IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-1034

NORTHEAST NATURAL ENERGY LLC and NNE WATER SYSTEMS LLC,

Defendants Below, Petitioners,

Appeal from an interlocutory order of the Circuit Court of Monongalia County (18-C-369)

vs.

PACHIRA ENERGY LLC,

Plaintiff Below, Respondent.

BRIEF OF THE RESPONDENT

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I. COUNTER-STATEMENT OF THE CASE

A. Pachira and NNE entered into several agreements to further their business of developing the Blacksville AMI.

Pachira Energy LLC ("Pachira") and Northeast Natural Energy LLC ("NNE") have been in the business of acquiring and developing oil and gas interests in West Virginia since January 2011. Appendix ("App."), at APP-000009 (¶¶ 27-28).[1] On January 20, 2011, Pachira and NNE entered into an Area of Mutual Interest and Exploration Agreement (the "AMI Agreement"). APP-000009 (¶ 27); APP-000046-64. Pursuant to the AMI Agreement, Pachira and NNE established the Blacksville Area of Mutual Interest—the geographical focus of their business operations—which includes oil and gas interests in Monongalia County, West Virginia, as well as parts of Greene County, Pennsylvania (the "Blacksville AMI"). APP-000009 (¶ 28); APP-000046-64. Pachira and NNE agreed that all leases taken within the Blacksville AMI, in which both Pachira and NNE participated, would be taken in the names of NNE as to a 75% working interest, and Pachira as to a 25% working interest. APP-000048 (Art. II, § 2.01); APP-000054 (Art. V, § 5.02).

NNE was the operator and drilled the wells within the Blacksville AMI and Pachira was, and is, a non-operator. APP-000011 (¶ 43). A separate Operating Agreement (the "JOA") governed the rights and obligations of Pachira and NNE concerning the drilling and operation of the wells drilled in the Blacksville AMI. APP-000011 (¶ 44); APP-000065-117.

In April of 2013, Pachira and NNE amended the AMI Agreement to provide for the acquisition and ownership of rights-of-way, easements, and surface use or similar agreements, and to provide for the construction, ownership, and operation of all gathering lines and

[1] Citations to the Appendix will be made directly to the relevant page in the Appendix (*i.e.*, APP-000009) with a pinpoint citation to any specific references on that page (*i.e.*, (¶ 28)).

appurtenant facilities that had been constructed to date and those yet to be constructed within the Blacksville AMI. APP-000118-122. Under the terms of the First Amendment to the AMI Agreement, NNE and Pachira agreed that ownership of rights-of-way acquired within the Blacksville AMI and related to the construction, ownership, or operation of pipelines and/or appurtenant facilities (including without limitation facilities used for the transportation, production, compression, dehydration, treatment, measurement or processing of oil, natural gas, associated liquids, or any other hydrocarbons produced by NNE or Pachira within the Blacksville AMI) (collectively, the "Surface Use Agreements") were to be shared between NNE and Pachira on the same 75/25% basis provided that the Surface Use Agreements acquired were associated with wells for which both NNE and Pachira participated in drilling pursuant to the JOA. APP-000012-13 (¶ 54). In other words, the Surface Use Agreements were being acquired in order to produce oil and gas from the wells drilled in the Blacksville AMI, and then to gather, process, and transport the products from wells in the Blacksville AMI to market. APP-000013 (¶ 55).

In connection with the Surface Use Agreements, NNE and Pachira agreed to construct and jointly own, on the same 75/25% basis, a water line and handling facilities (collectively, the "Water Facilities"). APP-000013 (¶ 59). NNE and Pachira agree that neither the AMI Agreement nor the JOA govern the Water Facilities. APP-000014 (¶¶ 60, 62); APP-000354 (¶¶ 60, 62). Despite Pachira's good faith attempts to memorialize the oral agreement concerning the Water Facilities in writing, NNE and Pachira have been unable to agree upon the terms of such a written agreement. *See* Brief of the Petitioners ("Petitioners' Brief"), at 2. Indeed, the parties exchanged draft agreements, but NNE pushed back on Pachira's attempts to reach an agreement in writing. *See* APP-000297 (54:3-12).

B. Despite the fact that the Water Facilities were built only to service the Blacksville AMI wells with water taken from a source within the Blacksville AMI, Petitioners intended to use them to (i) transport water from sources outside of the Blacksville AMI, (ii) transport water to wells outside of the Blacksville AMI, and/or (iii) sell water to third-party operators for use in wells outside of the Blacksville AMI, without the consent of Pachira.

Petitioners used millions of dollars of Pachira's funds to design, build, and install the Water Facilities, ostensibly for the joint benefit of Pachira and NNE. APP-000014 (¶ 61); APP-000354 (¶ 61). While neither the AMI Agreement nor the JOA govern the Water Facilities, they were constructed on property acquired by the Surface Use Agreements. APP-000118-122.

At no time was there an agreement, implied or otherwise, that the Water Facilities were to be used to (i) transport water from a source located outside of the Blacksville AMI, (ii) provide water to wells located outside of the Blacksville AMI, and/or (iii) provide water to third parties. APP-000021 (¶ 121). Pachira has consistently and repeatedly informed Petitioners that they do not have the right to use the joint venture Water Facilities for the transportation of water from a source outside of the Blacksville AMI or to supply water to non-Blacksville AMI wells without Pachira's consent. APP-000021 (¶ 122); APP-000358 (¶ 122). Such consent has never been given. *Id.*

Prior to the commencement of this suit, the Water Facilities and related operations had always been confined to areas within the Blacksville AMI. The Water Facilities include two water withdrawal points from Dunkard Creek, which is within the Blacksville AMI. APP-000150 (¶ 30). The Water Facilities are located throughout the Blacksville AMI and include numerous above-ground storage tanks that can store tens of thousands of barrels of water each. APP-000150 (¶ 31). Until September 12, 2018, the Water Facilities had never been used to transport water from a source located outside of the Blacksville AMI. APP-000149 (¶ 19); *see also* Petitioners' Brief, at 4. To date, the Water Facilities have never been used to provide water

to wells located outside of the Blacksville AMI or to sell water to third parties not involved in the operation of the Blacksville AMI wells. APP-000149 (¶¶ 20-21).

Petitioners connected their waterline, which is located outside of the Blacksville AMI, from the Monongahela River to the Water Facilities (the "Monongahela River Trunk Line") for their own personal venture to the exclusion of Pachira. APP-000022 (¶ 129). Despite Pachira's repeated admonishments against such use, Petitioners, including NNE President Michael John, told Pachira that the Monongahela River Trunk Line and the Water Facilities would be used to (i) transport water from outside of the Blacksville AMI, (ii) transport water to wells outside of the Blacksville AMI, and (iii) to sell water to third parties. APP-000027-28 (¶¶ 174-76). On September 4, 2018, Petitioners began testing the Monongahela River Trunk Line to begin using it to hydraulically fracture wells within the Blacksville AMI. *See* Petitioners' Brief, at 3.

C. Pachira filed suit against Petitioners and moved for an injunction regarding the Water Facilities.

On September 11, 2018, Pachira filed a verified Complaint in the Circuit Court of Monongalia County against NNE and NNE Water Systems LLC (collectively, "Petitioners").[2] APP-000005-122. On September 12, 2018, NNE commenced hydraulic fracturing operations on wells within the Blacksville AMI using water from the Monongahela River Trunk Line that was drawn from the Monongahela River outside of the Blacksville AMI. *See* Petitioners' Brief, at 4. After learning of NNE's operations, on September 13, 2018, Pachira filed an Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing (the "Motion") seeking to enjoin Petitioners from using the Water Facilities to "(i) transport

[2] Pachira filed a complaint against Petitioners in the United States District Court for the Northern District of West Virginia on August 28, 2018, but later filed a notice of voluntary dismissal due to concerns regarding lack of subject matter jurisdiction.

water from sources located outside of an area defined as the Blacksville AMI, (ii) transport water to wells located outside of the Blacksville AMI, or (iii) sell water to third-party operators for use in wells located outside of the Blacksville AMI[.]" APP-000125. The Motion was supported by a brief in support and a detailed, and notarized, four-page affidavit from Benjamin M. Statler, President of Pachira (the "Statler Affidavit"). APP-000123-128; APP-000132-198. On September 13, 2018, Petitioners filed Defendants' Response in Opposition to Plaintiff Pachira Energy LLC's Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing, including a declaration of Mike John, President and CEO of NNE (the "John Declaration"). APP-000200-243.

On September 19, 2018, the Circuit Court conducted a hearing on the Motion that lasted approximately one and a half hours (the "Preliminary Injunction Hearing"). APP-000244-308. At the end of the hearing, the Circuit Court directed Petitioners to provide additional information regarding any alleged damages and injury that they would suffer if an injunction was issued. APP-000303-307 (60:22-64:12). On September 24, 2018, Petitioners submitted an eighteen-page letter outlining the damages they would purportedly suffer if enjoined. APP-000415-432. On September 26, 2018, Pachira submitted a forty-one page letter rebutting the purported financial impact that Petitioners would face if enjoined. APP-000433-473. Notably, the letter included a detailed affidavit of Carl Howes, Vice President of Pachira, which included nearly thirty pages of documentary support. *See id.*

It was only after briefing supported by notarized affidavits and declarations, a lengthy hearing, and nearly sixty pages of supplemental documentation regarding the alleged harm to Petitioners—specifically requested by the Circuit Court—that the Circuit Court granted the Motion in part and denied it in part. Specifically, the Circuit Court granted the Motion and

enjoined Petitioners from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI, but denied the Motion and did not enjoin Petitioners from using the Water Facilities to "transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE." APP-000381.

The Circuit Court asked the parties to jointly draft the preliminary injunction order. Despite a good-faith attempt, the parties could not agree on a draft order. On October 19, 2018, the parties served separate proposed injunction orders on the Circuit Court. APP-000474-501. On October 25, 2018, the Circuit Court entered an Order Granting in Part and Denying in Part Plaintiff's Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing (the "Order") enjoining Petitioners from using the Water Facilities "(i) to transport water to locations outside of the Blacksville AMI or (ii) to sell water to third parties for use outside of the Blacksville AMI." APP-000375-382.

II. SUMMARY OF ARGUMENT

The Circuit Court did not abuse its discretion in granting a preliminary injunction enjoining Petitioners from using the Water Facilities to transport water to locations outside of the Blacksville AMI or to sell water to third parties for use outside of the Blacksville AMI for the following reasons.

