IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel. PATRICK MORRISEY, ATTORNEY GENERAL, and THOMAS J. SMITH IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION AND COMMISSIONER OF HIGHWAYS, WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

Plaintiffs,

v.

Kanawha County Circuit Court
Civil Action No. 17-C-41

JUDGE KAUFMAN

OLDCASTLE, INC. *et al.*,

Defendants.

CITY OF CHARLESTON, and all others similarly situated, *et al.*,

Plaintiffs,

v.

Kanawha County Circuit Court
Civil Action No. 16-C-1552 (lead)

(Consolidated with 16-C-661-B -Raleigh; 16-C-337-DS -Mercer; 16-C-425 -Wood; 16-C-1598 -Kanawha; 16-C-666-Cabell)

JUDGE KAUFMAN

WEST VIRGINIA PAVING, INC., *et al.*,

Defendants.

TO THE HONORABLE CHIEF JUSTICE LOUGHRY:

JOINT MOTION TO REFER TO BUSINESS COURT BY THE ATTORNEY GENERAL, THE SECRETARY OF TRANSPORTATION AND COMMISSIONER OF HIGHWAYS, AND THE CITIES OF CHARLESTON, HUNTINGTON, PARKERSBURG, BECKLEY, AND BLUEFIELD, AND THE KANAWHA COUNTY COMMISSION

The Attorney General, the Commissioner of the Highways and Secretary of Transportation (the "State"), and the Cities of Charleston, Huntington, Parkersburg, Beckley, and Bluefield and the Kanawha County Commission (the "Local Governments") jointly request that their complex civil actions alleging a statewide antitrust conspiracy of asphalt and asphalt services currently pending before Judge Kaufman in the Circuit Court of Kanawha County be transferred to the Business Court. *See* W. Va. Trial Ct. R. 29.06. These cases represent a unified effort among West Virginia's leaders to restore free market competition to the aggregate, asphalt, and asphalt services market and recoup the millions lost to massive overpayments by West Virginia taxpayers as a result of the defendants' broad antitrust conspiracy.

Just a few months ago, the Chief Justice granted a motion by Judge Sims to transfer a similar case *also involving claims of a statewide antitrust conspiracy* among wine distributors to the Business Court. *See* Exh. A. There is no question that the State's and Local Governments' antitrust cases deserve the same treatment. The principal claims in the cases "involve matters of significance to the transactions . . . between business entities." W. Va. Tr. Ct. R. 29.04(a)(1). They involve lengthy and detailed allegations of an antitrust conspiracy among aggregate and asphalt manufacturers and asphalt service providers, involving millions of dollars of overpayments by the taxpayers of this State and their local governments.

Like the Chief Justice's correct conclusion in the wine distributors' case, *see* Exh. A, the antitrust conspiracy claims here present complicated commercial issues "in which specialized

treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter [and] familiarity with [the] specific law [and] legal principles" that apply to antitrust claims. *Id.* at 29.04(a)(2); *see* Exh. A. Finally, the principal claims do not involve any of the categories which are specifically excluded by Rule 29.04(a)(3). No party will be prejudiced and no efficiencies will be lost by the simple transfer of these cases to Business Court.

In sum, the legal and factual questions involving in the State and Local Governments' cases are highly complex and rarely applied by our courts. Given the momentous public importance of these antitrust cases and the damages at stake, the parties, the public, and ultimately the Supreme Court will be best served by transferring these cases to Business Court.

BACKGROUND

The Local Governments' cases were filed in their respective counties in October 2016. See Exh. C.[1] The State's case was filed on January 11, 2017 by the Attorney General on behalf of the State and the Secretary of Transportation and Commissioner of Highways. *See* Exh. B. On the same day, the Attorney General issues a request for proposals for the appointment of outside legal counsel.[2] On April 25, 2017, the Attorney General issued a decision, authorizing the appointment of the present counsel for the State.[3]

While the Attorney General evaluated who to appoint as outside counsel in the State's case, some defendants filed motions to dismiss in the Local Governments' now-consolidated

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[1] Most of the underlying Local Government complaints were filed on October 12, though the Kanawha County Commission's complaint was filed on October 20.

[2] *See* Office of the Attorney General, *Request for Proposal for Legal Services # 58*, http://ago.wv.gov/outsidecounsel/Documents/RFP%20re.%20WV%20Paving%20(M0149953xCECC6).PDF (Jan. 11, 2017).

[3] *See* Office of the Attorney General, *Written Determination*, http://ago.wv.gov/outsidecounsel/Documents/WD%20Appointing%20Bailey,%20Robinson,%20and%20Webb%20(M0186071xCECC6).PDF (Apr. 25, 2017).

case. *See* Exh. E (docket sheet). Defendant Kelly Paving, Inc., filed its motions to dismiss on February 27, 2017. Defendants American Asphalt & Aggregate, Inc., American Asphalt of West Virginia, LLC, and Blacktop Industries and Equipment Company (the "AAA Defendants") filed their motions to dismiss on February 28, 2017, even though they had already answered. Numerous other defendants, including West Virginia Paving, Inc., Southern West Virginia Paving, Inc., Southern West Virginia Asphalt, Inc., and Camden Materials LLC filed answers and no motions to dismiss. Following a hearing, the Circuit Court did not rule on any of the motions and rather held them in abeyance pending discovery. *See* Exh. F. Discovery thus continued in earnest in late spring 2017.

In the State's case, and prior to the appointment of outside counsel in April 25, 2017, Defendants Oldcastle Inc. and Oldcastle Materials Inc. moved to dismiss for lack of personal jurisdiction. *See* Exh. E. After the appointment of counsel, the State sought and obtained stipulated extensions to serve defendant CRH, plc, which required international service. After CRH was finally served in July 2017, CRH also filed a motion to dismiss for lack of personal jurisdiction. The State opposed the motions in a filing dated September 5, 2017. Following a hearing on September 27, 2017, the Circuit Court granted CRH's motion and held the Oldcastle motions in abeyance pending a period of jurisdictional discovery, which continues to this day. During this same period, the parties in both cases stipulated that discovery produced in one case would be considered as produced in the other case. *See* Exh. F.

In August 2017, the Local Governments took their first deposition, of Defendant Camden Materials LLC. *See* Exh. E. In December, the State took the depositions of three fact witnesses. Documentary discovery continues in both cases on a rolling basis and further depositions are almost certainly to occur with respect to the claims in both cases. *See* Exh. E.

Despite no scheduling order, in December 2017 Defendant Kelly Paving, Inc. filed motions for summary judgment as to the Local Government plaintiffs and the AAA Defendants filed renewed motions to dismiss and motions for summary judgment as to the Local Government plaintiffs. At a hearing for these motions on January 11, 2018, *before the motions were argued or decided*, counsel for the State and Local Governments advised the Circuit Court at a bench conference that they may file a motion to refer to Business Court. Following that oral notification, argument was heard and the Circuit Court orally granted only Kelly Paving's motions for summary judgment as the Local Government consolidated case only. The Court denied the other motions to dismiss or for summary judgment, as the plaintiffs had requested. As the Local Governments' Rule 56(f) affidavit of Benjamin L. Bailey explains, which was filed in response to the premature motions for summary judgment, significant discovery remains in these complex antitrust cases, including the development and disclosure of critical expert evidence and analysis. *See* Exh. G. That discovery continues with respect to the remaining seven defendants, as does the jurisdictional discovery related to Oldcastle, Inc. and Oldcastle Materials, Inc.[4]

DISCUSSION

I. This case—a complex statewide antitrust conspiracy—is a perfect fit for the Business Court.

This case is entirely about numerous, major antitrust violations, alleging claims under the West Virginia Antitrust Act ("Antitrust Act") concerning aggregate, asphalt, and asphalt services throughout West Virginia. The State and Local Governments filed substantively similar complaints. The State's complaint contains six counts, 242 numbered paragraphs, and a 19-

[4] Also at the hearing, the Circuit Court granted the State's motion for leave to amend the complaint to re-join CRH, plc, based on new evidence supporting the assertion of personal jurisdiction over that entity, which the Court also indicated it would present as a certified question and stay all discovery as to CRH in the meantime.

paragraph prayer for relief. The Local Governments' complaints (one for each entity) contain four counts, 141 numbered paragraphs, and a comprehensive prayer for relief in each. *See id.*

The State's case was brought by the Attorney General on behalf of the State of West Virginia, under his *parens patria* enforcement authority provided under the Antitrust Act, together with the Secretary of Transportation and Commissioner of Highways on behalf of the Department of Transportation and Division of Highways, No. 17-C-41. *See* Exh. B. The Local Governments originally filed separate complaints and cases, but which have since been consolidated under the lead *City of Charleston* case, No. 16-C-1552. *See* Exh. C. Both the State's and Local Governments' cases are currently pending before Judge Kaufman in Kanawha County Circuit Court. Both cases are brought against the same defendants, except that the State's case has named three additional nonresident entities.

As the complaints in the cases explain in detail, the Defendants are a collection of once vigorous competitors in aggregate materials, asphalt production, paving and contracting services, now illegally combined into actual or de facto monopolies throughout the State. The State and Local Governments allege that Defendants have established and abused their market power illegally and have done so through a common scheme that has harmed competition throughout the State, in violation of the Antitrust Act. *See* W. Va. Code §§ 47-18-3 & -4; Exhs. B-C (complaints).

The two antitrust cases squarely qualify as "business litigation." W. Va. Tr. Ct. R. 29.04. *First*, all of the claims contained in the complaints *directly* "involve matters of significance to the transactions, operations, or governance among business entities." W. Va. Tr. Ct. R. 29.04(a)(1). Notably, this definition does not describe "business litigation" in relation to the nature of the parties, but rather to the nature of *the claims brought*. Here, even though the State and Local

Governments are public officials and bodies, their antitrust conspiracy *claims* clearly "involve matters of significant to the transactions, operations, or governance among business entities."

Indeed, the Chief Justice has referred numerous other cases to the Business Court that involve public officials and public bodies as parties on a regular basis—including one in 2016 from Judge Kaufman involving the Sanitary Board of the City of Charleston that was successfully referred nearly two-years after the complaint was filed.[5] Regardless, however, the State and Local Governments' allegations of an antitrust conspiracy concern their role as direct and frequent commercial participants in the aggregate, asphalt, and asphalt services marketplace. These cases are about restoring free competition in the markets throughout the State. *See* Exhs. B-C (complaints).

Second, the dispute unquestionably "presents commercial . . . issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. Va. Tr. Ct. R. 29.04(a)(2). A

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[5] *See, e.g., Denex Petroleum Corp. v.* ***Mark Matkovich, State Tax Commissioner; John Cutright, Assessor of Barbour County; and the County Commission of Barbour County***, BCD Case No. 16-AA-1-BRB (referral on October 11, 2017), http://bcd.courtswv.gov/Helpers/DownloadHandler.ashx?t=public&n=636434080532209810_17-BCD-31OrderGrantingReferral.pdf; *J.F. Allen Corp. v.* ***The Sanitary Board of the City of Charleston****, et al.*, BCD Case No. 14-C-1182-KAN (referral on June 21, 2016), http://bcd.courtswv.gov/Helpers/DownloadHandler.ashx?t=public&n=636021826019932502_16-BCD-07OrderGrantingReferral.pdf; ***The West Virginia Investment Management Board and the West Virginia Consolidated Public Retirement Board*** *v. Variable Annuity Life Insurance Company*, BCD Case No. 09-c-2104-KAN (referral on December 16, 2014), http://bcd.courtswv.gov/Helpers/DownloadHandler.ashx?t=public&n=635568288049815320_14-BCD-26December162014.pdf (emphases on public officers and agencies as parties).

In 2017 alone, the Chief Justice referred to Business Court *thirteen* cases involving the State Tax Commissioner as a party. *See* Business Court Division Online Case Management (query of all cases January 1, 2017 to January 1, 2018). Although tax appeals are themselves excluded from the exclusion under Rule 29.04(a)(3), such cases would *still* have had to satisfy the definition of Business Litigation under subsection (1).

court with "specialized knowledge or expertise" is particularly critical in this case, because antitrust conspiracy cases are infrequent in Circuit Courts, more complex (both factually and legally) than the everyday civil action, and involve the application of unique provisions of substantive and procedural law. *Id.* Thus, the Chief Justice's conclusion in the wine distributors' case, *see* Exh. A, applies with equal force—if not more so—to these antitrust cases.

