

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 4473

TRAIL CREEK INVESTMENTS LLC
and WARREN OIL COMPANY, LLC,

Plaintiffs,

v.

WARREN OIL HOLDING
COMPANY, LLC, et al.;

Defendants.

**ORDER ON JOINT CONSENT
MOTION FOR APPOINTMENT OF
DISCOVERY REFEREE**

THIS MATTER is before the Court on the parties' Joint Consent Motion for Appointment of Discovery Referee (ECF No. 229). On 22 May 2024, the Court informed the parties via email that at the upcoming 5 June 2024 Business Court Rule (BCR) 10.9 conference they should be prepared to discuss the appointment of a discovery referee in this matter. At the conference, the parties jointly agreed to this appointment, pursuant to the terms of N.C. R. Civ. P. 53 and this Order.

On consideration of the parties' consent and agreement to the protocol set forth herein, and for good cause, the Court hereby **APPOINTS** Alan W. Duncan of Turning Point Litigation in Greensboro, North Carolina as the Discovery Referee in this matter and **ORDERS** the Discovery Referee, as prescribed by N.C. R. Civ. P. 53(f)(1), to proceed with all reasonable diligence in this engagement.

I. Background

Based on the number and frequency of discovery disputes to date, the need for the commitment of time and attention to such matters, and the state of the Court's

docket, the Court finds that the appointment of a Discovery Referee in this matter will assist the Court in effectively and expeditiously facilitating the exchange of information and discovery between the parties, including resolving any discovery disputes.

II. Referee's Authority and Duties

The Discovery Referee shall have the authority to (i) oversee and resolve any disputes related to discovery in this case, including disputes arising from fact and expert discovery, subpoenas, written discovery, depositions, electronically stored information (including search methods, terms and protocols, production and redaction, formatting and other technical matters), confidentiality designations, privilege issues, discovery scheduling and access to trade secrets and other records; (ii) direct, supervise, monitor, and report on implementation and compliance with the Court's orders regarding discovery; (iii) interpret any agreements regarding discovery matters that the parties reach; (iv) carry out any other duties referred to the Discovery Referee by the Court; and (v) communicate with the parties and their attorneys as necessary to permit the full and efficient performance of these duties.

For clarity, this authority will include decisions regarding issues raised in Defendants' Rule 10.9 submission dated 4 June 2024, the Court having already indicated to Defendants that they may submit a motion and corresponding briefing on the first issue in their 7 May 2024 submission to the Court and may submit a more specific submission on the second issue to the Discovery Referee if the parties are unable to resolve that dispute between themselves.

The Discovery Referee shall be authorized to retain third-party information from technology vendors reasonably required to perform the duties set forth herein.

III. Procedure.

No later than twenty (20) days from the date of this Order, as set forth in N.C. R. Civ. P. 53(f)(1), the Discovery Referee shall set the first meeting of the parties, either in person or virtually. At the initial meeting, the Parties shall be prepared to discuss the background of the case, what materials would be useful to provide to the Discovery Referee to educate the Discovery Referee regarding the action, including any existing disputes, and proposed procedures for submitting disputes.

The Discovery Referee shall have the discretion to establish the procedure for submission and resolution of disputes, including briefing schedules, page limits, and the form of any submissions. The timing and nature of these procedures should be commensurate with the need for efficient and speedy resolution of discovery matters, consistent with the discovery schedule established for this case. At the sole discretion of the Discovery Referee, any discovery dispute may be ruled upon without oral argument or heard in person or virtually.

The Discovery Referee shall have the discretion to establish dates for regular status conferences if the Discovery Referee determines that will facilitate the efficient handling of discovery issues in this case.

Unless otherwise directed by the Court, or in connection with an objection to or appeal from an order of the Discovery Referee, submissions to the Discovery Referee shall not be filed on the publicly available Electronic Case Filing (“ECF”)

docket. For clarity, the parties shall not be required to use the procedures set forth in Business Court Rule 10.9 in connection with disputes that are encompassed within this Order.

Within seven (7) business days from the later of the completion of briefing or hearing of disputes, the Discovery Referee shall file on the publicly available ECF docket any written report, findings and/or decisions, with appropriate redactions to protect the confidentiality of information designated pursuant to the Protective Order entered in this case (ECF No. 189). The Discovery Referee, for good cause, shall be permitted to extend the seven (7) business day deadline set forth above.