First, the Circuit Court was presented with sufficient evidence to enjoin Petitioners' actions. Not only did Petitioners fail to object to the sufficiency of any evidence at the Preliminary Injunction Hearing, their claim that the Circuit Court did not have sufficient evidence to enjoin them is demonstrably false. Petitioners' argument ignores substantial evidence before the Circuit Court, including facts proffered by counsel, Pachira's verified Complaint, the Statler Affidavit, the John Declaration, and supplemental submissions by the

parties that were specifically requested by the Circuit Court. This evidence is significantly more than a mere "cursory" affidavit as Petitioners' allege, and was sufficient evidence to support the preliminary injunction entered by the Circuit Court.

Second, the Circuit Court did not abuse its discretion in holding that Pachira was likely to succeed on the merits. Pachira presented numerous provisions of the Uniform Partnership Act of West Virginia, W. Va. Code § 47B-1-1, *et seq.* (the "Partnership Act") and associated case law to support its position that the parties entered into a joint venture partnership regarding the Water Facilities. In stark contrast, Petitioners relied on two treatises and one irrelevant Alabama case to support their view that the parties entered into a tenancy in common. The Circuit Court simply applied the law to the undisputed facts. Petitioners' contention to the contrary is nothing more than a disagreement with the Circuit Court's application of West Virginia partnership law to the undisputed facts of this case, which does not and cannot constitute an abuse of discretion.

Third, the Circuit Court did not abuse its discretion in holding that Pachira established that it was likely to suffer immediate and irreparable harm. In their brief, Petitioners present no evidence to support their argument. In fact, the excerpts that Petitioners rely upon are only relevant to the injunctive relief that the Circuit Court denied. With respect to the portion of the preliminary injunction granted by the Circuit Court, Pachira demonstrated that it would suffer immediate and irreparable harm because (i) Petitioners intended to use the Water Facilities in violation of their unwaivable duties of loyalty, care, and good faith and fair dealing, (ii) use of the Water Facilities in violation of the joint venture partnership is a trespass to partnership property, and (iii) use of the Water Facilities for purposes outside of the Blacksville AMI is an unauthorized interference with a real property interest.

Fourth, the Circuit Court did not abuse its discretion in holding that the balance of the hardships weighed in favor of Pachira. Not only did Petitioners ***admit*** that the Circuit Court properly applied the balance of the hardship test, they ignore the fact that the Circuit Court specifically requested that Petitioners provide detail regarding any harm that they would suffer if enjoined. There is simply no question that the Circuit Court considered the harm that a preliminary injunction may have caused Petitioners. It simply found that the balance weighed in favor of granting an injunction.

Fifth, the Circuit Court did not abuse its discretion in holding that a preliminary injunction is in the public interest. While Petitioners myopically argue that it is in the public interest to develop oil and gas interests and that utilizing the Water Facilities allows that development in a safe manner, they completely ignore any obligation for parties to act in accordance with their duties as partners. It simply cannot be public policy to promote the development of oil and gas interests in violation of any obligation or fiduciary duty associated with a joint venture partnership.

For all of these reasons, the Circuit Court did not abuse its discretion and its Order should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal is suitable for argument pursuant to Rule 19 because it concerns claims of error in the application of settled law. *See* W. Va. R. App. P. 19(a)(1).

IV. ARGUMENT

A. Petitioners have the burden of establishing that the Circuit Court abused its discretion in granting a preliminary injunction.

In reviewing the grant of a preliminary injunction, the Court reviews (i) "the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion

standard," (ii) "the circuit court's underlying factual findings under a clearly erroneous standard," and (iii) "questions of law de novo." *Hart v. Nat'l Collegiate Athletic Ass'n*, 209 W. Va. 543, 545, 550 S.E.2d 79, 81 (2001). Petitioners do not claim that the Circuit Court committed an error in any underlying findings of fact or questions of law. Therefore, the Circuit Court's grant of the preliminary injunction is reviewed under an abuse of discretion standard. *See id.*

"The power to grant or refuse a temporary or preliminary injunction ordinarily rests in the sound discretion of the trial court according to the facts and circumstances of the particular case, and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion." *West v. Nat'l Mines Corp.*, 168 W. Va. 578, 589, 285 S.E.2d 670, 678 (1981). "In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *Shafer v. Kings Tire Serv., Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (internal citations omitted). To determine whether the Circuit Court has abused its discretion, the Court must "consider the circumstances of the particular case that have influenced the court's decision." *Hart*, 209 W. Va. At 547, 550 S.E.2d at 83. As this Court has previously stated, the abuse of discretion standard is meant to "safeguard[] the superior vantage points of those entrusted with primary decisional responsibility." *State ex rel. First State Bank v. Hustead*, 237 W. Va. 219, 225, 786 S.E.2d 479, 485 (2015) (internal citations omitted).

A mere disagreement with the Circuit Court's decision does not equate to an abuse of discretion. Simply because the Circuit Court ***could have*** or even ***should have*** come to a different conclusion is not enough. *See, e.g., id.* ("When reviewing a circuit court's decision for

abuse of discretion, words like 'could' and 'should' are not part of our judicial vocabulary."); *see also State v. Shafer*, 237 W. Va. 616, 621, 789 S.E.2d 153, 158 (2015) ("Although this Court may not necessarily have obtained the same result had we been presiding over a case determined by a lower court, our mere disagreement with such a ruling does not automatically lead to the conclusion that the lower court abused its discretion.") (internal citations omitted). Instead, an abuse of discretion exists only where the Circuit Court's decision is ***unsupportable***. *See Hustead*, 237 W. Va. at 225, 786 S.E.2d at 485.

B. The Court should affirm the Order because the Circuit Court did not abuse its discretion by enjoining Petitioners from transporting water to locations outside of the Blacksville AMI or selling water to third parties for use outside of the Blacksville AMI.