Moreover, the substantive law governing antitrust conspiracy cases is complex and hardly routine in Circuit Court. The Supreme Court of Appeals and the Legislature have repeatedly directed that courts of this State should apply federal decisional law with respect to the Antitrust Act—meaning that state courts of general jurisdiction will have to look to specially developed federal law in order to fully adjudicate the plaintiffs' claims. *See* Syl. pt. 3, *Kessel v. Monongalia Cty. Gen. Hosp. Co.*, 220 W. Va. 602, 605, 648 S.E.2d 366, 369 (2007); *see also id.* at 614, 648 S.E.2d at 378 (court observing that the parties' antitrust claims required an "exhaustive examination and consideration of the United States Supreme Court Sherman Act cases . . . and their progeny").

Third and finally, the principal claims do not involve any of the categories which are specifically excluded from the Business Court by Rule 29.04(a)(3). The cases constitute neither "*administrative* disputes with government organizations" nor "*consumer* class actions." First of all, there is nothing "administrative" about this case. It is a full-blown private and public enforcement action under the Antitrust Act. There are no administrative standards, procedures, or forums involved whatsoever. Secondly, neither the State's nor the Local Governments' cases can reasonably called "*consumer* class actions." To be sure, the Local Governments' consolidated case is a putative class action. But it is not a "consumer" action. It raises no West Virginia Consumer Credit and Protection Act or similar claims. *See, e.g.*, *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va.

507, 711 S.E.2d 577 (2011); *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). Rather, the Local Governments' consolidated case, like the State's cases, raises claims under the Antitrust Act. There is simply no exclusion that can be fairly construed to prevent antitrust class actions from being transferred to Business Court.

II. The transfer to Business Court will not prejudice any parties and no efficiencies will be lost.

This motion to refer should be decided now. See W. Va. Tr. Ct. R. 29.06(a)(2). Several reasons justify transferring these two cases.

First, no scheduling order has been entered in either case. Although the Circuit Court only recently (January 12, 2018) directed the parties to discuss putting together a schedule, no such scheduling has been agreed or entered at the time of filing this motion to refer—even though the State's case was filed in early 2017 and the Local Governments' cases in late 2016.

Second, discovery continues in both cases. The State and Local Government plaintiffs only recently began taking depositions, and only one defendant in either case has taken but a single deposition. Transferring the cases to business court will not impact or interrupt the discovery to date or that is planned to occur. Indeed, to increase efficiency among the parties, they have stipulated that all discovery produced in one case is considered as produced in the other. Such a stipulation would survive a transfer to Business Court. Not only that, but the State continues to take limited jurisdictional discovery over at least two nonresident defendants, Oldcastle, Inc., and Oldcastle Materials, Inc., which will be subject at some undefined future date to renewed motion practice—which has not yet even been scheduled.

Third, no orders on dispositive motions had been entered in either case until on the eve of the filing of this motion to refer—and even then, the oral order on January 12, 2018, granted dispositive relief to *only one defendant (Kelly Paving) out of a total of eleven*, and not as to the

State's case. Indeed, the Court *denied* the other defendants' motions to dismiss or for summary judgment at that same hearing. Thus, to the extent there is a developed record for dispositive motions among all the other defendants, it is far from complete.[6]

Assuming for the sake of argument that "good cause" is required because some of the defendants moved to dismiss in lieu of answering, the standard is easily met here. Substantial and complex legal claims and defenses—including potentially dispositive issues—will still require judicial resolution in this case. For example, the Business Court is particularly suited to resolve questions regarding the sufficiency of allegations of antitrust injury, which involve the application a complex area of federal law, as well as the application of the rarely-invoked West Virginia Antitrust Act.

