IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: May 01 2023
10:32AM EDT
Transaction ID 69924748

No. 23-0142

STATE OF WEST VIRGINIA, *ex rel.* PACHIRA ENERGY LLC,

Petitioner,

v.

THE HONORABLE CINDY SCOTT, NORTHEAST NATURAL ENERGY LLC, and NNE WATER SYSTEMS LLC,

Respondents.

Hon. Cindy Scott, Judge
Circuit Court of Monongalia County
Civil Action No. 18-C-369

BRIEF OF THE RESPONDENTS, NORTHEAST NATURAL ENERGY LLC and NNE WATER SYSTEMS LLC

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I. INTRODUCTION

A writ of prohibition is not appropriate in this matter. "The writ of prohibition shall lie as a matter of right," W. Va. Code § 53-1-1 provides, "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Here, the Petitioner, Pachira Energy LLC ("Pachira"), does not contend that the Circuit Court lacks jurisdiction over the subject matter, nor does it contend that it exceeded its legitimate powers regarding resolving issues presented to the Circuit Court. Instead, Pachira's Petition raises *new* legal arguments that directly *contradict* its position throughout the underlying proceedings, including before this Court, that were not presented to the Circuit Court.

Specifically, in its attempt to limit the implied Water System partnership to two partners (instead of three) to avoid dissociation, Pachira argued vehemently below that the partnership was between Pachira and Respondent NNE Water Systems LLC ("NNE WS") and that Respondent Northeast Natural Energy ("NNE") was *not* a partner. Now, in its Petition, and *for the first time*, Pachira alleges that NNE (*not* NNE WS) was its partner. This is because Pachira failed to refute the testimony and overwhelming evidence presented to the lower court that NNE must be included with Pachira and NNE WS in the implied partnership. Now Pachira presents a complete about-face of its position, arguing that NNE *is* a partner and NNE WS *is not*. Pachira asks this Court to reverse the Circuit Court based on a completely different legal argument that the lower court never considered. On this basis alone, the Petition for Writ of Prohibition should be rejected.

With respect to the other arguments set forth in the Petition, the action before the Circuit Court is about a business relationship with multiple facets.

On one hand, Pachira and NNE invest together in operations to develop natural gas in Monongalia County pursuant to two written agreements: a Joint Operating Agreement ("JOA") and an Area of Mutual Interest Agreement ("AMI Agreement"). The JOA and the AMI Agreement confined those operations to the "Blacksville AMI."

On the other hand, the Circuit Court found that Pachira, NNE, and NNE WS operated a water line and handling facility ("Water System") that serves those oil and gas operations without a written contract. The Circuit Court concluded that all three parties own and operate the Water System as a partnership under the Uniform Partnership Act ("Partnership Act"), W. Va. Code § 47B-1-1, *et seq*. (the "Water System Partnership").

Pachira asked for that exact finding when it filed its original federal court complaint almost five years ago. Once in state court, Pachira's conduct proved that its desires go beyond the Water System Partnership: Pachira has always sought to leverage both business relationships—the Water System Partnership and the contractual relationships—against NNE and NNE WS. Pachira's conduct before the Circuit Court demonstrated an unequivocal need to withdraw from the Water System Partnership. The Circuit Court granted Pachira that relief. Thereafter, Pachira argued against the Circuit Court's findings, fearing its leverage diminished. Pachira then filed its Petition for Writ of Prohibition with this Court, improperly seeking to prohibit the Circuit Court's orders based on facts and arguments *never raised in the Circuit Court*.

Pachira's Petition demonstrates the drastic measures Pachira will pursue to slow down the ultimate resolution of the proceedings before the Circuit Court. NNE has persevered and continues developing natural gas in the Blacksville AMI for Pachira's benefit, notwithstanding Pachira's unrelenting strategy to harm NNE. Now, despite receiving a ruling *in its favor* from the

Circuit Court, Pachira asks this Honorable Court to prohibit the lower court based on new arguments and prevent the parties from resolving one of Pachira's claims with the Circuit Court's supervision. Pachira attempts to hold Respondents hostage.

Pachira argues the Circuit Court condoned a "phase out" of Pachira from the Water System Partnership and should be restrained from dissociating Pachira without dissolving the Partnership. The law and the facts do not so constrain the Circuit Court.

First, Pachira sought multiple avenues of relief, as did NNE and NNE WS against Pachira for its misdeeds. The Circuit Court resolved Pachira's claims *in favor of Pachira* by concluding that the Water System Partnership exists, which is what Pachira has always alleged, and provided a judicially supervised method for Pachira to extract its value, which is what Pachira has always sought. The Circuit Court acted within its authority when it allowed the Water System to continue serving the natural gas operations in the Blacksville AMI for Pachira's and NNE's benefit.

Second, Pachira's claims of "harm" are unfounded. The most misleading and oft-used method that Pachira employs to allege harm is by citing this Court's opinion in *Northeast Natural Energy LLC v. Pachira Energy, LLC*, 243 W. Va. 362, 844 S.E.2d 133 (2020). That opinion agreed that the scant facts before the Court on Pachira's emergency motion for injunctive relief *might* be developed into a finding of harm. The parties have been in front of the Circuit Court numerous times in the four and half years since that preliminary injunction hearing, and, as this Court will see, the facts demonstrate that Pachira has not been, and will not be, harmed by NNE or NNE WS. Pachira's constant citations to this Court's opinion are misleading. Pachira's harm to NNE and NNE WS continues daily, and the Circuit Court took a significant step to protect those parties from Pachira by allowing them to continue operating the Water System.

The second misdirection is Pachira's claim that, by being dissociated on November 12, 2021, NNE and NNE WS can somehow injure Pachira by carrying on the business of the Water System Partnership. As the Circuit Court noted and the Partnership Act requires, the valuation of Pachira's dissociated interest is frozen on the date of dissociation. No harm can befall Pachira by allowing NNE and NNE WS to continue operating the Water System Partnership. *Pachira gets its value out of the entity as of that day*. Pachira will receive the value of its 25% investment in the Partnership under the Circuit Court's order. It is not being "squeezed" or "phased" out; Pachira is being *bought* out under judicial supervision. Pachira filed this lawsuit to terminate its role as a partner in an implied partnership. Pachira's request to dissolve the partnership does not change anything for Pachira: if the partnership is dissolved, Pachira is still "out." Dissolving the partnership would drastically affect NNE and NNE WS. The Water System serves the AMI. It was designed to lower costs and increase efficiencies associated with developing jointly owned wells. NNE is the designated Operator of the AMI wells under the JOA, and NNE WS operates the Water System. NNE and NNE WS conduct these operations to benefit Pachira, NNE, and others with interests in the jointly owned wells. Dissolving the partnership harms all those parties--Pachira included--since the Water System will no longer be the most cost-effective means to serve the Blacksville AMI wells.

If Pachira would allow its lawsuit to go forward, the parties would have conducted depositions and found answers to many of Pachira's spurious claims of "harm." NNE has never misused the Water System, inappropriately pursued personal gain, or sought to hurt Pachira. Even the communications Pachira references in its Petition show that NNE has always followed the written agreements between the parties and respectfully responded to Pachira's many requests.

NNE and NNE WS want to end this litigation and vindicate themselves from the vitriol Pachira spreads to the Respondents (and now the Circuit Court) through this action. Accordingly, this Court should deny Pachira's Petition for Writ of Prohibition.

II. QUESTIONS PRESENTED

1. Is a writ of prohibition appropriate where Petitioner seeks prohibition based on a completely new (and, in fact, opposite) argument that was never presented to the Circuit Court and where this Court has held that a writ of prohibition will not be considered where the petitioner fails to raise the issue complained of before the lower court?

2. If Petitioner prevails on the first Question, then did the lower court exceed its legitimate powers by granting relief under W. Va. Code §§ 37-4-3 and 47B-7-1, which provide procedures to buy out the interest of a co-tenant or partner, where the statutes do not preclude equitable remedies, where Petitioner has repeatedly sought to be "bought out" of its 25% interest in the Water System, where NNE and NNE WS also requested to buyout Petitioner, and where the lower court found that the buyout was appropriate because it is necessary for NNE and NNE WS to be able to continue operating the Water System in order to service the ongoing drilling operations in the area of mutual interest?

3. If Petitioner prevails on both of the Questions above, then is Petitioner harmed by the lower court's ruling that NNE and NNE WS may continue to carry on the operation of the Water System Partnership where the valuation of Petitioner's dissociated interest (25%) is set by statute on the date of dissociation (November 12, 2021), where the value of Petitioner's interest will be determined via expert witness testimony in a valuation proceeding to be held before the lower court, and where nothing occurring after that date affects the value of Petitioner's 25% interest?

III. COUNTERSTATEMENT OF THE CASE

Since commencing this action almost five years ago, Pachira has alleged that Respondents and Pachira entered a partnership under the Partnership Act for the purpose of the construction, operation, and ownership of the Water System.[1] NNE constructed the Water System inside the Blacksville AMI incrementally over time. The Water System was installed pursuant to certain

[1] *See* AR000935 – AR001117, at ¶¶ 9, 61–66.

right-of-way agreements, easements, and surface use agreements ("SUAs"), acquired pursuant to the First Amendment to the AMI Agreement.[2] Pachira pled, "[i]n connection with the [SUAs], NNE and Pachira agreed to construct and jointly own, on the same 75/25% basis, the Water [System]."[3] Pachira alleges that it formed a partnership concerning the Water System because the parties did not enter a written agreement governing its operation or ownership.[4]

After constructing the Water System incrementally, NNE began evaluating the potential of the Water System infrastructure as a stand-alone set of assets. By Partial Assignment and Bill of Sale dated January 20, 2018, and effective October 1, 2017, NNE assigned certain interests in and to the Water Facilities to NNE WS.[5] At that time, NNE and Pachira attempted but could not memorialize an agreement regarding using the Water System.[6] Pachira filed multiple injunctions related to the Water System to preclude using it for any purpose other than to serve jointly-owned wells within the Blacksville AMI.[7] The Circuit Court granted the first Motion for Preliminary Injunction in part, preserving the status quo by enjoining Respondents from "using the Water Line and Handling Facilities (i) to transport water to locations outside of the Blacksville AMI or (ii) to sell water to third parties for use outside the Blacksville AMI."[8] The October 25, 2018, Injunction

[2] *Id.* at ¶ 51, Ex. A.

[3] *Id.* at ¶¶ 56, 203, 247, 267, 323, 352, & 420.

[4] *Id.* at ¶ 60.

[5] AR001760 – AR001761 at ¶¶ 9 – 10.

[6] AR001327, at ¶ 60.

[7] *See* Pl.'s Mot. For TRO and Prelim. Inj. Filed Sept. 19, 2018, AR000001 (first injunction attempt); Pl.'s Mot. For Prelim. Inj. Filed Nov. 8, 2019, AR000007 (second injunction attempt); Pl.'s Aug. 31, 2020, Mot. For Prelim. Inj., AR000011 (third injunction attempt).

[8] Order entered October 25, 2018 (the "October 25, 2018, Injunction"), AR000177.

precludes the parties from realizing profits through using the Water System to transport or sell water to third parties outside the AMI.

Pachira has consistently sought to leverage a divorce of all business relations with NNE and to extract its 25% investment (or more) in the Water System Partnership. This includes filing a Motion for Partition by Allotment or Sale or Alternative Ground for Relief ("Partition Motion").[9] In its Partition Motion, Pachira "seeks partition by allotment or sale."[10] Pachira argued that it has an absolute right to partition and that partition in kind cannot be conveniently made.[11]

On June 30, 2020, Pachira filed a "Notice of Supplemental Authority Providing Alternative Ground for Relief," adding judicial dissolution to its request for relief.[12] Pachira reaffirmed its argument that it "is entitled to an allotment (one party buys out the other party's interest in the Water Line and Handling Facilities)[.]"[13] Pachira stated, "*regardless* of whether the Water [System is] a joint venture or held by a tenancy in common, there are only two options: (i) **one party can buy out the other party's interest in the Water [System]** (*see* . . . 47B-7-1 . . .); or (ii) the Water [System is] sold (*see* 47B-8-7 . . .)."[14] NNE and NNE WS consistently argued in their pleadings and before this Court that the entity operating the Water System is not a partnership implied under West Virginia law.[15] The Circuit Court disagreed and ruled in favor of Pachira, finding that Pachira,

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[9] See AR000538 and AR000563.

[10] AR000538 and AR000543.

[11] AR000542.

[12] AR000649 – AR000656.

[13] *Id.*

[14] AR000656 (*emphasis* original, **emphasis** added).

[15] Pet. 5 n.1, 11, 12. Respondents preserve all rights to appeal the Circuit Court's finding that the parties formed a partnership under West Virginia law. The court must analyze two factors necessary to determine whether a partnership has been formed: (1) the intent to share in profits and losses; and (2) the intent to share management authority. *See, e.g., Kaufman v. Catzen*, 100 W. Va. 79, 130 S.E. 292 (1925) (no

NNE, and NNE WS were all partners in the implied partnership concerning the Water System. The Circuit Court "wanted to allow Pachira to be out" of the Water System "without affecting the daily operations of the remaining partners."[16] In other words, the Circuit Court granted Pachira's request to monetize its investment in the Water System Partnership but did not grant Pachira's draconian wish to dissolve the Water System that NNE and NNE WS had been successfully operating for the benefit of the Blacksville AMI in spite of Pachira's constant attempts to destroy the operations.

To defeat the Circuit Court's order finding an implied partnership in favor of Pachira, Pachira argued below that the Water System Partnership was with *NNE WS* and that NNE was *not* a part of the partnership.[17] Pachira specifically sought to *exclude* NNE from the partnership.[18]

After the Circuit Court found that Pachira, NNE, and NNE WS formed a Partnership, *Pachira stopped paying its water bills owed to NNE under the JOA*.[19] Specifically, Pachira has not paid NNE under the JOA for costs associated with a single barrel of water used to complete jointly

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partnership where management vested in one individual to the exclusion of another). No motion was pending before the Circuit Court asking for the finding of a partnership, and no evidence was presented to prove these two essential elements. The facts in the record prove that neither factor can be satisfied. Pachira went to great lengths to preclude the Water Facilities from realizing profits. *See* Third Am. Compl. [AR000935 – 001117] at ¶ 100 (the Water Facilities do not profit under Pachira's injunction: "the cost is a wash for both NNE and Pachira because the parties' get that money back"); *id.* ¶¶ 106, 260, 271, 307, 331 & 368 (NNE proposed generating revenue by selling water to third parties; Pachira objected). Furthermore, Pachira never shared in management authority, which Pachira sought through this lawsuit. *See id.* ¶¶ 72, 96 & 114 (NNE and NNE WS have made all decisions with respect to the permitting, design, construction, installation, and operation of the Water Facilities).

[16] Order entered Nov. 12, 2021, the ("Dissociation Order") AR001377.

[17] AR001334, AR001338, AR001340, AR001344—AR001346, AR001350—AR001353, AR001579, AR1583–AR001585.

[18] AR001579, AR1583–AR001585.

[19] *See* AR001974 – AR001975; *see also* AR001944 – AR001945 (Pachira's defaults for failure to pay water costs have been an issue before the Circuit Court throughout the proceedings).

owned wells since the Circuit Court entered the Dissociation Order. Pachira has racked up millions of dollars in defaults under the JOA.[20] NNE is currently carrying those costs to continue the oil and gas development operations for the benefit of NNE and Pachira under the JOA.

In contrast to Pachira's arguments made below, it now argues *for the first time* that "Pachira believed the Water System partnership extended only to those entities that were party to the agreement and had partnership interests in the Water System—Pachira and NNE, regardless of which entity held the Water System partnership."[21] Furthering misdirection, Pachira also argues for the first time that the alleged partnership between Pachira and NNE was formed "in 2013."[22]

Simply stated, Pachira sought application of the Partnership Act to its relationship vis-à-vis the Water System, but now not only wants to deprive the Circuit Court of jurisdiction to fashion a remedy under the Act but also have this Court overturn the Circuit Court's interlocutory rulings based on arguments never made to the Circuit Court.

IV. SUMMARY OF ARGUMENT

Pachira's Petition for Writ of Prohibition should be denied because it fails to meet the factors set forth in *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

First, Pachira raises new arguments related to the identity of the partners in the Water System Partnership and the date of its formation in its Petition that the Circuit Court did not consider. The failure to raise those issues below prevents consideration of that matter since the Circuit Court had no opportunity to consider the issue while formulating the relief fashioned.

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[20] *Id*. Currently, Pachira has refused to pay and remains in default on $4,960,139.09 in water costs.

[21] Pet. 6.

[22] Pet. 5.

Second, the Circuit Court's actions are not erroneous as a matter of law under the third *Berger* factor because it acted within its legitimate authority in dissociating Pachira based on the record since: (1) two partners remain in the partnership after Pachira's dissociation; (2) the Circuit Court correctly found the Water System Partnership is a partnership for a particular purpose; and (3) the Circuit Court had the authority to dissociate Pachira and allow NNE and NNE WS to buy out its interest under both law and equity. The Circuit Court held *six* hearings on issues related to its findings and the latest, an evidentiary hearing on June 22, 2022, directly concerning a Motion to Modify filed by Pachira that Pachira never cited in its Petition.[23] Respondents presented witnesses and voluminous exhibits at the evidentiary hearing that Pachira fails to cite.

Third, the second factor in *Berger*, "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal," also fails. The value of Pachira's interest in the Partnership is set as of the date of dissociation. The record before the Circuit Court demonstrated that NNE and NNE WS did not, and will not, harm Pachira's interest in the Water System.

Finally, the fourth and fifth factors of *Berger* do not support granting Prohibition because the Circuit Court acted within its legitimate powers in dissociating Pachira from the Water System Partnership pursuant to the facts and law argued below.

V. ARGUMENT

A. STANDARD OF REVIEW.

This Court limits its exercise of original jurisdiction because "prohibition . . . against judges [is a] drastic and extraordinary remed[y] . . . reserved for really extraordinary causes."[24]

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[23] Pachira's Appendix states that the hearing occurred on June 20, 2022. It did not. *See* AR001591.

[24] *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996) (citations and quotations omitted).

In Syllabus Point 4 of *Hoover*, *supra*, this Court identified the five factors to consider:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

"Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight."[25] A writ of "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari."[26] "This Court will use prohibition . . . to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."[27] Pachira's Petition fails to satisfy the *Berger* factors.

B. THE PETITION SHOULD BE DENIED BECAUSE PACHIRA SEEKS INTERLOCUTORY REVIEW OF CIRCUIT COURT RULINGS BASED ON ARGUMENTS NEVER RAISED.

Pachira asks this Court to prohibit rulings by the Honorable Cindy Scott based on legal arguments never raised.[28] Pachira alleges that she failed to apply West Virginia partnership law by

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[25] *Id.*

[26] *State ex rel. Hamrick v. Stucky*, 220 W. Va. 180, 184, 640 S.E.2d 243, 247 (2006) (*citing* Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953)).

[27] *Id.* (*citing* Syl. pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)).

[28] The Honorable Cindy Scott is a judge on the Circuit Court of Monongalia County. Pachira's Petition incorrectly identifies Judge Scott as being in the Circuit Court of Pleasants County. Pet. (Caption).

allowing the Water System Partnership to continue after dissociating Pachira.[29] Pachira claims this is erroneous based on a new argument that was not considered at any stage in this litigation.

Pachira claims in its Petition *for the first time* that the partnership consisted only of NNE and Pachira and, therefore, Pachira's dissociation requires dissolution under W. Va. Code § 47B-8-1. That is a complete reversal of Pachira's previous argument that Pachira and *NNE WS* were partners in the Partnership and that *NNE was not a partner*. Pachira's numerous filings and representations before the Circuit Court clearly demonstrate Pachira's long-held position as to the identity of the partners. Moreover, Pachira alleges *for the first time* that the Partnership was formed in 2013. The allegation that the Partnership was formed in 2013 *is new*. The argument that the partnership existed between NNE and Pachira is not just new; it is a complete reversal of Pachira's pleadings and arguments before the Circuit Court.

To Pachira, these new claims are critical because Pachira's Petition fails if this Court looks at the same facts and law that the Circuit Court considered. These new claims are also fatal to Pachira's Petition, as it is inappropriate to bring a writ of prohibition based on issues not raised before the Circuit Court because "[f]ailure to raise an issue below will prevent consideration of that matter" above since "the circuit court was not permitted to consider this issue in the course of formulating" the relief fashioned.[30] It is obviously "inappropriate" for this Court to "inform the circuit court that it has acted wrongly when it did not have an opportunity to address the matter in the first instance."[31] That is exactly what Pachira is attempting to do in its Petition.

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[29] Pet. 20 – 35.

[30] *State ex rel. Almond v. Rudolph*, 238 W. Va. 289, 299, 794 S.E.2d 10, 20 (2016) (*quoting State ex. rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, 228 W. Va. 252, 265, 719 S.E.2d 722, 735 (2011).

[31] *Id.*

Like in *Bedell*, where a writ of prohibition was denied because the petitioner failed to raise a non-jurisdictional issue before the circuit court, Pachira requests that this Court tell the Circuit Court "that it has acted wrongly" when Pachira raised the opposite arguments below. It does not make sense for Pachira to claim that the Circuit Court was wrong to find NNE WS to be a partner when Pachira vigorously argued that NNE WS was a partner before the Circuit Court.

Relatedly, Pachira never argued, and the Circuit Court did not consider whether NNE had the ability to bring NNE WS into the partnership because Pachira never contested NNE WS as a partner until it filed the Petition. Though Pachira argued before the Circuit Court that the Partnership consisted of Pachira and NNE WS, Pachira now claims that the Partnership is between Pachira and NNE—not NNE WS— "because a transfer of one partner's interests cannot make a new partner."[32] To make that argument, Pachira offers new facts and a logical leap: for the first time, Pachira alleges that the partnership came into being in 2013, and second, that the partnership is between Pachira and NNE.[33]

Neither Pachira, nor anyone else, alleged that the *Water Systems Partnership* began in 2013. The Court should pay attention to Pachira's careful use of quotation marks to make this assertion.[34] The Dissociation Order does not state that the implied partnership was formed in 2013. Nor does the Dissociation Order state that the oral agreement created the "Water System partnership."

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[32] Pet. 33.

[33] *See* Pet. 5.

[34] *Compare* Pet. 5 ("Around the same time in 2013, 'Pachira and NNE entered into an oral agreement to acquire, develop, own and operate' the Water System partnership.") (*citing* Nov. 12 Order, Findings of Fact, ¶ 7) *with* the Dissociation Order, Findings of Fact ¶ 7, AR001330 ("Pachira and NNE entered into an oral agreement to acquire, develop, own and operate a water line, infrastructure, and facilities.").

Beyond misleading, Pachira attempts to sanction the lower court by inserting these new facts not presented below.

Additionally, Pachira never argued that *NNE* was in the Partnership with Pachira to the exclusion of NNE WS until filing this Petition. In fact, Pachira argued the opposite below – that NNE was *never* a partner. The Circuit Court concluded that "*Plaintiff [Pachira] and Defendants [NNE and NNE WS]* conduct the Water Line as a partnership under West Virginia law. The Water Line and Handling Facilities in the Blacksville AMI is partnership property."[35]

Pachira objected, vigorously arguing that the partnership was between Pachira and *NNE WS – not NNE*.[36] Pachira stated, "the Court's order of dissociation rather than dissolution possibly stems from a misapprehension of the *fact that there are only two partners in the Water Line and Handling Facilities—Pachira and NNE WS*."[37] Pachira argued before the Circuit Court that the Water System Partnership was between Pachira and NNE WS on the date of dissociation.[38] The Circuit Court disagreed. Under Pachira's argument before the Circuit Court, the Water System Partnership *could not have formed* prior to NNE's assignment of interests in the Water System to NNE WS by Partial Assignment and Bill of Sale dated January 20, 2018, and effective October 1, 2017.[39]

Pachira's new argument that the partnership began in 2013 and the complete about-face of its position that NNE WS and Pachira were partners conclusively demonstrates that the Petition

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[35] Dissociation Order, Concl. of Law ¶ 10 (emphasis added), AR001331.

[36] A.R. 001344.

[37] *Id.* (emphasis added).

[38] AR001579, AR1583–AR001585.

[39] AR001747.

is inappropriate.[40] This is not a clear-cut legal error contravening a clear statutory, constitutional, or common law.[41] Pachira asks this Court to consider a completely different legal argument based on facts that are not of record. The Dissociation Order is not erroneous as a matter of law.[42]

C. THE NOVEMBER 12 ORDER IS NOT "CLEARLY ERRONEOUS" UNDER WEST VIRGINIA LAW BECAUSE THE CIRCUIT COURT ACTED WITHIN ITS LEGITIMATE AUTHORITY.

