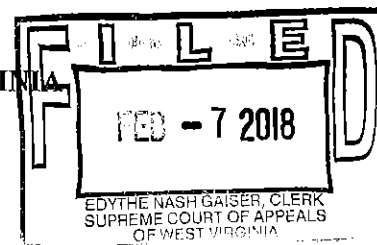


BEFORE THE CHIEF JUSTICE OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.* PATRICK MORRISEY,
ATTORNEY GENERAL, and THOMAS J. SMITH, *in his*
official capacity as SECRETARY OF TRANSPORTATION AND
COMMISSIONER OF HIGHWAYS, WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,



PLAINTIFFS,

v.

KANAWHA COUNTY CIRCUIT COURT
CIVIL ACTION NO. 17-C-41

JUDGE TOD J. KAUFMAN

CRH, PLC;
OLDCASTLE, INC.;
OLDCASTLE MATERIALS, INC.;
WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA ASPHALT, INC.;
KELLY PAVING, INC.;
CAMDEN MATERIALS, LLC;
AMERICAN ASPHALT & AGGREGATE, INC.;
AMERICAN ASPHALT OF WEST VIRGINIA, LLC;
BLACKTOP INDUSTRIES AND EQUIPMENT COMPANY,

DEFENDANTS.

CITY OF CHARLESTON,
and all others similarly situated,

PLAINTIFF,

v.

KANAWHA COUNTY CIRCUIT COURT
CIVIL ACTION NO. 16-C-1552,
consolidated with Civil Action Nos. 16-C-
661-B (Raleigh), 16-C-337-DS (Mercer), 16-
C-425 (Wood), 16-C-1598 (Kanawha), and
16-C-666 (Cabell)

JUDGE TOD J. KAUFMAN

WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA ASPHALT, INC.;
KELLY PAVING, INC.;
CAMDEN MATERIALS, LLC;
AMERICAN ASPHALT & AGGREGATE, INC.;
AMERICAN ASPHALT OF WEST VIRGINIA, LLC;
BLACKTOP INDUSTRIES AND EQUIPMENT COMPANY;
JOHN AND JANE DOES 1-25,

DEFENDANTS.

**REPLY MEMORANDUM BY KELLY PAVING, INC. IN OPPOSITION TO
PLAINTIFFS' JOINT MOTION TO REFER TO BUSINESS COURT**

Comes now the Respondent, Kelly Paving, Inc. ("Kelly Paving"), by and through the undersigned counsel, and, pursuant to West Virginia Trial Court Rule 29.06(a)(4), respectfully files its Reply Memorandum in Opposition to Plaintiffs' Joint Motion to Refer to Business Court.

I. INTRODUCTION

In October 2016, more than fourteen months ago, the City of Charleston, the City of Beckley, the City of Bluefield, the City of Huntington, the City of Parkersburg, and the Kanawha County Commission ("the Local Governments"), as well as the West Virginia Department of Transportation and Division of Highways,¹ filed separate—though identical—civil antitrust actions ("the Consolidated Case") in the Circuit Courts of Kanawha County, Raleigh County,

¹ The law firm of Bailey & Glasser, LLP filed the West Virginia Department of Transportation and Division of Highways Complaint without authorization from the Attorney General to sue on behalf of the State of West Virginia. [See Compl., *W. Va. Dep't of Transp. & Div. of Highways v. W. Va. Paving, Inc.*, No. 16-C-1561 (Kanawha Cty. Cir. Ct. Oct. 14, 2016), attached hereto as "**Exhibit 1**"]. Between December 5 and December 15, 2016, each Defendant, citing that deficiency, moved to dismiss the Complaint. Recognizing the futility of opposing those motions, Bailey & Glasser voluntarily dismissed the original State action on January 11, 2017. [See Notice of Voluntary Dismissal Without Prejudice, *W. Va. Dep't of Transp. & Div. of Highways*, No. 16-C-1561 (Kanawha Cty. Cir. Ct. Jan. 11, 2017), attached hereto as "**Exhibit 2**".] On the same day, the Attorney General filed the instant State Action and, three months later, authorized the appointment Bailey & Glasser to represent the State.

Mercer County, Cabell County, and Wood County. [See Pls.' Joint Mot. to Refer, Exs. C(1), C(2), C(3), C(4), C(5) & C(6).] The Defendants were the same in each civil action and consisted of eight businesses, including Kelly Paving, that were involved in the sale of asphalt and/or provision of asphalt paving services in the State of West Virginia. The Consolidated Case alleges claims for unlawful restraint of trade in the sale of asphalt and/or provision of asphalt paving services, in violation of W. Va. Code § 47-18-3, and for monopolization of the sale of asphalt, in violation of West Virginia Code § 47-18-4.

The Complaints filed by the law firm of Bailey & Glasser, LLP ("Bailey & Glasser") on behalf of the Local Governments were from the outset deficient in describing the alleged restraint of trade or monopolistic conduct in any venue other than the City of Charleston. It is noteworthy that almost all of the conduct alleged in the Complaints involved transactions and commerce in southern West Virginia—more specifically, in the City of Charleston. The Complaints did not describe any individual contracts or transactions by and between Kelly Paving and the City of Beckley, the City of Bluefield, the City of Charleston, the City of Huntington, or Kanawha County Commission. Of the six Local Governments, only the City of Parkersburg had done business with Kelly Paving.

In recognition of the overbreadth of the Complaints, Kelly Paving aggressively began its motion practice in late 2016. On December 14, 2016, Kelly Paving filed Motions to Dismiss each of the Local Governments' Complaints—except for that filed by the City of Parkersburg—asserting that those entities lacked standing to prosecute their claims against Kelly Paving. On February 2, 2017, Judge Tod J. Kaufman convened a Hearing to consider, *inter alia*, Kelly Paving's Motion to Dismiss the City of Charleston's Complaint. At the Hearing, the City of Charleston was unwilling to concede that it had never done business with Kelly Paving, even

though it—along with the City of Beckley, the City of Bluefield, the City of Huntington, and the Kanawha County Commission—each admitted that fact when subsequently served with Requests for Admission. [See City of Beckley’s Resp. to Reqs. for Admis. at 4, ¶¶ 1–3; City of Bluefield’s Resp. to Reqs. for Admis. at 4, ¶¶ 1–3; City of Charleston’s Resp. to Reqs. for Admis. at 4, ¶¶ 1–3; City of Huntington’s Resp. to Reqs. for Admis. at 4, ¶¶ 1–3; Kanawha County Commission’s Resp. to Reqs. for Admis. at 4, ¶¶ 1–3, collectively attached hereto as “**Exhibit 3**”.] None of the Local Governments could describe then, or since, what “injury-in-fact” each had suffered as a result of conduct by Kelly Paving. At the conclusion of that Hearing, Judge Kaufman orally ruled that he would grant the Motion to Dismiss the City of Charleston’s Complaint and instructed the undersigned to prepare an appropriate Order. [See Tr. of Feb. 2, 2017 Hr’g at 23:20–24, attached hereto as “**Exhibit 4**”.]

In addition, Judge Kaufman also heard argument on the City of Charleston’s Motion, pursuant to West Virginia Rule of Civil Procedure 42(a) and (b), to Transfer and Consolidate the cases filed by the Local Governments.² Kelly Paving opposed consolidation. Nonetheless, Judge Kaufman found that each of the cases brought by the Local Governments presented common questions of law and fact and, therefore, warranted consolidation. [See Order Granting Pl.’s Mot. to Transfer and Consolidate Related Cases at 1–4, ¶¶ 1–9 (entered Feb. 2, 2017), attached hereto as “**Exhibit 5**”.]

On February 2, 2017, Kelly Paving tendered a Proposed Order Granting Its Motion to Dismiss the City of Charleston’s Complaint. Shortly thereafter, on February 8, the City of

² Bailey & Glasser chose to file the first of the original six cases brought on behalf of the Local Governments in Kanawha County to establish the predicate for Rule 42 consolidation of the remaining five cases. Bailey & Glasser knew that the City of Charleston case had been assigned to Judge Kaufman before any of the other five cases were brought on behalf of the remaining Local Governments.

Charleston filed its Notice of Objection to Kelly Paving's Proposed Order, as well as a Rule 59(e) Motion to Alter or Amend the Court's Decision to Dismiss Kelly Paving. Following receipt of the Rule 59(e) Motion, Judge Kaufman convened a Status Conference on March 6, 2017 and announced that he had reconsidered his oral ruling granting Kelly Paving's Motion to Dismiss the City of Charleston's Complaint. Judge Kaufman formally declined to enter Kelly Paving's Proposed Order Granting Its Motion to Dismiss the City of Charleston's Complaint and, instead, published a Scheduling Order that afforded the Local Governments more than four months to conduct discovery and come forward with factual evidence of an "injury-in-fact" and of a conspiracy involving Kelly Paving. [Order Memorializing Mar. 6, 2017 Status Conference and Hr'g on Mots. at 2-3, ¶¶ 1-5 (entered Mar. 16, 2017), attached to Pls.' Joint Mot. to Refer as Ex. F(1).] The discovery period was extended even further following a Hearing convened by the Circuit Court on July 20, 2017. [Order Memorializing the July 20, 2017 Mots. Hr'g at 3, ¶¶ 9-10 (entered Aug. 21, 2017), attached to Pls.' Joint Mot. to Refer as Ex. F(2); *see also* Tr. of July 20, 2017 Hr'g, attached hereto as "**Exhibit 6**".]

On December 6, 2017—some nine months after the Circuit Court originally directed the Local Governments to take targeted discovery that addressed the existence of an "injury-in-fact" and of a "conspiracy" raised by the Motions to Dismiss in the Consolidated Case—Kelly Paving filed its Motion for Summary Judgment Directed to the Cities of Beckley, Bluefield, Charleston, Huntington and the Kanawha County Commission. In its supporting Memorandum of Law, Kelly Paving argued that those Plaintiffs had failed to come forward with any evidence of having suffered an "injury-in-fact" fairly traceable to Kelly Paving's conduct. In addition, Kelly Paving filed its Motion for Summary Judgment Directed to the City of Parkersburg. In its supporting Memorandum of Law, Kelly Paving argued that, putting aside the unsupported allegations in the

Complaint, the City of Parkersburg had come forward with no factual proof sufficient to support its four claims against Kelly Paving.

Meanwhile, on January 11, 2017, the West Virginia Attorney General and Secretary of Transportation and Commissioner of Highways (“the State”) filed a similar antitrust action (“the State Action”) in the Circuit Court of Kanawha County against the same eight Defendants, as well as the corporate parent of three of those businesses (CRH, plc) and two of its subsidiaries (Oldcastle, Inc. and Oldcastle Materials, Inc.). [See Pls.’ Joint Mot. to Refer, Ex. B.] The State Action was originally assigned to Judge Carrie Webster. On May 4, 2017, Kelly Paving filed a Motion to Consolidate the State Action into the Consolidated Case filed by the Local Governments. Before Kelly Paving’s Motion to Consolidate could be set for Hearing, however, Judge Webster requested, *sua sponte*, that the State Action be reassigned to Judge Kaufman. The Chief Judge granted that request on May 22, 2017. [See Order Granting Request for Case Reassignment (entered May 19, 2017), attached hereto as “**Exhibit 7**”.] Bailey & Glasser did not cause any of its clients to object to the reassignment.

Between February 17 and August 4, 2017, CRH, plc, Oldcastle, Inc., and Oldcastle Materials, Inc. filed Motions to Dismiss the State Action for Lack of Personal Jurisdiction. In addition, on September 1, 2017, CRH, plc, Oldcastle, Inc., and Oldcastle Materials, Inc. filed a Motion for a Protective Order. On September 26, 2017, the Circuit Court convened a Hearing to resolve CRH, plc, Oldcastle, Inc., and Oldcastle Materials, Inc.’s outstanding Motions. [See Tr. of Sept. 26, 2017 Hr’g, attached hereto as “**Exhibit 8**”.] While the Circuit Court granted CRH, plc’s Motion to Dismiss, it held Oldcastle, Inc. and Oldcastle Materials, Inc.’s Motions to Dismiss in abeyance. [Order Granting CRH, plc’s Mot. to Dismiss, Holding in Abeyance Oldcastle, Inc.’s and Oldcastle Materials, Inc.’s Mot. to Dismiss, and Granting in Part and Denying in Part

Oldcastle, Inc.'s and Oldcastle Materials, Inc.'s Mot. for Protective Order at 2–3, ¶¶ 3, 8 (entered Sept. 29, 2017), attached to attached to Pls.' Joint Mot. to Refer as Ex. F(3).] Taking a tack similar to that followed in the Consolidated Case, the Circuit Court entered a Scheduling Order affording the State a period of roughly four months to conduct targeted jurisdictional discovery of Oldcastle, Inc. and Oldcastle Materials, Inc. [*Id.* at 3, ¶¶ 9–11.]

The State pursued jurisdictional discovery of Oldcastle, Inc. and Oldcastle Materials, Inc. and, on December 22, 2017, filed a Motion for Leave to Amend Its Complaint. Through the Motion for Leave, the State sought to bring CRH, plc back into the State Action. The State asserted that newly discovered evidence supported the Circuit Court's exercise of personal jurisdiction over CRH, plc.

The Circuit Court convened a Hearing on January 12, 2018 to resolve, among other things, Kelly Paving's Motions for Summary Judgment in the Consolidated Case and the State's Motion for Leave to Amend in the State Action. [*See* Tr. of Jan. 12, 2018 Hr'g, attached hereto as "**Exhibit 9**".] The first mention of the possibility of referring either the Consolidated Case or the State Action to the Business Court Division occurred during an off-the-record bench conference in the middle of that Hearing. Notwithstanding Bailey & Glasser's implicit suggestion, the Circuit Court refused to adjourn the Hearing. Instead, the Circuit Court heard more than two hours of argument and, at its conclusion, orally granted Kelly Paving's Motions for Summary Judgment. Less than one week after the Circuit Court's adverse decisions, the Local Governments and the State (collectively, "the Movants") filed the instant Motion to Refer.

Despite the pending Motion to Refer, the Circuit Court has continued to shepherd these cases toward resolution by and through the entry of three significant orders on February 1, 2018.³ Regarding the Consolidated Case, the Circuit Court entered a seventy-four (74) page, two-hundred and fifty-three (253) paragraph Order granting Kelly Paving's Motions for Summary Judgment. [See Order Granting the Mots. for Summ. J. to Kelly Paving, Inc. for All Causes of Action Asserted by the Cities of Beckley, Bluefield, Charleston, Huntington and Parkersburg and the Kanawha County Commission (entered Feb. 1, 2018), attached hereto as "**Exhibit 12**".] In addition, the Circuit Court entered a ten (10) page Order denying American Asphalt & Aggregate, Inc., American Asphalt of West Virginia, LLC, and Blacktop Industries and Equipment Company's Motions to Dismiss and Renewed Motions to Dismiss or for Summary Judgment. [See Order Denying American Asphalt & Aggregate, Inc., American Asphalt of West Virginia, LLC, and Blacktop Industries and Equipment Company's Mots. to Dismiss and Renewed Mots. to Dismiss or for Summ. J. as to the Claims Brought by the Cities of Beckley, Bluefield, and Parkersburg (entered Feb. 1, 2018), attached hereto as "**Exhibit 13**".] Regarding the State Action, the Circuit Court entered a six (6) page Order granting the State's Motion for Leave to Amend the Complaint and Ordering Jurisdictional Discovery. [See Order Granting the States' Mot. for Leave to Amend the Compl. and Ordering Jurisdictional Disc. (entered Feb. 1, 2018), attached hereto as "**Exhibit 14**".] In that Order, the Circuit Court brought CRH, plc back into the litigation and ordered the

³ In addition to the Orders entered on February 1, 2018, the Circuit Court entered an Order denying Kelly Paving's Renewed Motion to Consolidate and an Order Granting Kelly Paving's Motion to Exceed the Page Limitation on January 31. [See Order Denying Kelly Paving, Inc.'s Renewed Motion to Consolidate as Moot (entered Jan. 31, 2018), attached hereto as "**Exhibit 10**"; Order Granting Defendant Kelly Paving, Inc.'s Motion Exceed Page Limitation Directed to the City of Parkersburg (entered Jan. 31, 2018), attached hereto as "**Exhibit 11**".]

State to complete all jurisdictional discovery no later than March 30, 2018, further evidencing the Circuit Court's deliberate and methodical approach in managing these cases. [*Id.* at 4, ¶¶ 15–17.]

Pursuant to Trial Court Rule 29, the Chief Justice should deny the Motion to Refer. First, neither the Consolidated Case nor the State Action come within the definition of “business litigation” because neither the Local Governments nor the State are “business entities.” W. Va. Tr. Ct. R. 29.04(a)(1). Second, and more importantly, specialized treatment is not likely to improve the expectation of a fair, efficient, and reasonable resolution of these controversies. W. Va. Tr. Ct. R. 29.04(a)(2). Unlike the Business Court, *this* Circuit Court knows—through firsthand experience—the dispositive issues of law, the contestable questions of fact, and the intricacies of a record constructed over the course of twelve to fourteen months of litigation. Likewise, the likelihood of a “fair” resolution is not promoted by granting the Motion to Refer, which the Movants filed less than one week after receiving adverse rulings from the Circuit Court on two dispositive motions. In the interest of judicial economy and fundamental fairness, Kelly Paving urges the Chief Justice to deny the Motion to Refer.

II. LEGAL STANDARD

In accordance with W. Va. Code § 51-2-15, the West Virginia Supreme Court of Appeals adopted West Virginia Trial Court Rule 29, thereby creating the Business Court Division, in 2012. The purpose of the Business Court is to efficiently manage and resolve litigation involving “commercial issues and disputes between businesses.” W. Va. Code § 51-2-15(a); W. Va. Tr. Ct. R. 29.01. To be eligible for referral and transfer by the Chief Justice to the Business Court, a civil action must fall under the definition of “business litigation.” W. Va. Tr. Ct. R. 29.03.

For a controversy to be considered “business litigation,” it must satisfy three criteria. *See* W. Va. Tr. Ct. R. 29.04(a). First, “the principal claim or claims [in the pending civil action must]

involve matters of significance to the transactions, operations, or governance between business entities.” W. Va. Tr. Ct. R. 29.04(a)(1). Second, “the dispute [must] present[] commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable.” W. Va. Tr. Ct. R. 29.04(a)(2). Third, “the principal claim or claims [must] not involve,” among other categories, “consumer litigation, such as . . . consumer class actions,” or “administrative disputes with government organizations and regulatory agencies,” with the exception “that complex tax appeals are eligible to be referred to the Business Court Division.” W. Va. Tr. Ct. R. 29.04(a)(3).

III. ARGUMENT

The Motion to Refer should be denied because neither the Consolidated Case nor the State Action warrant referral under Trial Court Rule 29. First, these cases are ineligible for referral because neither the Local Governments nor the State are “business entities.” W. Va. Tr. Ct. R. 29.04(a)(1). Second, and more importantly, referral is not likely “to improve the expectation of a fair and reasonable resolution” of either controversy. W. Va. Tr. Ct. R. 29.04(a)(2). Over the past twelve to fourteen months, the litigants—with capable assistance from the Circuit Court—have engaged in significant motion practice, taken voluminous discovery, and made substantial progress toward bringing each case to resolution. In these circumstances, referral will neither promote the efficient management nor the fair and reasonable resolution of these disputes.

A. THE LOCAL GOVERNMENTS AND THE STATE ARE NOT “BUSINESS ENTITIES” AS CONTEMPLATED BY TRIAL COURT RULE 29.

The instant litigation is not eligible for referral because neither the Local Governments nor the State are “business entities.” To come within the definition of “business litigation,” the

“principal claim or claims” in the pending civil action must “involve matters of significance to the transactions, operations, or governance *between business entities*.” W. Va. Tr. Ct. R. 29.04(a)(1) (emphasis added).

Under the plain language of Trial Court Rule 29.04(a)(1), the Local Governments and the State of West Virginia are not “business entities.” The quintessential definition of the term “business” is “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” *Business*, BLACK’S LAW DICTIONARY (10th ed. 2014). Although Kelly Paving neatly fits that definition, neither the Local Governments nor the State of West Virginia do. Instead, each are “[a]n organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.” *Government*, BLACK’S LAW DICTIONARY (10th ed. 2014).

Recognizing the elementary distinction between business entities and state and local governments, the Movants argue that the Chief Justice “has referred numerous other cases to the Business Court that involve public officials and public bodies as parties.” [Pls.’ Joint Mot. to Refer at 7 & n.5.] However, the cases to which the Movants refer are inapposite. In each of the three identified cases, no litigant or judge opposed referral and, therefore, the Chief Justice had no occasion to pass on the issue.⁴ The remaining thirteen cases involved—as the Movants concede—tax appeals, but Trial Court Rule 29.04(a)(3) expressly states “that complex tax appeals are eligible to be referred to the Business Court Division.”

⁴ [See Reply Mem. of Pet’r Denex Petroleum Corporation to Judicial Mot. to Refer to Business Ct. at 3, *Denex Petroleum Corp. v. Matkovich*, No. 16-AA-1 (Barbour Cty. Cir. Ct. Sept. 11, 2017), attached hereto as “**Exhibit 15**”; Letter from Judge Tod J. Kaufman to Chief Justice Menis Ketchum at 1, *J.F. Allen Corp. v. Sanitary Board of City of Charleston*, No. 14-C-1182 (Kanawha Cty. Cir. Ct. June 14, 2016), attached hereto as “**Exhibit 16**”; Docket Sheet, *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, No. 09-C-2104 (Kanawha Cty. Cir. Ct.), attached hereto as “**Exhibit 17**”.]

In point of fact, the Chief Justice has expressly refused to refer a case to the Business Court involving a local government. In 2013, Chief Justice Benjamin declined to refer litigation to the Business Court because the “case involve[d] a county government, which is not a business entity as contemplated by TCR 29.” [Administrative Order at 1, *Cty. Commission of Hampshire Cty. v. Somerset Steel Erection Co.*, BCD Nos. 12-C-25, 12-C-62-HMP (W. Va. May 31, 2013) (Benjamin, C.J.), attached hereto as “Exhibit 18”.] The same logic applies with equal force here. Accordingly, the Motion to Refer should be denied.

B. IN THE ALTERNATIVE, SPECIALIZED TREATMENT IS NOT LIKELY TO IMPROVE THE EXPECTATION OF A FAIR AND REASONABLE RESOLUTION OF EITHER CONTROVERSY IN LIGHT OF THE EXTENSIVE DEVELOPMENT AND PROCEDURAL POSTURE OF THESE CASES.

Even if these cases involved matters of significance to and between business entities, the extensive development and procedural posture of these cases remove them from the scope of Trial Court Rule 29. To fit the definition of “business litigation,” the Chief Justice must find that “specialized treatment is *likely to improve* the expectation of *a fair and reasonable resolution* of the controversy.” W. Va. Tr. Ct. R. 29.04(a)(2) (emphasis added). Looking to the progression of this litigation, as well as the timing of the Motion to Refer, it is apparent that referral will neither promote the efficient management nor the “fair and reasonable resolution” of these disputes. W. Va. Tr. Ct. R. 29.04(a)(2); *see also* W. Va. Tr. Ct. R. 29.01.

- 1. Because the Circuit Court has—through adjudicating more than two dozen substantive motions—acquired extensive knowledge about the factual and legal issues in dispute, referral will hinder the “efficient” and “reasonable resolution” of these controversies.**

First, the progression and extensive development of these cases over the past twelve to fourteen months demonstrate that referral is inappropriate. The Local Governments filed the Consolidated Case more than fourteen months ago, and the State filed the State Action some two

months following. During the intervening months, the litigants—with capable case management from the Circuit Court—have engaged in significant motion practice, taken voluminous discovery, and made substantial progress toward bringing each case to resolution.

In the Consolidated Case, for example, the Circuit Court has adjudicated no fewer than nineteen motions over the past eleven months. These nineteen motions included eight motions to dismiss filed by four of the eight defendants and, collectively, directed to five of the six plaintiffs; two motions to consolidate; one motion to compel; and five motions for summary judgment filed by four of the eight defendants and, collectively, directed to all six plaintiffs. [See Docket Sheet, attached to Pls.' Joint Mot. to Refer as Ex. E(1).] In order to resolve these motions, the Circuit Court has convened no fewer than four hearings.

Likewise, in the State Action, the Circuit Court has adjudicated no fewer than five motions over the past four months. These five motions included two motions to dismiss filed by three of the eleven defendants, one motion for a protective order filed by three of the eleven defendants, one motion to consolidate, and one motion for leave to amend the complaint. [See Docket Sheet, attached to Pls.' Joint Mot. to Refer as Ex. E(2).] To resolve these motions, the Circuit Court has convened no fewer than two hearings.

In representing that “transfer to the Business Court does not mean that the parties must start litigation over” or revisit “previously filed motions or orders,” the Movants miss the point. [Pls.' Joint Mot. to Refer at 11.] Through its analysis of thousands of pages of motions practice and hours of discussion with counsel in open court, this Circuit Court has become very familiar with the intricacies and inner workings of these cases. Unlike the Business Court, this Circuit Court knows—through firsthand experience—the record constructed over the course of twelve to fourteen months of litigation.

While the Circuit Court's familiarity and experience is most pronounced in the Consolidated Case, the specialized knowledge acquired by shepherding the Consolidated Case through dispositive motions translates naturally to the State Action. The reason why is simple. Both the Consolidated Action and the State Action pursue nearly identical legal claims and theories, involve common questions of fact and of law, and seek more or less the same type of relief against, for all practical purposes, identical parties. For example, each action alleges claims for unlawful restraint of trade in the sale of asphalt and provision of asphalt paving services (in violation of W. Va. Code § 47-18-3), for monopolization of the production and sale of asphalt (in violation of W. Va. Code § 47-18-4), and for unjust enrichment. [*Compare* Pls.' Joint Mot. to Refer, Ex. B, at 23–26, 30–31, ¶¶ 189–212, 237–42, *with, e.g.*, Pls.' Joint Mot. to Refer, Ex. C(1), at 27–31, ¶¶ 116–34.] Likewise, in both actions, West Virginia Paving, Inc.; Southern West Virginia Paving, Inc.; Southern West Virginia Asphalt, Inc.; Kelly Paving; Camden Materials, LLC; American Asphalt & Aggregate, Inc.; American Asphalt of West Virginia, LLC; and Blacktop Industries and Equipment Company are all named as Defendants. [*Compare* Pls.' Joint Mot. to Refer, Ex. B, at 3–5, ¶¶ 14–23, *with, e.g.*, Pls.' Joint Mot. to Refer, Ex. C(1), at 7–9, ¶¶ 25–32.] Although the State Action includes three nominally additional Defendants—CRH, plc; Oldcastle, Inc.; and Oldcastle Materials, Inc.—it is a distinction without a difference. [Pls.' Joint Mot. to Refer, Ex. B, at 2–3, ¶¶ 8–13.] CRH, plc is the corporate parent of Oldcastle, Inc. and Oldcastle Materials, Inc., as well as of West Virginia Paving, Inc.; Southern West Virginia Paving, Inc.; and Southern West Virginia Asphalt, Inc. [*Id.* at 2–3, ¶ 8.] These questions of fact and issues of law, which are common to both the Consolidated Case and the State Action, illustrate why the Circuit Court is best positioned to resolve each controversy.

On numerous occasions, the Chief Justice has recognized that referral is inappropriate once litigation has matured past the embryonic stage. In 2015, Chief Justice Workman refused to refer an action to the Business Court because the

dispute, which ha[d] been pending for over a year and in which numerous substantive motions [had] been decided, [did] not require specialized treatment to improve the expectation of a fair and reasonable resolution, and therefore [did] not meet the criteria for referral under Rule 29.04(a)(2) of the West Virginia Trial Court Rules.