Nor would it be correct, as Defendants may assert, that the State and Local Governments are only seeking transfer now because the Circuit Court recently ruled against them as to one defendant. This is squarely wrong because: (1) the State and Local Governments orally advised Judge Kaufman of their intent to file this motion to refer ***before*** he issued his dispositive rulings, which was to grant summary judgment to Kelly Paving in the Local Government case only; and (2) the only dispositive order that went against the plaintiffs was only as to *one defendant*, while the remaining orders went *the plaintiffs' favor*.

And it is no answer to say that the Chief Justice should not refer cases to Business Court simply because the cases were filed over a year before the referral. Business Court referral orders demonstrate otherwise on a regular basis.[7]

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[6] In fact, the Local Governments will be appealing the lone interlocutory order granting summary judgment to Kelly Paving, which the parties and Circuit Court agreed should be certified for immediate appeal under Rule 54(b).

[7] For example: The *Denex Petroleum* case was filed on March 23, 2015 and referred October 11, 2017. *See* BCD Case No. 16-AA-1-BRB. The *Soaring Eagle Lodge* case was filed December 11, 2015 and

Finally, there will be no prejudice to any of the Defendants if these cases are referred to Business Court. The transfer to Business Court does not mean that the parties must start litigation over, and nor does it mean that previously filed motions or orders are void. On the contrary, the Business Court is well-equipped to review the record already created and to take under its supervision the appropriate adjudication of the remaining phases of this complex litigation.

CONCLUSION

The Business Court was designed precisely for cases like these. For these reasons, the State and Local Government's joint motion to refer to Business Court case numbers 17-C-41 and 16-C-1552 (lead of consolidated cases) should be granted.

Respectfully submitted:

STATE OF WEST VIRGINIA, ex rel.
PATRICK MORRISEY, ATTORNEY GENERAL and THOMAS J. SMITH IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION AND COMMISSIONER OF HIGHWAYS, WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

AND

THE CITY OF CHARLESTON, CITY OF BECKLEY, CITY OF BLUEFIELD, CITY OF PARKERSBURG, CITY OF HUNTINGTON AND THE KANAWHA COUNTY COMMISSION

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referred April 4, 2017. *See* BCD Case No. 15-C-2202-KAN. The *Stephen Peters* case was filed February 27, 2014 and referred September 16, 2016. *See* BCD Case No. 14-C-36-LWS. The *Charleston Sanitary Board* case was filed June 30, 2014 and referred June 21, 2016. *See* BCD Case No. 14-C-1182-KAN.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel. PATRICK MORRISEY, ATTORNEY GENERAL, and THOMAS J. SMITH IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION AND COMMISSIONER OF HIGHWAYS, WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

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JUDGE KAUFMAN

WEST VIRGINIA PAVING, INC., *et al.*,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I have served true and accurate copies of the forgoing via hand delivery and/or U.S. Mail, this 18th day of January 2018, addressed as follows:

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January 18, 2018

VIA HAND DELIVERY
Edythe Nash Gaiser, Clerk of Court
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Re: ***City of Charleston, et al. v. West Virginia Paving, Inc., et al.,***
Civil Action No. 16-C-1552 (Cir. Ct. Kanawha Cnty.) (lead of consolidated)

AND

State of West Virginia, et rel Patrick Morrisey, Attorney General, et al. v. Oldcastle, Inc., et al.
Civil Action No. 17-C-41 (Cir. Ct. Kanawha Cnty.)

Dear Ms. Gaiser:

Enclosed for filing regarding the above-referenced matters is the original **Joint Motion to Refer to Business Court** directed to the Chief Justice. Per my office's communications with Ms. Wines, we have included a thumb drive containing the entire filing in electronic format in lieu of additional hard copies.

Copies of the Motion and attachments have been served on counsel, the Business Court Division Central Office, the presiding judicial officer below, and the Clerk of the Kanawha County Circuit Court, as evidenced by the Certificate of Service.

Do not hesitate to contact us if you have any questions.

Sincerely,

Benjamin L. Bailey

BLB/md

Enclosure

cc: Honorable Tod Kaufman – *via hand delivery*
Cathy Gatson, Kanawha County Circuit Clerk -- *via hand delivery*
Business Court Division Central Office -- *via US Mail*
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