The Circuit Court acted within its authority under West Virginia law by dissociating Pachira without dissolving the Partnership. Noted above, the Circuit Court's conclusion that there were three partners in the Water System Partnership on the date of Pachira's dissociation is within the court's authority based on the record.[43] As such, on that premise alone, the Petition should be denied. In addition, the Circuit Court did not exceed its authority by dissociating Pachira because the partnership is for a particular purpose, and the court has the equitable authority to act to resolve the claims before it.

1. Dissociation is an appropriate and complete remedy because the partnership may continue with the two remaining partners.

The Circuit Court concluded that Pachira, NNE, and NNE WS conducted the Water System as a partnership.[44] This Court previously agreed, concluding that "[t]he evidence below

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[40] *Bedell,* 228 W. Va. at 265, 719 S.E.2d at 735.

[41] *Stucky*, 220 W. Va. at 186, 640 S.E.2d at 249.

[42] Syl. pt. 4, *Berger*, *supra*.

[43] Notably, Pachira's Third Amended Complaint, the operative pleading, consistently refers to Pachira being in a joint venture/partnership with the "Defendants" (NNE and NNE WS). *See* Third Am. Compl, AR000935 – AR001117.

[44] Dissociation Order, Concl. of Law at ¶10, AR001331 ("Plaintiff and Defendants conduct the Water [System] as a partnership under West Virginia law" and that "[t]he Water [System] in the Blacksville AMI [are] partnership property."); *see also* AR001750 – AR001751 at ¶¶ 28 and 36.

indicates that Pachira and [Respondents][45] are, in fact, partners in a partnership[.]"[46] The Circuit Court found that "[t]he Partnership Act is controlling as there is no partnership agreement for the [Water System Partnership]."[47] The Circuit Court then dissociated Pachira from that partnership implied under West Virginia Law.[48] Because NNE and NNE WS remain in the Partnership, they may continue to operate the Water System without Pachira. The law does not require dissolution.

"A partnership is a relationship among two or more persons who agree to enter business together on either negotiated terms or terms implied by law."[49] A factor in determining whether dissociation is appropriate (in place of dissolution) involves a finding that at least two parties remained to conduct the Water System as an implied partnership under West Virginia law on the date of Pachira's dissociation. At that time, even Pachira agreed that the Circuit Court would be acting in its authority if there were three partners:

> To the extent the [Circuit] Court's Order reflects a presumption that there are more than two partners in the Water [System] partnership, its conclusion that dissociation rather than dissolution was appropriate relief might withstand scrutiny . . . for in that case there would still be more than one partner left to carry on the business of the partnership.[50]

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[45] This Court referred in its opinion to both NNE and NNE WS as "Northeast." *Ne. Nat. Energy*, 243 W. Va. at 366, 844 S.E.2d at 136, n.1.

[46] *Id.* at 367, 844 S.E.2d at 138.

[47] Dissociation Order, Concl. of Law at ¶ 11.

[48] *Id.,* Concl. of Law at ¶ 14.

[49] PARTNERSHIP LAW & PRACTICE § 1:1 (2021-2022); *see also* W. Va. Code § 47B-2-2 ("the association of two or more persons to carry on as co-owners of a business for profit forms a partnership . . .").

[50] Pl.'s Mem. in Supp. of Mot. to Modify at 9, AR001345.

The Circuit Court correctly concluded that the implied Water System Partnership included Pachira, NNE WS, and NNE.[51] Pachira fails to mention the significant much of the evidence before the Circuit Court. As noted, the Circuit Court held *six* hearings touching on the issues decided in the Dissociation Order and January 11, 2023, Order denying Pachira's Motion to Modify.[52] Pachira does not mention the June 22, 2022, evidentiary hearing where the Circuit Court took testimony and admitted documentary evidence. That evidence proved that NNE and NNE WS were in the implied Partnership with Pachira. In fact, NNE WS holds title to 210 SUAs and the appurtenant water infrastructure that are a part of the Water System Partnership.[53]

The Circuit Court concluded that all three parties were in the Partnership prior to Pachira's dissociation by applying the law and equity to a mountain of evidence that Pachira hides in its Petition. But now, attempting to get around that voluminous evidence, Pachira claims for the first time that the Water System Partnership was formed in 2013 between NNE and Pachira. Noted above, Pachira never raised either of these facts before the Circuit Court. That flip of its position was the only way Pachira could hope to succeed in prohibiting the Circuit Court's rulings. Because the Circuit Court found that NNE, NNE WS, and Pachira were all in the implied partnership, the Water System Partnership could continue after Pachira's dissociation.

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[51] Dissociation Order, Concl. of Law at ¶10, AR001331.

[52] *See* Docket Sheet at AR000002 – AR000021 (hearing on Pachira's first Motion for Preliminary Injunction conducted on September 19, 2018; hearing on Pachira's Partition Motion conducted on February 25, 2020; second hearing on Pachira's Partition Motion, which also considered Pachira's request for dissolution, conducted on October 26, 2020; hearing on Respondents' Motion to Dismiss which challenged the Pachira's partnership claims conducted on July 26, 2021; hearing on Pachira Motion for Emergency Stay Relief conducted on January 19, 2022; and the seminal hearing on the issues raised in Pachira's Petition, held on June 22, 2022, to take evidence related to Pachira's Motion to Modify).

[53] AR001500 – 001522; AR001331, at ¶ 10 ("The Water [System] in the Blacksville AMI is partnership property.").

2. Pachira has always alleged facts demonstrating that the Partnership was for a particular purpose—only after being dissociated did Pachira claim the Partnership was at will.

The Circuit Court did not find a partnership at will.[54] A partnership at will is "a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking."[55] Pachira seeks to overturn the Circuit Court's rulings, claiming the Water System Partnership is at will and, thus, must be dissolved pursuant to W. Va. Code § 47B-8-1(1). Pachira conspicuously fails to mention that a partner's dissociation from a partnership for a definite term or undertaking does not trigger dissolution.[56]

If it is a partnership at all, the implied Water System Partnership is a partnership for a definite term or particular undertaking, i.e., (pursuant to Pachira's own arguments) to transport water to and from jointly owned wells within the AMI. The Partnership Act does not define a partnership for a definite term or particular undertaking.[57] The Partnership Act differentiates the treatment of a partnership for a particular undertaking from a partnership at will.

"In the absence of some contrary showing a partnership is deemed to be at will and any partner may withdraw at any time without incurring liability, such a withdrawal is wrongful if it is in violation of an express or implied agreement that the relationship would continue for a definite term or until a particular undertaking is completed."[58] "A 'particular undertaking' under the statute must be capable of accomplishment at some time, although the exact time may

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[54] AR001754 at ¶ 56.

[55] W. Va. Code § 47B-8-1(9).

[56] *See id.*

[57] AR001766 – AR001768.

[58] *Fischer v. Fischer*, 197 S.W.3d 98, 102 (Ky. 2006) (*citing 68th Street Apts., Inc. v. Lauricella,* 362 A.2d 78, 86–87 (N.J. Super. 1976)).

be unknown and unascertainable at the date of the agreement."[59] "It is true that where a partnership is not limited as to time, and there is nothing to show the intention of the parties as to its duration, it will be held to be a partnership at will. But where a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished."[60]

Pachira alleged that the Water System Partnership can only use the Water System within the AMI for AMI wells.[61] Pachira obtained the October 25, 2018, Injunction based upon that exact argument.[62] The record demonstrates that drilling will cease in the AMI at some point and the Water System Partnership will likewise conclude.[63]

The Water System Partnership has a specific purpose (i.e., operating a water system in the AMI to service wells in the AMI) and a definite term (i.e., ending when drilling in the AMI is complete). Thus, under Pachira's own pleadings and arguments before the Circuit Court, the implied Water System Partnership is not a partnership at will, and Pachira's dissociation from the partnership does not trigger dissolution and winding up.

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[59] *Girard Bank v. Haley*, 460 Pa. 237, 332 A.2d 443, 447 (1975).

[60] *Lauricella,* 362 A.2d at 87.