[Administrative Order at 1, *Coyne v. Tri-State Petroleum Corp.*, BCD No. 14-C-200-OHI (W. Va. Sept. 3, 2015) (Workman, C.J.), attached hereto as “**Exhibit 19**”.] In 2016, Chief Justice Ketchum declined to refer an action “because the case ha[d] been pending for some time and considerable effort ha[d] been made towards resolution.” [Administrative Order at 1, *Greatwide Cheetah Transp., LLC v. Slemboski*, BCD No. 14-C-106-PRN (W. Va. Oct. 24, 2016) (Ketchum, C.J.), attached hereto as “**Exhibit 20**”.] In the following year, Your Honor applied the same standard. [Administrative Order at 1, *Lovins v. Jai Sai, LLC*, BCD No. 13-C-1796-KAN (W. Va. Mar. 3, 2017) (Loughry, C.J.), attached hereto as “**Exhibit 21**”.]

While the Movants claim that, on “a regular basis,” the Chief Justice transfers actions “filed over a year before the referral,” the four cases cited in support of that proposition are easily distinguishable. [Pls.’ Joint Mot. to Refer at 10–11 & n.7.] In three of the four cases, referral was unopposed;⁵ in fact, in two the Circuit Court supported referral.⁶ More importantly, in three of the

⁵ [See Reply Mem. of Pet’r Denex Petroleum Corporation to Judicial Mot. to Refer to Business Ct. at 3, *Denex Petroleum Corp.*, *supra* note 4; Letter from Judge Tod J. Kaufman to Chief Justice Menis Ketchum at 1, *J.F. Allen Corp.*, *supra* note 4; Docket Sheet, *Soaring Eagle Lodge Master Ass’n v. Soaring Eagle Dev. Co.*, No. 15-C-2202 (Kanawha Cty. Cir. Ct.), attached hereto as “**Exhibit 22**”.]

⁶ [See Mot. to Refer to Business Ct. Division at 1, *Denex Petroleum Corp.* (Barbour Cty. Cir. Ct. Aug. 21, 2017), attached hereto as “**Exhibit 23**”; Letter from Judge Tod J. Kaufman to Chief Justice Menis Ketchum, *J.F. Allen Corp.*, *supra* note 4, at 1.]

four cases, the Circuit Court had not decided a single substantive motion.⁷ From even a cursory glance, none of the four identified cases bear even a passing resemblance to the cases under consideration here.

The same differences in substantive development and procedure posture likewise distinguish the Consolidated Case and State Action from an antitrust case which the Chief Justice recently referred to the Business Court, *Wine & Beverage Merchants v. Mountain State Beverage, Inc.*, BCD No. 17-C-91-HAN. [See Pls.' Joint Mot. to Refer at 2–3, 8 & Ex. A.] In that case, the Circuit Court *sua sponte* filed the motion to refer.⁸ The motion was unopposed.⁹ And perhaps most importantly, during the two-month lifespan of the action, the Circuit Court had not decided a single substantive motion.¹⁰ Apart from involving allegations of antitrust conduct, *Wine & Beverage Merchants* is not comparable to either the Consolidated Case or the State Action.

In conclusion, because referral will not aid the efficient and reasonable resolution of these cases, the Chief Justice should deny the Motion to Refer.

2. The expectation of a “fair” resolution of these controversies will not be improved by granting the Motion to Refer, which the

⁷ [See Docket Sheet, *Denex Petroleum Corp.*, No. 16-AA-1 (Barbour Cty. Cir. Ct.), attached hereto as “Exhibit 24”; Docket Sheet, *Soaring Eagle Lodge Master Ass’n*, *supra* note 5; Docket Sheet, *Peters v. J & J Land Props., LLC*, No. 14-C-36 (Lewis Cty. Cir. Ct.), attached hereto as “Exhibit 25”.]

⁸ [See Mot. to Refer to Business Ct. Division at 1, *Wine & Beverage Merchs. v. Mountain State Beverage, Inc.*, No. 17-C-91 (Hancock Cty. Cir. Ct. Sept. 18, 2017), attached hereto as “Exhibit 26”.]

⁹ [See Pls.' Reply in Supp. of Cir. Ct. of Hancock Cty.'s Mot. to Refer to Business Ct. Division at 1–2, *Wine & Beverage Merchs.*, No. 17-C-91 (Hancock Cty. Cir. Ct. Oct. 10, 2017), attached hereto as “Exhibit 27”.]

¹⁰ [See Docket Sheet, *Wine & Beverage Merchs.*, No. 17-C-91 (Hancock Cty. Cir. Ct.), attached hereto as “Exhibit 28”.]

Movants filed less than one week after receiving an adverse ruling from the Circuit Court.

Second, referral will frustrate the expectation of a “fair” resolution of these controversies in light of the procedure posture of the Movants’ Motion. The Local Governments filed the Consolidated Case more than fourteen months ago, with the State Action following two months later. Despite more than twelve months of ongoing litigation, the first mention of the instant Motion to Refer occurred during an off-the-record bench conference in the middle of a hearing convened to adjudicate five ripe and outstanding motions for summary judgment. [Tr. of Jan. 12, 2018 Hr’g at 7:2–6.] Notwithstanding counsel’s implicit suggestion, the Circuit Court refused to adjourn the hearing. Instead, the Circuit Court heard more than two hours of argument and, at its conclusion, orally granted two of the five dispositive motions. [*Id.* at 147:19–23, 149:14–21.] Less than one week after the Circuit Court’s adverse decisions, the Movants filed the instant Motion to Refer.

In light of such timing, it is difficult to accept counsel’s representation that the Motion to Refer was not prompted by the Circuit Court’s adverse rulings. [Pls.’ Joint Mot. to Refer at 10.] It is unnecessary, however, to reach the issue of counsel’s subjective intent. The objectively reasonable perception of forum shopping is more than enough reason to refuse referral. The Chief Justice recently expressed concern about the danger of “forum shopping” in the forum non conveniens context. *See State ex rel. Am. Elec. Power Co. v. Nibert*, 237 W. Va. 14, 33, 784 S.E.2d 713, 732 (2016) (Loughry, J., dissenting). In *Nibert*, the Chief Justice concluded that the circuit court should have dismissed a fly-ash exposure action on forum non conveniens grounds because the harm occurred in Ohio and fifty-six of the seventy-seven plaintiffs were Ohio residents. *Id.* at 29–33, 784 S.E.2d at 728–32. The decision to exercise jurisdiction despite the presence of a more

natural and suitable forum (*i.e.*, Ohio) raised, in the Chief Justice's view, "the unwelcome hint of 'home cooking' and forum shopping." *Id.* at 33, 784 S.E.2d at 732.

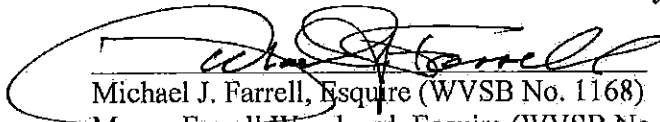
The same concerns about forum shopping are implicated by the instant Motion to Refer too. The expectation of a "fair" and "reasonable" resolution of a controversy is enriched when Chief Justice encourages litigants to diligently pursue motions to refer. In this case, however, the lack of diligence is apparent. The Chief Justice should not endorse the use of this procedural mechanism as a way for dissatisfied litigants to obtain a different forum when an unfavorable decision is foreseeable and imminent.

IV. CONCLUSION

For the foregoing reasons, Kelly Paving urges the Chief Justice to deny the Plaintiffs' Joint Motion to Refer to Business Court.

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**BEFORE THE CHIEF JUSTICE OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA, *ex rel.* PATRICK MORRISEY,
ATTORNEY GENERAL, and THOMAS J. SMITH, *in his*
official capacity as SECRETARY OF TRANSPORTATION AND
COMMISSIONER OF HIGHWAYS, WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,**

PLAINTIFFS,

v.

**KANAWHA COUNTY CIRCUIT COURT
CIVIL ACTION NO. 17-C-41**

JUDGE TOD J. KAUFMAN

**CRH, PLC;
OLDCASTLE, INC.;
OLDCASTLE MATERIALS, INC.;
WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA ASPHALT, INC.;
KELLY PAVING, INC.;
CAMDEN MATERIALS, LLC;
AMERICAN ASPHALT & AGGREGATE, INC.;
AMERICAN ASPHALT OF WEST VIRGINIA, LLC;
BLACKTOP INDUSTRIES AND EQUIPMENT COMPANY,**

DEFENDANTS.

**CITY OF CHARLESTON,
*and all others similarly situated,***

PLAINTIFF,

v.

**KANAWHA COUNTY CIRCUIT COURT
CIVIL ACTION NO. 16-C-1552,
consolidated with Civil Action Nos. 16-C-
661-B (Raleigh), 16-C-337-DS (Mercer), 16-
C-425 (Wood), 16-C-1598 (Kanawha), and
16-C-666 (Cabell)**

JUDGE TOD J. KAUFMAN

WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA ASPHALT, INC.;
KELLY PAVING, INC.;
CAMDEN MATERIALS, LLC;
AMERICAN ASPHALT & AGGREGATE, INC.;
AMERICAN ASPHALT OF WEST VIRGINIA, LLC;
BLACKTOP INDUSTRIES AND EQUIPMENT COMPANY;
JOHN AND JANE DOES 1-25,

DEFENDANTS.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Kelly Paving, Inc., do hereby certify that the foregoing
“REPLY MEMORANDUM BY KELLY PAVING, INC. IN OPPOSITION TO
PLAINTIFFS’ JOINT MOTION TO REFER TO BUSINESS COURT,” has been served this
7th day of February, 2018, via electronic, United States mail, postage prepaid, and/or hand delivery
on the following:

Hon. Tod Kaufman, Judge
Circuit Court of Kanawha County
Judicial Annex Building
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Charleston, WV 25301

Cathy S. Gatson, Clerk
Circuit Court of Kanawha County
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Charleston, WV 25301

Edythe Nash Gaiser, Clerk of Court
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