The Discovery Referee need not preserve for the record any documents created by the Discovery Referee that are docketed in this case, nor any documents received by the Discovery Referee from counsel of parties in this case. Any documents created by the Discovery Referee and anyone working in association with the Discovery Referee need not be preserved and are otherwise not subject to any form of production.

The Discovery Referee shall have the discretion to transcribe any hearings or conferences over which the Discovery Referee presides. If the Discovery Referee elects for transcription, the moving party shall have the responsibility for arranging transcription of the hearing/conference and distributing the transcription to the opposing party and the Discovery Referee. The Discovery Referee shall be permitted, but not required, to file on the ECF docket a transcript of the proceedings or exhibits that are the subject of the Discovery Referee's report or decision.

IV. Review of Discovery Referee's Reports

All or any part of the report of the Discovery Referee may be excepted by any party as set forth in N.C. R. Civ. P. 53(g)(2), except that pursuant to Business Court Rule 4.1(d), the periods for objection shall be as follows: Any such objection or exception shall be filed within ten (10) days of the entry of the Discovery Referee's written decision. Any response to the objection shall be filed within seven (7) days of the objection. There shall be no right of a reply unless requested by the Court. Memoranda accompanying or responding to the objection or exception shall be limited to 2500 words. Failure to meet these deadlines shall result in permanent waiver of any objection to the Discovery Referee's report.

The timely filing of an objection stays the effect of the report or ruling that is the subject of the objection.

V. Discovery Referee's Compensation

The Discovery Referee shall be compensated at the rate of \$520 per hour for this service as a Special Master, and will be assisted in his duties by Hillary M. Kies, his partner at Turning Point Litigation in Greensboro, North Carolina, at a rate of \$320 per hour, together with any reasonable expenses, including any expenses for travel, transcription costs, and any third-party information technology vendor. Plaintiffs and Defendants shall bear this cost equally, subject to later modification in the Court's discretion. The Court may from time-to-time order one or more of the parties to advance sums to be applied to the Discovery Referee's compensation hereunder.

On approximately a monthly basis, the Discovery Referee shall submit to the Court and the parties a statement for services, in summary form only, which amounts shall be paid by the parties within thirty (30) days following submission of the same.

VI. Other Matters

A. Protective Order

The Discovery Referee shall, before beginning the assignment hereunder, execute a document agreeing to be bound by the protective order in this case (ECF No. 189). The Discovery Referee, and all persons working with the Discovery Referee, shall have access to “Confidential” and “Highly Confidential-Attorneys’ Eyes Only” materials. Disclosing such materials to the Discovery Referee or to persons working with the Discovery Referee will not constitute a waiver of any protections set forth in the protective order.

B. Cooperation

The Court expects the parties and counsel to cooperate fully with the Discovery Referee. The parties will make readily available to the Discovery Referee any and all facilities, files, databases, and documents necessary to fulfill the Discovery Referee’s responsibilities under this Order. The Discovery Referee shall have only the powers set forth in this Order. As an officer of the Court, the Discovery Referee shall enjoy the same protections from being compelled to testify and from liability for damages as those enjoyed by other judicial officers performing similar functions.

C. Electronic Filing

The Court **ORDERS** that the Clerk of Court give Alan Duncan and Hillary

Kies access to the electronic docket in this matter and that Alan Duncan and Hillary Kies have full access to any and all sealed filings in this matter.

D. Impartiality

The Discovery Referee shall certify or attest, before beginning service hereunder, that the Discovery Referee knows of no grounds for disqualification from service in this case hereunder as set forth in Canon 3C of the North Carolina Code of Judicial Conduct.

E. Ex Parte Communication

The Discovery Referee may communicate *ex parte* with the Court at the discretion of the Discovery Referee, without providing notice to the parties, including to assist the Court with legal analysis of the parties' positions, the nature of the activities of the Discovery Referee, management of discovery and other procedural matters, but the Discovery Referee shall not communicate any matters relating to settlement negotiations.

The Discovery Referee may not communicate *ex parte* with any party or counsel for any party without express written consent of the parties or their counsel or further order of this Court.

F. Amendment

The Court may amend this Order at any time.

SO ORDERED this the 5th day of July, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases