OF PHILIP COLLIER W/EXH'S & COS
54	07/20/18	AC (2)O:MLD G.STOWERS; ENT 07/18/18

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CASE SCREEN 4

Case number : 18-C-90

Action Log

LEWIS CLARK TIERNEY, III; CHRI vs. ANN TIERNEY SMITH, INDIVIDUAL

Line	Date	Action / Results
55	07/19/18	LK O: PHILIP W. COLLIER ADMITTED PRO HAC VICE S/7/18/TAB
56	07/19/18	LK O: TIMOTHY D. THOMPSON ADMITTED PRO HAC VICE S/7/18/TAB
57	08/15/18	# NOT OF CHANGE OF INFO OF ATTY, J. ZAK RITCHIE W/COS
58	08/15/81	# NOT OF CHANGE OF INFO OF ATTY, ISAAC FORMAN W/COS
59	08/15/18	# COS AS TO NOT OF CHANGE OF ATTY INFO OF MICHAEL HISSAM
60	09/10/18	# TIMOTHY THOMPSON'S NOT OF W/D OF CNSL W/COS
61	07/09/20	# P'S APPLICATION FOR EXPEDITED PROD OF CORPORATE DOCUMENTS &
62		REQ FOR TEMP STAY W/EXH'S & COS
63	07/14/20	# JOINT MOT FOR LEAVE TO REMOVE EXH'S & FILE SUBSTITUTE EXH'S
64		W/COS
65	07/15/20	# MOT TO DIS TIERNEY CORP. & LEATHERWOOD CO. W/EXH & COS
66	07/15/20	# MEMO OF LAW IN SUPP OF MOT TO DIS W/COS
67	07/17/20	# COS AS TO JOINT MOT & O FOR LEAVE TO REMOVE EXH'S, FILE SUBST
68		EXH'S
69	07/28/20	= ORDER DLVD; 7/15/20; LT
70	07/17/20	LK O: JOINT MOT AND ORDER FOR LEAVE TO REMOVE EXHIBITS, FILE
71		SUBST EXHIBITS S/7/15/TAB
72	01/05/21	# TIERNEY CORP & LEATHERWOOD CO'S RESP TO P'S APPLICATION

C=Chg D=Del 1-4=Scr M=Menu T=Chg Line# PgUp PgDn P=Prt A=Add I=Image

FUNCTION = INQUIRE

CASE SCREEN 4

Case number : 18-C-90

Action Log

LEWIS CLARK TIERNEY, III; CHRI vs. ANN TIERNEY SMITH, INDIVIDUAL

Line	Date	Action / Results
73		FOR EXPEDITED PRODUCTION OF CORPORATE DOCS & REQ FOR TEMP STAY
74		W/EXH & COS
75	01/05/21	# TIERNEY CORP & LEATHERWOODE CO'S RESP TO P'S APPLICATION FOR
76		EXPEDITED PRODUCTION OF CORPORATE DOCS & REQ FOR TEMP STAY
77		W/EXH & COS
78	06/01/21	# NOT OF HRG W/COS (6/24/21 @ 1 PM)
79	06/07/21	# NOT OF HRG W/COS (6/24/21 @ 1 PM)
80	06/15/21	# P'S REPLY IN SUPP OF APPLICATION FOR EXPEDITED PROD OF
81		CORPORATE DOCUMENTS & REQ FOR TEMP STAY W/COS
82	06/15/21	# D'S JOINT MOT TO F UNDER SEAL W/COS
83	06/22/21	# DUANE MORRIS, LLP & DOUGLAS WOLOSHIN'S JOINER IN TIERNEY
84		CORP. & LEATHERWOOD CO'S MOT TO APPROV SETTLEMENT W/COS
85	06/22/21	# DOUGLAS WOLOSHIN & DUANE MORRIS, LLP'S RESP IN OPPOS TO P'S
86		APPLICATION FOR PROD OF CORPORATE DOCS W/COS
87	06/22/21	# DOUGLAS WOLOSHIN & DUANE MORRIS, LLP'S MEMO IN SUPP OF MOT
88		TO DIS OF TIERNEY CORP. & LEATHERWOOD CO. W/COS
89	06/22/21	# P'S RESP IN OPPOS TO TIERNEY CORP'S MOT TO DIS W/COS
90	06/23/21	SR ORDER SIGNED 6/16/21 DLVD

C=Chg D=Del 1-4=Scr M=Menu T=Chg Line# PgUp PgDn P=Prt A=Add I=Image

FUNCTION = INQUIRE

CASE SCREEN 4

• Case number : 18-C-90

Action Log

LEWIS CLARK TIERNEY,, III.; CHRI vs. ANN TIERNEY SMITH,, INDIVIDUAL

Line	Date	Action / Results
91	06/16/21	# 0: GRT D'S JOINT MOT TO SEAL MOT TO APPROV SETTLEMENT
92		W/EXH'S & COS/TAB
93	06/16/21	# (SEALED) MOT TO APPROV SETTLEMENT W/EXH'S & COS
94	06/22/21	# NOT OF APPEARANCE W/COS
95	06/29/21	# TRANS OF PROCEEDINGS HELD ON 6/24/21 BEFORE JUDGE TABIT

C=Chg D=Del 1-4=Scr M=Menu T=Chg Line# PgUp PgDn P=Prt A=Add I=Image

IN THE SUPREME COURT OF APPEALS WEST VIRGINIA

**LEWIS CLARK TIERNEY, III;
CHRISTOPHER SCOTT TIERNEY,
KENNA TIERNEY 2000 IRREVOCABLE
TRUST, Carolyn Kenna Tierney, Co-Trustee;
CAROLYN KENNA TIERNEY GRIESEMER,
and CAROL K. TIERNEY 2000 GST TRUST,
Carol K. Tierney, Trustee, Each Individually and
Derivatively on behalf of The Tierney Corporation
and The Leatherwood Company,**

Plaintiffs,

v.

Kanawha County Circuit Court
Civil Action No. 18-C-90
Judge Joanna Tabit

**ANN TIERNEY SMITH, Individually and in
her capacity as a director and officer of The
Tierney Corporation and The Leatherwood Co;
C. MATTHEW S. TIERNEY, Individually and
in his prior capacity as a director and officer of
The Tierney Corporation and The Leatherwood Co;
DOUGLAS WOLOSHIN, Individually and in his
capacity as a director and officer of The Tierney
Corporation and the Leatherwood Co.; DUANE
MORRIS, LLP, a Delaware limited liability
partnership; and THE TIERNEY
CORPORATION, a West Virginia corporation,
a nominal defendant, THE LEATHERWOOD
COMPANY, a West Virginia corporation,
a nominal defendant,**

Defendants.

CERTIFICATE OF SERVICE

I, ROBERT B. ALLEN, counsel for Defendants, The Tierney Corporation and The Leatherwood Company, do hereby certify that on this the 2nd day of July, 2021, the foregoing **DEFENDANTS' MOTION TO REFER TO BUSINESS COURT DIVISION** with attachments has been served by either hand delivery or first-class mail to the following:

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The Honorable Joanna I. Tabit, Judge
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