[61] *See* AR000937, at ¶ 9 ("Pachira entered into a . . . partnership for the acquisition, development, ownership, and operation of a water line . . . *to be used solely for the transportation of water for use in the drilling and hydraulic fracturing . . . operations of the wells on the jointly-owned leases and minerals*.") (emphasis added); *see also* Affidavit of Benjamin M. Statler dated September 13, 2018, at ¶¶ 7, 15, AR001830; Hrg. Trans. Feb. 25, 2020, at p. 13, AR001893, ("[t]he water system is designed to service the [AMI] wells that have been drilled. *If you don't use it for the wells, then the water system has, literally, no value*.") (emphasis added).

[62] *See* AR001822 ("Because the [SUAs] were *limited solely for purposes of the Blacksville AMI wells, the Water Line and Handlings Facilities constructed within the Surface Use Agreements were necessarily limited to purposes related to the Blacksville AMI wells*.") (emphasis added); *see also* Aff. of Benjamin M. Statler dated Sept. 13, 2018, at ¶¶ 7, 15, AR001830.

[63] AR001669, AR001702.

3. The Circuit Court has the authority to grant the relief granted in the November 12 Dissociation Order because it equitably resolved Pachira's claims.

Dissociation is appropriate under the Circuit Court's findings and provides the relief requested by Pachira in this litigation. West Virginia is a jurisdiction that has adopted the Revised Uniform Partnership Act ("RUPA"). RUPA was adopted to mitigate the harsh provisions contained in the former Uniform Partnership Act ("UPA"), particularly the UPA's automatic dissolution and compelled liquidation requirements.[64] "RUPA's underlying philosophy differs radically from UPA's" through the adoption of the "'entity' theory of partnership as opposed to the 'aggregate' theory that the UPA espouses."[65] Pursuant to the aggregate theory, if a partner withdraws, the partnership ceases.[66] However, the drastically less harsh entity theory "allows for the partnership to continue even with the departure of a member because it views the partnership as 'an entity distinct from its partners.'"[67] In the interest of preserving the partnership, a partnership may continue if the remaining parties agree to buy out the partner's share. The partnership does not automatically dissolve.[68] Additionally, the option to buy out the exiting partner does not have to be expressly delineated in a partnership agreement; the surviving parties must merely choose to exercise the buy-out option.[69]

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[64] *Creel v. Lilly*, 354 Md. 77, 89, 729 A.2d 385, 392 (1999).

[65] *Id*.

[66] *Id*.

[67] *Id*. at 90, 729 A.2d at 392.

[68] *Id*.

[69] *Id*.

"RUPA [was] intended as a *flexible, modern alternative* to the more rigid UPA, and its provisions are consistent with the reasonable expectations of commercial parties in today's business world."[70] The entity theory, to which West Virginia adheres, creates two paths: "winding up and termination of the partnership" *or* continuing the partnership "and purchas[ing] the departing partner's share."[71] A trial court has discretion under RUPA to employ either remedy.

For example, in *Warnick v. Warnick*,[72] a trial court's decision to disassociate a partner was upheld by the Supreme Court of Wyoming even though the trial court did not specify its reasoning under RUPA. On cross-appeal, one of the partners argued that the trial court "improperly fashioned an equitable remedy" in its relief, but this argument was rejected because "RUPA itself preserves equitable considerations."[73] Similarly, in *Robertson v. Jacobs Cattle Co.*,[74] the Supreme Court of Nebraska concluded that, under RUPA and its entity theory, courts possess discretion in the remedies imposed, especially since "a main purpose of RUPA is 'to prevent mandatory dissolution' of a partnership."

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[70] *Id*. at 90, 729 A.2d at 393 (emphasis added).

[71] *Id*. (quoting *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA.L.REV at 583) (emphasis original). Demonstrating that RUPA adheres to a less rigid approach and that courts have the power to reach less drastic results, the court in *Creel* succinctly stated, "[T]he options [that] various courts have adopted to avoid a compelled liquidation of all partnership assets are equally applicable to the instant case. A dissolution is a dissolution and a winding-up process is a winding-up process, no matter what the underlying reason is for its occurrence." *Id.*, 354 Md. at 92, 729 A.2d at 394.

[72] 76 P.3d 316, 322 (Wy. 2003).

[73] *Warnick*, *supra* at 323 (emphasis added).

[74] 285 Neb. 859, 872, 830 N.W.2d 191, 203 (2013).

Relative to the flexibility bestowed in partnership disputes, this Court has observed, "[c]ourts have broad powers to fashion equitable relief."[75] Moreover, "claims for equitable relief have not been abolished in West Virginia."[76] This Court has further held that:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[77]

"[A] West Virginia trial court is empowered by the principles of equity to grant equitable relief[.]"[78] The Partnership Act allows equity to supplement the statute.[79]

This Court discussed a circuit court's power to fashion equitable relief in the case of *Francis v. Bryson*.[80] The facts in *Francis* were complicated and required equitable resolution. The appellant rented a tract of land to the appellees.[81] Following the termination of the lease agreement, the parties entered into a new agreement but disputed what arrangements were agreed to.[82] The appellant contended that the new terms obligated the appellee to pay $350.00 per month as rent and to hold possession of the property on a month-by-month basis.[83] Further, the appellant

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[75] *CashCall, Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300, at *19 (May 30, 2014) (memorandum).

[76] *Est. of Jones by Jones v. City of Martinsburg*, No. 18-0927, 2020 WL 8991834, at *11 (Oct. 30, 2020) (memorandum).

[77] *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)).

[78] *Id.*

[79] W. Va. Code § 47B-1-4(a) ("Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.").

[80] 217 W. Va. 432, 433, 618 S.E.2d 441, 442 (2005).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 433–34, 618 S.E.2d at 442–43.

contended that the appellee had failed to pay rent for a year for a total arrearage of $4,300.00.[84] The appellant filed a petition for summary relief and wrongful occupation of residential rental property.[85] He was subsequently awarded judgment in magistrate court in the amount of $4,300.00 for rental arrearages plus $90.00 in costs.[86]

The appellees filed an appeal to the circuit court arguing that they had entered into a written agreement with the appellant to purchase the property, which required a down payment of 25% of the purchase price and would then make monthly payments of $350.00 toward the purchase of the real estate.[87] The appellant contended he did not receive the down payment and, thus, considered the $350.00 per month payments as rent.[88] The appellees provided evidence that they had expended $7,000.00 in improvements to the property.[89] At the time a bench trial was held, the alleged rental arrearage had totaled approximately $5,700.00.[90]

The circuit court did not require a transfer of title to the property to the appellees under the written agreed, but fashioned equitable relief to resolve the matter.[91] The circuit court held that the appellees had intended the monthly payments as payments towards the property's purchase price and as the performance of the agreement to purchase the property.[92] The circuit

[84] *Id.* at 434, 618 S.E.2d at 443.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

court found that the appellant accepted those payments with knowledge of the appellees' intent to buy the property.[93] Lastly, the circuit court held that the appellant would reimburse the appellees for the $7,000.00 expended in improvements to the property, but the circuit court did not provide a judgment for the alleged $5,700.00 delinquency in rental payments.[94]

On appeal, this Court reviewed the statutory code section that governed what relief a landlord was entitled to for wrongful occupation.[95] The Court noted that, while the statute provided specific recourse to landlords whose tenants are delinquent in pay, the situation before the circuit court "entail[ed] substantially more complexity than a simple failure to make rent payments. Thus, other equitable concerns were properly addressed by the lower court."[96] This Court further noted that "the lower court was faced with the unenviable task of *attempting to rectify a misunderstanding that had been sustained over a period of years and involved substantial expenditures of money*."[97] This Court explained that "this Court does not discern that the lower court's findings are clearly erroneous. Nor does this Court find any abuse of discretion by the lower court in fashioning appropriate relief."[98]

Likewise, in this case, the Circuit Court's findings are not clearly erroneous because it acted within the scope of its inherent powers by granting dissociation under its broad powers to fashion equitable relief beneficial to all parties. Like the circuit court in *Francis*, the Circuit Court

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[93] *Id.*

[94] *Id.*

[95] *Id.* at 435, 618 S.E.2d at 444.

[96] *Id.*

[97] *Id.* at 436, 618 S.E.2d at 445 (emphasis added).