1. The Circuit Court considered sufficient evidence to support the preliminary injunction.

On appeal, Petitioners contend that the Circuit Court did not have sufficient evidentiary support to enter a preliminary injunction. *See* Petitioners' Brief, at 20-22. Specifically, Petitioners baldly contend that the Circuit Court considered nothing more than a "cursory affidavit" as the basis for the preliminary injunction. *See id.* at 21. That contention is simply false and should be rejected for several reasons.

First, Petitioners did not object to the sufficiency of the Statler Affidavit, or any other evidence, during the Preliminary Injunction Hearing. *See generally* APP-000244-308. As a result, Petitioners waived any arguments regarding the sufficiency of the evidence considered by the Circuit Court because they failed to provide it with "an opportunity to rule on the objection and thereby correct potential error." *Wimer v. Hinkle*, 180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989) ("The fundamental purpose of an objection to evidence is to bring to the court's attention potentially inadmissible evidence so that the court may make a ruling on the question."). Petitioners' strategic decision to remain silent at the Circuit Court level should not grant them

now an "unfair advantage." *Id.*; *see also Wood v. Crane Co.*, 764 F.3d 316, 326 (4th Cir. 2014) ("Our litigation system typically operates on a raise-or-waive model: if a litigant fails to raise a claim in a complaint, or a defense in an answer, or to preserve an objection at trial, they are generally out of luck . . . [t]his model forces efficiency and discourages sandbagging."). As a result, this Court should reject Petitioners' argument regarding the sufficiency of the evidence considered by the Circuit Court.

Second, Petitioners' representation that the Statler Affidavit was the only evidence that the Circuit Court considered in granting Pachira's Motion is demonstrably false. In fact, the Order states that the Circuit Court "considered proffered facts by counsel, statements in Plaintiff's verified complaint, the affidavits of Benjamin Statler and Mike John, and the arguments of counsel."[3] APP-000375. In addition, the Circuit Court specifically "requested that [Petitioners] provide additional detail as to the damages they would suffer if an injunction should issue." *Id.* On September 14, 2018, Petitioners provided an eighteen-page letter, including attachments, detailing those alleged damages. *See* APP-000415-432. On September 26, 2018, Pachira filed a forty-one-page letter, which included an affidavit of Carl Howes, Pachira's Vice President, with nearly thirty pages of supporting documentation refuting Petitioners' purported damages. *See* APP-000433-473.[4] In light of these undisputed facts, it is clear that the Circuit Court considered much more than an allegedly cursory affidavit in ruling on the Motion.

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[3] Notably, this statement was not included in either of the draft orders proffered by the parties. Rather, this statement was added by the Circuit Court. APP-000477; APP-000486.

[4] It is telling that despite including these supplemental letters in their Rule 7(e) Notice, Petitioners failed to include them in the original Appendix. Unsurprisingly, these documents completely undermine Petitioners' argument that the Circuit Court failed to consider sufficient evidence to support a preliminary injunction, particularly the relative harm that Petitioners would suffer if enjoined. It was not until Pachira pointed out the omissions that these documents were included in a Supplemental Appendix. *See* APP-000415-501.

Third, even if the Court were to ignore the substantial evidence considered by the Circuit Court and, instead, focus solely on the Statler Affidavit as Petitioners suggest, an affidavit is sufficient evidentiary support to form the basis for injunctive relief. W. Va. Code § 53-5-8; *see also* Petitioners' Brief, at 20. Although Petitioners claim that a cursory affidavit is insufficient to support the issuance of an injunction (Petitioners' Brief, at 20-21 (relying on *Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Ass'n,* 183 W. Va. 15, 393 S.E.2d 653 (1990))), they failed to provide any case law to explain what constitutes a "cursory" affidavit or how the Statler Affidavit fits that definition. *See* Petitioners' Brief, at 20-22. The Statler Affidavit set forth detailed factual support for the Motion and the past course of conduct among the parties. *See* APP-000147-151. As a result, it was not "cursory," as Petitioners suggest, and it provided the Circuit Court with an adequate basis to grant the Motion.

Therefore, contrary to Petitioners' assertion, the Circuit Court considered adequate evidence to support a preliminary injunction enjoining Petitioners from using the Water Facilities "(i) to transport water to locations outside of the Blacksville AMI or (ii) to sell water to third parties for use outside of the Blacksville AMI."[5] APP-000381. Petitioners' mere disagreement with the Circuit Court's finding of sufficient evidence to enjoin them does not constitute an abuse of discretion by the Court. *See Hustead*, 237 W. Va. at 225, 786 S.E.2d at 485; *Shafer*, 237 W. Va. at 621, 789 S.E.2d at 158. Because the Circuit Court considered sufficient evidence of record to grant Pachira's Motion, the Order should be affirmed.

[5] The Circuit Court did not merely rubber stamp an order granting Pachira's Motion. Instead, the Circuit Court carefully weighed the sufficiency of the evidence in issuing its order as evidenced by the Circuit Court's denial of Pachira's Motion with respect to enjoining Petitioners' use of the Water Facilities "to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE." APP-000381.

2. The Circuit Court did not abuse its discretion in holding that Pachira demonstrated a likelihood of success on the merits.