[98] *Id.* at 437, 618 S.E.2d at 446.

was presented with complex issues, and both parties sought an equitable judgment in their favor. To equitably resolve the issues, the Circuit Court utilized its broad equitable powers to fashion relief that protected the interests of the parties.[99]

The Circuit Court has heard hours of testimony and considered voluminous briefing on the facts and law. The Circuit Court disagreed with Pachira's claims "that NNE's conduct unreasonably frustrated the economic purpose of the partnership."[100] It is abundantly clear from the record that the Circuit Court recognized the partnership could not continue with Pachira.[101] Thus, the Circuit Court examined the relief the parties requested and, through its equitable powers, fashioned such justified relief and acted within its authority.

i. Pachira requested the relief granted in the Dissociation Order.

Pachira asked the Circuit Court to allow "one party [to] buy out the other party's interest in the Water [System]."[102] That is exactly what the Circuit Court did by ordering NNE and NNE WS to buy out Pachira's interest in the Water System. To be clear, Pachira stated, "In other words, *regardless* of whether the Water [System] is a joint venture or held by tenancy in common, there are only two options: (i) one party can buy out the other party's interest in the Water [System] (*see*

[99] Likewise, the matter of *BB Land LLC and JB Exploration I LLC v. Blackrock Enterprises LLC and Michael L. Benedum*, Civil Action 18-C-2, in which the West Virginia Business Court Division entered a Final Judgment Order on April 25, 2022, is instructive. Regarding the dissociation of Blackrock, the Business Court found that the rights and remedies of JB are governed by RUPA, given the *de facto* mining partnership. A party may bring an action for dissociation under W. Va. Code § 47B-4-5. The court may also compel dissociation under W. Va. Code § 47B-6-1 where the partner engaged in harmful conduct that adversely and materially affected the partnership business or engaged in conduct relating to the partnership business that made it not reasonably practicable to carry on the business with the partner. The Business Court found Blackrock had engaged in conduct that made the continuation of the partnership impossible.

[100] AR001331, at ¶ 13 – 14.

[101] *Id.* at ¶ 14.

[102] AR00656.

W. Va. Code §§ 37-4-3 (tenancy in common), 47B-7-1 (joint venture); or (ii) the Water [System] is sold (*see* W. Va. Code §§ 37-4-3 (tenancy in common), 47B-8-7 (joint venture)).”[103] Pachira concluded by affirmatively stating that it is entitled to a buyout: “Pachira is entitled to (i) allotment (one party buys out the other party’s interest in the Water [System] or (ii) a sale of the Water [System] … In light of the June 15, 2020 Opinion, finding that the Water [System] is a partnership, *Pachira is entitled to the same relief under the Partnership Act*.”[104]

As Pachira requested, the Circuit Court granted the “same relief under the Partnership Act.” Pachira asked to be bought out, regardless of the form of the buyout process. Pachira’s claim that the Circuit Court granted relief not requested is directly contradicted by Pachira’s request. Moreover, if there is any doubt, the equitable relief granted by the Circuit Court is, by its very nature, as if the Circuit Court had granted Pachira’s motion for partition by allotment or sale.[105] Pursuant to W. Va. Code § 37-4-3, partition by allotment is proper when “partition in kind cannot be conveniently made” and allows the entire property to be “allotted to any party or parties who will accept it, and pay therefor to the other party or parties such sum of money as his or their interest therein may entitle him or them . . . .”[106] W. Va. Code § 37-4-3 continues:

> In the event that allotment shall be made as aforesaid and the person or persons entitled to the proceeds, for any reason, cannot agree upon the value of the subject, the court, or the judge thereof in vacation, shall appoint three disinterested and qualified persons to fix the value of the whole subject who, after being duly sworn to make an appraisal of the fair market value of the subject, shall within thirty days

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[103] AR000656 (emphasis original).

[104] *Id.* (emphasis added).

[105] *See generally* Partition Motion, AR000535 – 000562; *see also* AR001894 (Counsel for Pachira explained its request for partition by allotment, “[e]ither we buy them out, they get their value, [or] they buy us out, we get the value….”).

[106] *See also Bowyer v. Wyckoff*, 238 W. Va. 446, 451, 796 S.E.2d 233, 238 (2017).

> from the taking of such oath, appraise the subject and make and file a written report of their findings in the office of the clerk of the court in which the suit is pending.

Pachira's requested relief for partition by allotment is synonymous with the relief granted by the Circuit Court when it ordered Pachira to dissociate from the partnership and for Respondents to buy out its interests in the Water System. The Partnership Act provides that "[i]f a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under section one, article eight of this chapter, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b) of this section."[107] The Circuit Court held that "[i]f the parties cannot agree to a buyout price of Pachira's interest, they may obtain independent appraisals, at their own expense."[108] The Circuit Court further explained, "[t]his Order is not for the sale or conveyance of property, but for the monetary buyout of Pachira's interest in the [Water System]."[109]

Here, the language of the Partnership Act and the Dissociation Order are similar, if not identical, to Pachira's requested relief for partition by allotment. In its Partition Motion, Pachira argued that "a partition by sale will advance Pachira's interest by allowing it to obtain the present value of its interest in the property while avoiding any prejudice to NNE WS by allowing it to retain the economic advantages of keeping the integrated system owned and subject to operation on an integrated basis."[110] Pachira sought to exit the implied partnership and receive payment for its interest in the Water Line.[111] Pachira's counsel stated,

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[107] W. Va. Code § 47B-7-1.

[108] Dissociation Order at 8.

[109] *Id* at 9.

[110] AR000543.

[111] *See* AR000693 – AR000694.

> [W]e're going to show, Your Honor, that it's not going to cause anybody any harm because, you know, you partition it, they can either buy it from us, *they can buy our interest from us, or we can buy their interest from them, and they get the value for the system, or if we can't agree on what that price would be, then, Your Honor, can appoint someone who sets the value and then you go through the process again*, and then, if neither one wants to buy, then it gets sold to a third-party, but in any event, *everyone gets the value of the system*.[112]

Thus, Pachira's request that the Circuit Court modify its order is not only inapposite to their request to exit the implied partnership but indicative of its true intent: to disrupt the operations, extort an extravagant payout, and draw out/extend these legal proceedings.

The Circuit Court allowed the parties to brief, argue, and present evidence at the Hearing on Pachira's Partition Motion as to the selling and purchase of the parties' interests in the Water System to resolve the matter. Any argument by Pachira that the Circuit Court *sua sponte* entered its Order is incorrect as Pachira had adequate time to present and protect its interest. As explained previously, West Virginia circuit courts are granted broad power in granting and shaping equitable relief for the circumstances presented to them.[113] Therefore, the Circuit Court properly exercised its power to fashion equitable relief to meet the needs and interests of the parties in this action.

ii. NNE and NNE WS requested Pachira's dissociation at the June 22, 2022, Hearing.

While Pachira contends that none of the Parties requested that Pachira be dissociated, that is incorrect. Aside from the relief requested by Pachira, which the Circuit Court granted, NNE and NNE WS also moved for the Court to dissociate Pachira from the Partnership prior to its January 11, 2023, Order denying Pachira's Motion to Modify the November 12 Dissociation Order. At the June 22, 2022, hearing on Pachira's Motion to Modify (the same evidentiary hearing that Pachira

[112] *Id.* (emphasis added).

[113] *See Francis*, 217 W. Va. at 433, 618 S.E.2d at 442.

fails to cite—or even mention—in its Petition), NNE and NNE WS requested that Pachira be dissociated from the implied partnership, to which Pachira did not object.

> Ms. Dawkins: Your Honor, in case you find that there was not a specific enough request by Pachira for dissociation for you to do this, just to cover all of our bases, if this Court upholds its ruling that there is indeed an implied partnership, Northeast Natural Energy and NNE Water Systems hereby request a judicial determination that Pachira be dissociated from the implied partnership as of November 12, 2021, in accordance with the Court's order.
>
> Now, there are different types, there are two different types of dissociation—
>
> Mr. King: Your Honor, I'm sorry. I don't mean to interrupt, but Ms. Dawkins interrupted me, was that just an official pleading that was requested? That's not in any motion or and pleading. That just came up. Brand new. Just now. Never requested before.
>
> The Court: Ms. Dawkins, clarify the purpose of that statement.
>
> Ms. Dawkins: Your Honor, the purpose of the statement is that in case, in the event, that this Court finds that…Pachira didn't really ask for dissociation. Their petition by allotment doesn't constitute that, well, we're asking.[114]

Thus, NNE and NNE WS moved the Circuit Court to dissociate Pachira as part of its requested relief should there be any ambiguity as to Pachira's requested relief. Such a request was made on the record prior to the Circuit Court's ruling on the Motion to Modify. NNE and NNE WS also requested the relief granted by the Circuit Court.

D. THERE IS NO HARM TO PACHIRA BECAUSE IT WILL RECEIVE THE VALUE OF ITS DISSOCIATED INTEREST IN THE WATER SYSTEM PARTNERSHIP THROUGH DUE PROCESS WHEN THE CIRCUIT COURT IS ALLOWED TO PROCEED.

The second factor in *Berger*, "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal," fails because the Dissociation Order will not harm Pachira.

[114] AR001620 – AR001621.

First, Pachira will receive the full value of its dissociated interest as of the date of dissociation and will not be affected by any actions taken after that date.

Second, Pachira's reliance on this Court's opinion affirming the October 25, 2018, Injunction does not prove harm will occur now or in the future. The record before the Court encompassed eight days: from September 11, 2018 (when Pachira filed its complaint) to September 19, 2018 (when the parties appeared before Judge Clawges). The last four and half years have demonstrated Pachira's wrongful conduct and attempts to harm the Water System Partnership.

Finally, and relatedly, delaying Pachira's dissociation harms NNE, which has had to carry Pachira's unpaid interests in the separate contractual relationship formed under the JOA because Pachira refused to pay its bills while fighting the Dissociation Order. Pachira will not be prejudiced if this Court denies the Petition for Writ of Prohibition.

1. NNE and NNE WS cannot affect the value of Pachira's dissociated interest with future conduct because the valuation is effective as of November 12, 2021, pursuant to the Partnership Act.

Pachira's claims of future "irreparable harm" ignore the most basic tenant of the Dissociation Order: Pachira will receive the value of its dissociated interest as of November 12, 2021—nothing that happens after that date affects the value of that dissociated interest.

W. Va. Code § 47B-7-1(b) states, "The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection (b), section seven, article eight of this chapter if, on the date of dissociation[.]" The value of the dissociated partner's interest and liabilities are fixed by the date of dissociation.[115] The dissociated

[115] *Id.*

partner has no interest in and avoids all risks associated with the partnership after the date of dissociation. There is no harm or risk of harm to the dissociated partner.

Pachira's former interest in or the buyout price of that interest cannot be harmed through NNE and NNE WS's *future* operation of the Water Facilities. Judge Scott agreed, "[w]hat happens after [November 12, 2021] doesn't benefit or harm [Pachira]. You have a set value as of November 12th. I don't see any harm or detriment that's happening to Pachira during that phase."[116] Any future risk of loss or harm is born by the remaining partners, not Pachira.[117]

Pachira claims in its Petition that the buyout of Pachira's dissociation interest provided for in the Dissociation Order "has gone poorly for Pachira."[118] Pachira's statement is not ripe. Pachira fails to mention that it has declined to participate in that judicially administered buyout process provided under W. Va. Code §§ 47B-7-1(b) and 47B-8-7.[119] While Pachira refuses that statutory due process, NNE and NNE WS have expended resources to comply with the Dissociation Order by hiring a consultant, valuing the Water System, making an offer to buy out Pachira's dissociated interest as required under the Dissociation Order, and placing the offered funds in an interest-

[116] AR001394 – AR001395.

[117] Pachira quotes Judge Scott out of context, stating "it "was not [the court's] intent to cut Pachira out prior to their exit," and it "never [intended] . . . to cut Pachira out of any decision making prior to their actual dissociation" or "stop their ability to participate until such time as they were bought out." Pet. 15, n.3 (citing AR001377). Judge Scott later corrected that statement. AR001394 – AR001395. Pachira was not "cut out" before dissociation, and there is no harm to Pachira since the date of valuation is the same date as Pachira's dissociation pursuant to statute. *See* W. Va. Code § 47B-7-1(b).

[118] Pet. 37.

[119] *See* AR000020 (Pachira filed multiple objections to stop the valuation due process from proceeding).

bearing account pending Pachira's acceptance or a judicial determination of the appropriate buyout price.[120] Pachira has refused.

Notably, Pachira is upset that its efforts to harm the Water System Partnership negatively affected the buyout price.[121] In a stunning reversal akin to Pachira's latest flipflop in its Petition (that Pachira and NNE were the only partners in the partnership formed in 2013), Pachira asked the Circuit Court to dissolve the October 25, 2018, Injunction for the sole purpose of inflating the value of its interest.[122] Pachira sought that injunction to stop the Partnership from profiting by transporting water to locations outside the Blacksville AMI or selling water to third parties. Once dissociated and subject to valuation, Pachira asked the Circuit Court to "clarify its Order to reflect that any valuation of the partnership as a going concern should presume the dissolution of the preliminary injunction granted by the [Circuit] Court on October 25, 2018."[123] The Water System Partnership is worth far less than it could have been because of Pachira's wrongful conduct. Pachira claims "harm" in its Petition, but the only harm to the Partnership came at Pachira's hand.

2. Pachira's examples of "harm" in the Petition are profoundly misleading; the record developed over the past four and half years since the injunction hearing on September 19, 2018, demonstrates NNE and NNE WS's proper conduct in contrast to Pachira's harmful actions.

Further, Pachira's repeated citations to this Court's June 2020 opinion affirming Judge Clawges's grant of preliminary injunction do not support Pachira's current allegations that NNE has breached fiduciary duties to Pachira. That opinion reviewed the record before Judge Clawges

[120] AR001601 – AR001602.

[121] AR001347.

[122] *Id.*

[123] *Id.*

as it existed *eight days into the litigation*. Pachira filed its complaint in the state court action on September 11, 2018, and the parties appeared before the Circuit Court on the motion for preliminary injunction on September 19, 2018.[124] No facts had been developed beyond the pleadings and scant affidavits and testimony. In the four and half years since that hearing was held just over a week into the litigation, the parties have conducted extensive discovery and appeared before the Circuit Court for evidentiary hearings on multiple occasions.

Pachira claims that this Court held NNE's desire to use the Water System to develop wells outside of the Blacksville AMI and to sell water to third parties "violated its partnership duties to Pachira."[125] This Court, however, was confronted with a different question: whether the Circuit Court erred in granting, in part, Pachira's motion for injunctive relief. The record was sparse at that time, and Judge Clawges sought to preserve the status quo. Pachira asked to enjoin NNE from "(i) transport[ing] water from sources located outside of the Blacksville AMI, (ii) transport[ing] water to locations outside of the Blacksville AMI, or (iii) sell[ing] water to third-parties for use outside of the Blacksville AMI."[126] Prior to Pachira filing its complaint, NNE had already begun transporting water from the Monongahela River, a source outside the AMI, into the Blacksville AMI for use in jointly owned wells.[127] The Circuit Court declined to enjoin NNE from bringing water into the AMI but restrained NNE from taking the other two actions.

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[124] *See* Pet. 10.

[125] Pet. 1 (citing *Ne. Nat. Energy LLC, v. Pachira Energy LLC*, 243 W. Va. 362, 844 S.E.2d 133 (2020)).

[126] AR000174 at ¶ 23.

[127] *Id.* at ¶¶ 17-18.

This Court affirmed the injunction, and the positions of the parties since the entry of the October 25, 2018, Injunction have remained in that status quo. Pachira seeks to mislead the Court with its own opinion by claiming this Court made findings and holdings that it simply did not.

First, this Court never held that NNE and NNE WS were "using th[e] partnership property for personal gain to the future detriment of both the partnership and its partner" or that the partners were even partners in a partnership.[128] Instead, under the Court's standard of review when reviewing an appeal of an injunction, the Court noted that the "evidence below indicates" and "also supports" these findings.[129] But that does not amount to *res judicata* on these issues as Pachira attempts to lead the Court to believe.

The record has matured since September 2018, but the use of the Water System has not changed. Even though Pachira is no longer a part of the Water System Partnership, the Water System has never transported water out of the AMI or to third parties for sale. The Partnership lost that profit-making opportunity due to Pachira's injunction.

3. The record demonstrates that Pachira's actions, if allowed to continue, will harm NNE and NNE WS.

Pachira tries hard to portray NNE and NNE WS in a false light as bad actors. The record demonstrates the opposite. Context destroys Pachira's claims of "harm" or breaches of fiduciary duties. Respondents are constrained to respond to some of Pachira's allegations, even though they are misplaced in the context of a petition for writ of prohibition, which should not involve "merely factual disputes."[130]

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[128] *See* Pet. 25, 36 (Pachira makes that claim).

[129] *Ne. Nat. Energy*, 243 W. Va. at 367, 844 S.E.2d at 138.

[130] *State ex rel. Suriano v. Gaughan*, *supra* at 345, 480 S.E.2d at 554.

First, Pachira continually and intentionally confuses its two relationships with NNE. The Dissociation Order ended the relationship between Pachira and the Respondents in the implied Water System Partnership. The second relationship exists under the written AMI Agreement and JOA, where NNE is the operator of over 100 wells it jointly owns with Pachira.[131] In that contractual relationship, NNE is the appointed "Operator" who makes day-to-day operational decisions, and Pachira is a "Non-Operator" who chooses to invest and participate in new wells drilled within the Blacksville AMI.[132] Pachira correctly notes that NNE and Pachira share the investment in new operations on a "75/25 split," with NNE investing 75% and Pachira investing 25% in the jointly owned wells in which it elects to participate.[133] For example, where Pachira states "all told, Pachira contributed $180 million to the AMI and JOA," NNE would have then contributed at least $540 million to the joint wells.[134] Likewise, where Pachira claims it "spent considerable funds on the Water System partnership, contributing $10 million to capital and operations costs," if true, NNE would have contributed at least $30 million to the same based on that 75/25 split.[135]

Second, the relationship under the JOA and AMI Agreement is critical to dispelling Pachira's allegations of harm in its Petition. As the Operator under the JOA, NNE manages the jointly owned wells for the benefit of all joint owners.[136] That includes managing water produced

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[131] Pet. 4.

[132] AR001028, AR001034, AR001048.

[133] Pet. 4. As noted throughout Pachira's pleadings and the proceedings below, Pachira received its proportionate share of revenue from the Water System (equaling over $18,151,077.00 up until the date of dissociation).

[134] *Id.*

[135] Pet. 5.

[136] AR001034.

by those wells throughout their productive lives.[137] Pachira misleads this Court, stating that "NNE continued using water from the Water System partnership property to its exclusive benefit" by "transporting produced wastewater from the AMI wells through the Water System to help fracture wells outside of the AMI in which Pachira had no interest."[138] Pachira cites a self-serving affidavit to support its claim.[139] This is profoundly misleading because the parties participated in an evidentiary hearing on this exact issue, the Circuit Court found no fault for NNE's actions, and—most importantly—NNE was found to be acting in the most cost-effective manner *for the benefit of Pachira* as a working interest owner in the jointly owned wells.[140]

NNE chose to dispose of wastewater in wells outside the AMI at a cost three times less expensive than trucking that same water to a disposal site in Ohio.[141] The Circuit Court noted that NNE's disposal choices were "the most efficient and economical way to achieve disposal of water, [] was consistent with industry standards used to dispose of produced water, and did not violate the October 25, 2018 Injunction Order."[142] The Circuit Court held after considering the evidence that NNE "properly chose a lesser expensive disposal option – which ultimately benefited the Blacksville AMI."[143] Pachira asserted a "breach of fiduciary duty" against the partnership where NNE and Pachira's relationship is governed by the JOA, not the oral partnership agreement.

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[137] *Id.*

[138] Pet. 9-10.

[139] *Id.*

[140] Order entered Dec. 17, 2020, 7 – 8, (concluding "This method used by the Defendants was the most efficient and economical way to achieve disposal of the water[.]"), AR001970 - AR001971.

[141] *Id.*

[142] *Id.*

[143] *Id.*

A second example is highlighted by Pachira's complaints about NNE allegedly withholding as-built diagrams of the Water System, withholding seismic data, and being invoiced 12.5 cents per barrel of water that originated in the Monongahela River.[144] The JOA and AMI Agreements govern all these allegations.

First, NNE did not "refuse to provide Pachira with as-built diagrams"—Pachira sent the self-serving letter cited in its Petition *after* it had been dissociated from the Water System Partnership.[145] NNE responded to Pachira's histrionics noting that NNE and NNE WS would comply with the Dissociation Order.[146]

Second, Pachira's claim that NNE withheld seismic data is likewise misleading—Pachira *failed to timely pay its share* of the seismic data under the AMI Agreement and was not entitled to it.[147]

Finally, Pachira's claim that NNE is improperly charging for water is unfounded. The JOA governs that charge. NNE provides Pachira the right to participate in drilling new wells under the JOA.[148] When NNE provides Pachira with the "Election to Participate," NNE also provides the estimated costs of investing in the well.[149] The estimate includes the costs associated with water used in well completions. Pachira signs the election notice under the JOA and is bound to pay its proportionate share of the costs to develop that well -- including its share of the costs of the water

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[144] Pet. 9.

[145] AR001369 (Letter dated November 24, 2021). In contrast, NNE confirmed that it provided all the as-built drawings in its possession to Pachira at Pachira's request. AR000715.

[146] AR001370.

[147] AR001129, at ¶¶ 76, 77; AR001143, at ¶ 193, 194.

[148] AR001035 – AR001036.

[149] *Id.*

used. Pachira omitted from its Petition that it has refused—without basis—to pay its share of the water costs since the Dissociation Order although it receives 100% of its revenues. As of the date of this filing, Pachira is in default of the JOA because it refuses to pay its share of the costs associated with water.[150] NNE is currently carrying those costs for Pachira's defaults.

Moreover, Pachira alleges that NNE was entertaining a nefarious plot to "phase out" Pachira from the Water System.[151] That has never been true, has been presented to the Circuit Court in an evidentiary hearing, and is another attempt by Pachira to mislead the Court.

If NNE could have connected to the Water System beyond the AMI, since NNE's operations in the geographic vicinity encompass areas outside the AMI, *then* Pachira and the Water System Partnership could have realized profits by transporting water through the Water System.[152] That would have been pure profit for Pachira, but Pachira enjoined that possibility.[153] There was never an intent to "phase out" Pachira. It is simple math that Pachira would have always held a 25% interest in the Water System inside the AMI.[154] If the Water System connected to additional infrastructure outside the AMI, Pachira's ownership inside would never change.[155]

Finally, Pachira claims the parties are hurtling toward "wholly unnecessary depositions, expert reports, and hearings regarding the value of Pachira's wrongfully dissociated interest[.]"[156]

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[150] AR001974 – AR001975.

[151] Pet. 8.

[152] AR000838 – AR000839.

[153] AR000839.

[154] AR000838.

[155] *Id.*

[156] Pet. 3.

Respondents already agreed to an extension of those deadlines while the Petition is pending.[157] Notwithstanding doing so, Respondents deeply desire that this Court deny the Petition so the Parties can move toward a resolution. After four and half years of litigation, the Parties deserve to move forward. Despite Pachira's claims in the Petition, there is no damage or prejudice to Pachira. The second factor under *Berger* fails.

E. BECAUSE THE CIRCUIT COURT DID NOT MANIFESTLY DISREGARD SUBSTANTIVE LAW OR RAISE NEW AND IMPORTANT PROBLEMS OR ISSUES OF LAW OF FIRST IMPRESSION, PROHIBITION IS INAPPROPRIATE.

The fourth and fifth *Berger* factors do not support granting Pachira's Petition because the Circuit Court acted within its legitimate powers in dissociating Pachira from the Water System Partnership pursuant to the facts and law argued below. There is no "issue of first impression."[158] Pachira makes new arguments to this Court that were not raised below and seeks to sanction the Circuit Court for not considering them. The Petition should be denied.

VI. CONCLUSION

Respondents respectfully request that this Honorable Court deny Petitioner Pachira Energy LLC's Petition for Writ of Prohibition for the foregoing reasons.

NORTHEAST NATURAL ENERGY LLC, and NNE WATER SYSTEMS LLC

By Counsel:

[157] *See* Joint Motion to Extend Deadlines, AR001985 – AR001990.

[158] *See* Pet. 39.

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VERIFICATION

I, Ancil G. Ramey, state that I have read the foregoing BRIEF OF THE RESPONDENTS, NORTHEAST NATURAL ENERGY LLC and NNE WATER SYSTEMS LLC; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Ancil G. Ramey
WV Bar No. 3013

CERTIFICATE OF SERVICE

I certify that on May 1, 2023, I served the foregoing "BRIEF OF THE RESPONDENTS" on Petitioner's counsel via the File and ServeXpress system as follows:

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