Petitioners contend that the Circuit Court abused its discretion in holding that Pachira "established that there is a likelihood of success on the merits of its claims."[6] Petitioners' Brief, at 23. Petitioners justify their position by asserting that the "evidence is undisputed that the parties did not form a partnership, joint venture, or have any other agreement related to the Water Facilities, but instead own the Water Facilities as tenants in common[.]" *Id.* This is false. To the contrary, Pachira has made clear from the outset of this action that the Water Facilities are jointly-owned joint venture property, governed by the Partnership Act. *See, e.g.*, APP-000014 (¶¶ 65-66); APP-000021-23 (¶¶ 119-137); APP-000026-28 (¶¶ 160-180); APP-000032-34 (¶¶ 209-229); APP-000039-42 (¶¶ 272-297). At its core, Petitioners' argument is merely a transparent disagreement with the Circuit Court's application of the law to the undisputed facts of this case. However, as previously stated, a mere disagreement with the Circuit Court's ruling does not constitute an abuse of discretion. *See Hustead*, 237 W. Va. at 225, 786 S.E.2d at 485; *Shafer*, 237 W. Va. at 621, 789 S.E.2d at 158.

Notably, the Circuit Court's findings of fact related to the Water Facilities are undisputed and were contained in Petitioners' proposed order to the Circuit Court.[7] Specifically, the following facts are undisputed:

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[6] Petitioners claim that the Circuit Court's failure to cite substantive law in the Order warrants setting aside the preliminary injunction. Ironically, they cite no case law to support their position.

[7] Indeed, the Circuit Court asked the parties to jointly propose an order setting forth its ruling on the Motion. The parties could not agree and submitted separate proposed orders. *See* APP-000474-501. As part of its submission, Pachira provided the Circuit Court with a redlined document comparing Petitioners' proposed order to its proposed order. *See* APP-000494-501. With the exception of six findings of fact, the findings of fact proposed by both parties ***are identical and undisputed*** as they relate to the Water Facilities. *See id.*

- NNE constructed and Plaintiff participated in the cost of constructing [the Water Facilities]. *See* APP-000222 (¶¶ 7-8); APP-000478 (¶ 4).

- There is no written agreement governing the construction, operation, or maintenance of the [Water Facilities]. *See* APP-000014 (¶ 63); APP-000354 (¶ 63); APP-000478 (¶ 5).

- NNE and Plaintiff shared the direct cost of construction, operation, and maintenance of the [Water Facilities] using the same 75%/25% ratio used in the AMI Agreement and the JOA. *See* APP-000222 (¶ 8); APP-000478 (¶ 6).

- The Monongahela River Trunk Line is located outside of the Blacksville AMI. *See* APP-000222 (¶ 14); APP-000478 (¶ 8).

- Plaintiff has no interest in and did not share in the cost of construction, operation, or maintenance of the Monongahela River Trunk Line. *See* APP-000222-223 (¶ 15); APP-000478 (¶ 9).

- Defendants intend to use the [Water Facilities] to transport water from the Monongahela River Trunk Line to wells outside of the Blacksville AMI in which Pachira holds no interest. *See* APP-000021 (¶ 124); APP-000359 (¶ 124); APP-000480 (¶ 19).

- Defendants also advised Plaintiff of the possibility of using the [Water Facilities] to sell water to third parties for use outside of the Blacksville AMI. *See* APP-000148 (¶ 14); APP-000480 (¶ 20).

The following additional facts, while not contained in the Circuit Court's Order, are still relevant to a determination that Pachira was likely to succeed on the merits and are also undisputed:

- The parties share profits from the Water Facilities on the same 75%/25% basis. APP-000274 (31:21-22).

- Pachira consistently and repeatedly informed Petitioners that Petitioners do not have the right to use the Water Facilities to transport "water from a source outside the Blacksville AMI, or to supply water to non-Blacksville AMI wells without Plaintiff's consent." APP-000021 (¶ 122); APP-000358-59 (¶ 122).

- Pachira "has paid millions of dollars for the direct costs associated with the [Water Facilities]." APP-000359 (¶ 123); APP-000021 (¶ 123).

- Until September 12, 2018, the Water Facilities had never been used to transport water from a source located outside of the Blacksville AMI. APP-000275 (32:1-5).

- The Water Facilities have never been used to transport water to sell to third-parties. APP-000275 (32:7-10).

- The Water Facilities have never been used to transport water to wells outside of the Blacksville AMI. APP-000275 (32:5-7).

Based on these undisputed facts, including the parties' prior dealings, the Circuit Court was tasked with applying the law to the facts to determine whether Pachira was likely to succeed on the merits of its claims. As discussed below, Pachira presented voluminous legal support for its position that the relationship between the parties created a joint venture partnership as opposed to a tenancy in common. *See* APP-000021-23 (¶¶ 119-137).

(a) Pachira presented substantial evidence and argument to the Circuit Court establishing that the parties formed a joint venture partnership with respect to the Water Facilities.

Under West Virginia law, a joint venture "is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge." *Armor v. Lantz*, 207 W. Va. 672, 677, 535 S.E.2d 737, 742 (2000). A joint venture does not need to be in writing, it can be oral or implied based on the parties' conduct. *Id.* at 677-78, 535 S.E.2d at 742-43; *see also Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 530, 766 S.E.2d 785, 789 (2014) (same, with respect to partnership law).[8] It is important to note that "the association of two or more persons to carry on as co-owners [sic] a

[8] West Virginia partnership law provides additional guidance because joint ventures are governed by the same legal principles as partnerships. *Armor*, 207 W. Va. at 678, 535 S.E.2d at 743.

business for profit forms a partnership, ***whether or not the persons intend to form a partnership***." W. Va. Code § 47B-2-2(a) (emphasis added). In fact, when people operate a business together for profit, they "may inadvertently create a partnership despite their expressed subjective intention not to do so." *Valentine*, 766 S.E.2d at 799. In other words, in the absence of a written agreement governing the relationship between the parties with respect to the Water Facilities, the Circuit Court need only apply the law to the undisputed conduct of the parties to find that Pachira was likely to succeed on the merits of its claim that the Water Facilities constitute a joint venture partnership. Indeed, the Circuit Court acknowledged as much, stating that "***I understand your partnership arguments, joint venture arguments, and I'm sympathetic to those arguments, they make sense[.]***" APP-000280 (37:8-10) (emphasis added).

In support of their position, Petitioners appear to contradict themselves, acknowledging the undisputed fact that the AMI Agreement and JOA do not govern the Water Facilities, yet claiming that the Circuit Court should have looked to those agreements to find that the parties had no intention in creating a partnership. *See* Petitioners' Brief, at 26-27; APP-000026 (¶ 166); APP-000362 (¶ 166). Petitioners incongruously criticize the Circuit Court for "completely ignoring" express disclaimers in the AMI Agreement and JOA regarding duties that arise under a partnership or joint venture agreement. Petitioners' Brief, at 27. But in the same breath, they also argue that there is no written agreement that governs the Water Facilities.[9] Petitioners' Brief, at 26-27. Petitioners cannot have it both ways.

[9] Notably, the Circuit Court recognized that there was a difference between how the parties treated the AMI Agreement and JOA and how they treated the Water Facilities. Specifically, the Circuit Court stated "I find it very interesting -- . . . you all are obviously sophisticated businessmen, you enter into two fairly complicated agreements to develop interests that involve a whole heck of a lot more money than I'll probably ever see and then you proceed to develop this pipeline without putting anything in writing?" APP-000285 (42:11-16).

In support of their position that the parties only formed a tenancy in common, Petitioners cite only to two general treatises and an unrelated Alabama case.[10] *See* Petitioners' Brief, at 27-28. Petitioners miss the point. The Alabama case relied upon by Petitioners relates to a dispute involving a private water line connecting the city water line to the parties' property—not the joint operation of the water system itself. *See Kellum*, 39 S.2d at 573-74. In fact, the only commonality between the case at hand and *Kellum* is that both involve disputes over the transportation of water. The water line at issue in *Kellum* was built by the owner of a property "as a way appurtenant for use of the abutting lots." *Id.* at 573. Those lots passed onto the parties in dispute, with the understanding that they would use the water line and pay their share "of the water bill." *Id.* at 573-74. The opinion provides no facts to suggest that *Kellum* involved anything more than a private dispute between two neighbors, over a water line that neither party built, with no common business enterprise. *Id.* Therefore, Petitioners' reliance on *Kellum* to qualify the parties' relationship as to the Water Facilities as a tenancy in common misses the fundamental difference between a tenancy in common and a joint venture partnership.

The key distinction between a joint venture partnership and a tenancy in common is that a joint venture partnership, unlike a tenancy in common, is specifically for a ***business purpose for profit***. *Compare* W. Va. Code § 47B-2-2(a) (a partnership is for profit) and *Armor*, 207 W. Va. at 677, 535 S.E.2d at 742 (a joint venture "is an association of two or more persons to carry out a single business enterprise ***for profit***") (emphasis added) *with Kellum*, 39 S.2d 573 (a water line for personal use). This distinction was specifically addressed during the Preliminary Injunction Hearing. APP-000276 (33:12-24). There is no dispute that the Water Facilities were established

[10] *Kellum v. Williams*, 39 S.2d 573 (Ala. 1949). Tellingly, Petitioners' search for case law that fits their mistaken narrative turned up a single Alabama opinion from 1949. The courts' apparent silence as to this issue is a significant indication that Petitioners' position is unsupportable.

for the purposes of business and to generate profits. *See* Petitioners' Brief, at 2. As a result, *Kellum* is inapposite.

Petitioners also attempt to circumvent the applicability of the Partnership Act by claiming that property taken in the name of one party and not in the name of a partnership is presumed to be separate property, not partnership property. *See* Petitioners' Brief, at 27, n.64 (citing W. Va. Code §§ 47B-2-2(c), 47B-2-4). In so doing, Petitioners ignore the undisputed fact that Pachira has paid millions of dollars in costs associated with the Water Facilities. APP-000021 (¶ 123); APP-000359 (¶ 123). Indeed, the Partnership Act addresses this very situation, stating that "[p]roperty is presumed to be partnership property if purchased with partnership assets, ***even if not acquired in the name of the partnership*** or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership." W. Va. Code § 47B-2-4(c) (emphasis added). Once acquired, any "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." W. Va. Code § 47B-2-3.

In light of the undisputed facts before the Circuit Court and West Virginia law, the Circuit Court did not abuse its discretion in finding that Pachira was likely to succeed on the merits of establishing that the Water Facilities are governed by West Virginia partnership law and not the law applicable to a tenancy in common. As the Circuit Court specifically noted during the Preliminary Injunction Hearing, "I understand your partnership arguments, joint venture arguments, and I'm sympathetic to those arguments, they make sense." APP-000280 (37:8-10). In other words, the Circuit Court did not err in finding that Pachira was likely to succeed in establishing that Petitioners were in breach by using the Water Facilities, which constitute joint venture partnership property, for their own personal gain. Accordingly, the

Circuit Court did not abuse its discretion in holding that Pachira is likely to succeed on the merits of its claim. As a result, the Order should be affirmed.

3. The Circuit Court did not abuse its discretion in holding that Pachira established that it was likely to suffer immediate and irreparable harm.

The Circuit Court did not abuse its discretion when it held that Pachira "established that it is likely to suffer immediate and irreparable harm before the Court makes its final ruling on Plaintiff's request for permanent injunctive relief if Defendants are not enjoined from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI." APP-000380. Petitioners focus on two excerpts from the Preliminary Injunction Hearing transcript in an attempt to demonstrate that Pachira's only arguments with respect to irreparable harm were maintaining the status quo and economic harm. *See* Petitioners' Brief, at 16-19. This representation is incorrect.

In fact, the excerpts cited by Petitioners were only relevant to relief that was denied by the Circuit Court (*i.e.*, an injunction to prevent Petitioners from transporting water from sources located outside of the Blacksville AMI such as the Monongahela River). *See* Petitioners' Brief, at 17-18 (quoting APP-000280-82). As evidenced by the Circuit Court's questions, those arguments dealt with the source of the water to be transported through the Water Facilities:

> THE COURT: Okay. So how are you harmed because water from the Monongahela River, as opposed to water from Dunkard Creek, has gone through those pipelines?
>
> ...
>
> THE COURT: How is it an interference? I'm sorry, I'm – you know, maybe I'm getting a little thick up here, but, I mean, water is water. What difference does it make where it comes from if the difference is what it costs?

APP-000280-281 (37:15-17, 38:8-11). Because the Circuit Court denied Pachira's Motion with respect to the source of the water, any arguments made regarding such relief are irrelevant to the instant appeal.

From the outset, Pachira sought to enjoin Petitioners from (i) transporting water from sources located outside of the Blacksville AMI for use at wells located within the Blacksville AMI that are jointly owned by Pachira and NNE; (ii) transporting water to wells located outside of the Blacksville AMI; and/or (iii) selling water to third-party operators for use in wells located outside of the Blacksville AMI. *See* APP-000134. Pachira made the following arguments in support of its claim that it would suffer immediate and irreparable harm if Petitioners were not enjoined:

- Petitioners' use of the Water Facilities for personal, rather than joint venture or partnership use, constitutes a trespass. *See* APP-000142; *see also* APP-000281 (38:18-22).

- Use of the Water Facilities to wells outside of the Blacksville AMI or to third parties would solely benefit Petitioners in violation of their duty of loyalty and obligation of good faith pursuant to W. Va. Code § 47B-1-3. *See* APP-000142.

- Petitioners' use of the Water Facilities will limit the available capacity of the Water Facilities to serve operations governed by the AMI Agreement and JOA. *See id.*

- Petitioners' use of the Water Facilities will inappropriately increase the wear and tear on the Water Facilities and Pachira is expected to contribute financially to maintenance costs. *See id.*

- The "unauthorized interference with a real property interest constitutes irreparable harm as a matter of law. . . ." *7-Eleven, Inc. v. Khan*, 977 F. Supp. 2d 214, 234 (E.D.N.Y. 2013) (cited by *SWN Prod. Co., LLC v. Edge*, CIV. A. No. 5:15-CV-103, 2015 WL 5786739, at *5 (N.D. W. Va. Sept. 30, 2015). *See id.* The Surface Use Agreements for the Water Facilities constitute a real property interest. The Water Facilities are simply fixtures to the land.

The Circuit Court specifically weighed whether Pachira's harm would be limited to monetary damages. *See* APP-000264 (21:8-9); APP-000268 (25:19-26:1). In fact, the Circuit Court denied Pachira's Motion with respect to enjoining Petitioners from transporting water from sources located outside of the Blacksville AMI for use inside the Blacksville AMI because any such harm could "be calculated and reduced to monetary damages." APP-000410 (¶ 22); APP-000413 (¶ 7(b)).

The Partnership Act imposes a number of fundamental duties and obligations upon a partner, namely the duty of care to protect the properties and interests of the partnership, the duty of loyalty, and the obligation of good faith and fair dealing as to the other partners. *See* W. Va. Code §§ 47B-4-1, 47B-4-4. These fundamental duties and obligations that exist between partners in West Virginia may not be eliminated or unreasonably reduced. *See* W. Va. Code § 47B-1-3. However, where the Water Facilities would be used solely for Petitioners' benefit, and in violation of Petitioners' unwaivable duties of loyalty, care, and good faith and fair dealing pursuant to the Partnership Act, Pachira's harm could not be reduced to monetary damages. *See* W. Va. Code §§ 47B-1-3; 47B-4-1(g) ("A partner may use or possess partnership property only on behalf of the partnership"); *see also In re Hutchinson*, 5 F.3d 750, 757 (4th Cir. 1993) (discussing the equitable nature of breach of fiduciary duty claims).

Further, where the Water Facilities may be used to transport water to locations outside of the Blacksville AMI or to sell water to third parties for use outside of the Blacksville AMI, those activities are to the detriment of the joint venture partnership and constitute a trespass to partnership property. APP-000281 (38:13-22).

Finally, the Water Facilities were constructed on property acquired pursuant to Surface Use Agreements, which were acquired in order to facilitate operations within the Blacksville

AMI. APP-000012-13 (¶¶ 54, 55, 59). Petitioners' proposed use of the Water Facilities to transport water to locations outside of the Blacksville AMI or to sell water to third parties for use outside of the Blacksville AMI exceeds the scope of the Surface Use Agreements and is an unauthorized interference with a real property interest, which constitutes irreparable harm as a matter of law. *SWN Prod. Co., LLC*, CIV. A. No. 5:15-CV-103, 2015 WL 5786739, at *5 ("[I]t is well-settled that unauthorized interference with a real property interest constitutes irreparable harm as a matter of law, given that a piece of property is considered to be a unique commodity for which a monetary remedy for injury is an inherently inadequate substitute.") (citing *7-Eleven, Inc.*, 977 F. Supp. 2d at 234); *EQT Prod. Co. v. Wender*, No. 2:16-CV-00290, 2016 WL 8261728, at *2 (S.D. W. Va. Jan. 20, 2016) (acknowledging that "unauthorized interference with a real property interest constitutes irreparable harm as a matter of law"). Therefore, the Circuit Court did not abuse its discretion in holding that Pachira established that it is likely to suffer immediate and irreparable harm. As a result, the Order should be affirmed.

4. The Circuit Court did not abuse its discretion in holding that the balance of the hardships weighed in favor of Pachira.

Curiously, Petitioners claim that the Circuit Court abused its discretion by "failing to address the harm to NNE in balancing the relative hardship to the respective parties." Petitioners' Brief, at 14. This argument is duplicitous in light of Petitioners' letter[11] to the Circuit Court stating that "[w]e believe that the Court properly applied the balance of hardship test as set forth in Camden-Clark Mem'l Hosp. Corp. v. Turner, 212 W. Va. 752, 756, 575 S.E.2d 362, 366 (2002) and considered the four preliminary injunction factors in 'flexible interplay' in reaching the conclusions above." APP-000475.

[11] Notably, Petitioners failed to include this letter in the original Appendix that they filed with this Court. *See* APP-000001-414.

Furthermore, and as detailed above, at the conclusion of the Preliminary Injunction Hearing, the Circuit Court ***specifically requested that Petitioners provide additional detail*** regarding (i) increased costs to complete a well site using only the Water Facilities as opposed to water from the Monongahela River and (ii) the costs Petitioners would incur if enjoined. APP-000303-304 (60:22-61:17). On September 14, 2018, Petitioners provided that information to the Circuit Court, claiming that they would suffer $15,869,196 in direct costs if enjoined, in addition to adverse impacts to their financial condition. *See* APP-000415-432. While Petitioners provided the Circuit Court with a substantial damages estimate, they failed to provide any evidentiary support for such alleged damages. *See id.* On September 26, 2018, Pachira responded with a forty-one-page letter that undercut every one of Petitioners' purported damages using Petitioners' own documentation as evidence. *See* APP-000433-473. Pachira's letter clearly showed that Petitioners would not be harmed in a manner sufficient to tip the balance of hardships in their favor.

In light of Petitioners' own admission that the Circuit Court properly applied the balance of hardship test as well as the extensive supplemental post-hearing submissions by the parties, it is disingenuous for Petitioners to assert that the Circuit Court failed to adequately balance the hardships. Rather, Petitioners simply failed to provide any credible, supported evidence to demonstrate that they would be disproportionately harmed if enjoined. Because the Circuit Court did not abuse its discretion in balancing the hardships, the Order should be affirmed.

5. The Circuit Court did not abuse its discretion in holding that a preliminary injunction is in the public interest.

Petitioners claim that the Circuit Court erred in identifying any public interest in granting the preliminary injunction because there was no support in the record for such a finding. *See* Petitioners' Brief, at 29-30. To the contrary, there was sufficient evidence of public interest

presented for the Circuit Court to enjoin Petitioners from using the Water Facilities to transport water to locations outside of the Blacksville AMI or to sell water to third parties for use outside of the Blacksville AMI.

Petitioners rely on the presumption that it is in the public interest to develop West Virginia's oil and gas resources and, by utilizing the Water Facilities, this development can be achieved in a safer manner. *See id.* at 29-30. Even if true, it does not necessarily follow that it is in the public interest to develop oil and gas resources in violation of the duties owed to a joint venture partnership or the Surface Use Agreements. Additionally, there was no credible evidence presented to the Circuit Court that the parties' prior use of the Water Facilities was less safe than Petitioners' proposed use.

Petitioners choose to ignore their obligation to use the Water Facilities in accordance with the joint venture partnership by simply dismissing the idea as "baseless and irrelevant." *See id.* at 30. However, the Circuit Court disagreed. The Circuit Court found that Pachira was likely to succeed on the merits of its claim. If Pachira is likely to succeed on the merits of establishing the existence of a joint venture partnership with respect to the Water Facilities, it cannot be public policy that oil and gas resources should be developed in violation of any obligations or fiduciary duties associated with such a joint venture partnership. *See* W. Va. Code §§ 47B-1-3, 47B-4-1, 47B-4-4; *see also Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005) (stating "the freedom to contract is a substantial public policy that should not be lightly dismissed"). This Court in *Wellington Power* added that "this State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *Id.* Petitioners presented no credible evidence of a greater importance to the general public in the use of the Water

Facilities in a manner inconsistent with joint venture partnership purposes. Because the Circuit Court did not abuse its discretion in holding that enjoining Petitioners was in the public interest, the Order should be affirmed.

V. CONCLUSION

For the foregoing reasons, Pachira respectfully requests that this Court affirm the Circuit Court's October 25, 2018 Order Granting in Part and Denying in Part Plaintiff's Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing.

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Respectfully submitted,

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