

11-0187

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.  
THE GALLOWAY GROUP,  
a West Virginia Partnership

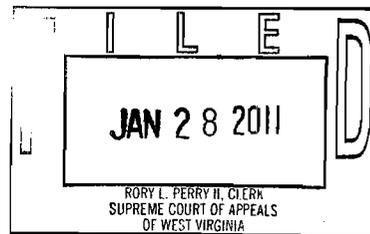
Petitioner,

v.

Upon Original Jurisdiction  
in Prohibition,

No. 11-0187

THE HONORABLE WARREN R. MCGRAW,  
Judge of the Twenty-Seventh Judicial Circuit;  
FREDEKING & FREDEKING LAW OFFICES, LC,  
and R.R. FREDEKING, II, INDIVIDUALLY,



Respondents.

PETITION FOR WRIT OF PROHIBITION

THE GALLOWAY GROUP

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## QUESTIONS PRESENTED

This petition presents two questions of law:

1. Whether the circuit court exceeded its legitimate powers in failing to compel arbitration under law partnership agreements which require that any dispute arising under the agreements be submitted to arbitration.

2. Whether, in a dispute relating to legal fees and expenses under law partnership agreements, the circuit court exceeded its legitimate powers in finding venue in Wyoming County based upon a law partnership's assumed representation of a union health and retirement fund which may have some beneficiaries in Wyoming County, even though none of the parties reside in Wyoming County, the principal place of business of the law partnership is Kanawha County and the partnership agreements were not formed or breached and did not create any obligation in Wyoming County.

## STATEMENT OF THE CASE

This petition concerns a fee distribution dispute arising under a series of agreements between lawyers related to the performance of legal work. (*App. 1-28*). The dispute is presently pending before the Circuit Court of Wyoming County in a civil action styled, *Fredeking & Fredeking Law Offices, LC, et. al. v. L. Thomas Galloway d/b/a Galloway & Associates, et. al., Civil Action No. 10-C-99*. (*App. 1-7*). Several claims set forth in the Complaint have already been ordered to arbitration by the United States District Court for the Southern District of West Virginia. *Galloway and Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, 2010 U.S. Dist. LEXIS 108175, Civil Action No. 3:10cv0830 (S.D.W.Va. October 8, 2010). (*App. 146-152*). The remaining claims are also subject to arbitration under similar arbitration agreements. (*App. 16-28*). However, the circuit court, in a display of open hostility to arbitration, has wrongfully concluded otherwise. (*App. 70-71, 135-145*).

The Petitioner, the Galloway Group [“Galloway Group”], is a West Virginia partnership consisting of attorneys and entities whose members are engaged in the practice of law. (*App. 1; 4-5; 16- 28*). Its principal place of business is Kanawha County, West Virginia. (*App. 22*). The Galloway Group was originally formed as a joint venture in 2001 and became a partnership in 2003. (*App. 16, 22*). There are three (3) Galloway Group agreements which relate to the performance of legal work and the distribution of fees pursuant to the agreements. (*App. 16-28*). Respondents, Fredeking & Fredeking Law Offices, LC and R.R. Fredeking, II [collectively “Fredeking”], are a West Virginia law firm and an individual attorney who maintain their offices in and are residents of Cabell County, West Virginia. (*App. 1*). Fredeking was a member of the Galloway Group at the time the agreements at issue were executed. (*App. 16-28*). Respondent, the Honorable Warren R. McGraw, is the duly elected circuit judge for the twenty-seventh judicial circuit and is the presiding judge in Civil Action No. 10-C-99.

Prior to the formation of the Galloway Group, Fredeking and L. Thomas Galloway d/b/a Galloway & Associates [“Galloway & Associates”] entered into a series of three (3) agreements relating to the rendering of professional services which provided a formula under which fees earned for cases filed during the effective period of a particular agreement would be divided. (*App. 1-4, 8-15*). The three (3) agreements are: (1) “Agreement between Fredeking & Fredeking and Galloway & Associates on Rendering of Professional Services, dated December 31, 1997”; (2) “Letter Agreement between Fredeking & Fredeking and Galloway & Associates for Year 2000, dated January 11, 2000”; and (3) “Letter Agreement between Fredeking & Fredeking and Galloway & Associates for year 2001, dated December 30, 2000.” (*App. 8-15*). Each of these agreements contains or incorporates an arbitration provision which requires that “[a]ll disputes of

any kind under this Agreement shall be submitted to arbitration under the standards established by the American Arbitration Association.” (*App. 10-11, ¶13; 12, ¶3 and footnote 2; 14, ¶4*).

The Galloway Group was later formed in 2001 with an initial agreement entitled “Formal Agreement on Fee Distribution in Galloway Group Cases with Milberg Weiss” [“Formal Agreement”]. (*App. 16- 19*). The first paragraph of the Formal Agreement states that the parties had reached an agreement on fee distribution of Galloway Group cases with Milberg Weiss Bershad Hynes and Lerach. (*App. 16*). The Formal Agreement was signed by Fredeking on October 11, 2001. (*App. 19*). It contains a dispute resolution provision which includes arbitration. Specifically, paragraph ten (10) provides:

**If a dispute of any type arises under this agreement**, including without limitation over determination of lead or co-lead or over the distribution of a fee in one or more cases, each member of the Galloway Group agrees to work in good faith to reach a reasonable and fair disposition of the dispute. If no agreement can be reached, each member of the Galloway Group agrees to submit the dispute to a person acceptable to each member of the Group. The decision of that person shall be final and binding on all parties to the dispute with no appeal or collateral attack of said decision. If the Group cannot agree on a person to make said decision, the matter shall be submitted to the American Arbitration Association, whose decision shall be final and binding with no appeal or collateral attack allowed. Each person shall bear their own costs and attorney fees in resolving any dispute

(emphasis supplied, *App. 18, ¶10*).

The Formal Agreement was amended by the execution of the “May 1, 2003 Amendment to Galloway Group Agreement” [“Amendment”]. (*App. 20- 21*). The Amendment incorporates all provisions of the Formal Agreement not specifically altered. (*App. 21, ¶4*). Later, on November 4, 2003, the “Galloway Group Partnership Agreement” [“Partnership Agreement”] was executed. (*App. 22- 28*). Like the Formal Agreement, the Partnership Agreement identifies the purpose of the Galloway Group to include client development, client maintenance, evaluation and initiation of potential litigation and other business. (*App. 22, ¶4*). It, too, contains a three

(3) step dispute resolution provision virtually identical to the provision in the Formal Agreement.

Paragraph thirteen (13) provides:

“Dispute Resolution – If a **dispute of any type arises under this Partnership Agreement**, including without limitation over determination of lead or co-lead or over the distribution over a fee in one or more cases, each Partner of the Galloway Group agrees to work in good faith to reach a reasonable and fair disposition of the dispute. If no agreement can be reached, each member of the Galloway Group agrees to submit the dispute to a person acceptable to each member of the Group. The decision of that person shall be final and binding (sic) on all parties to the dispute with no appeal or collateral attack of said decision. If the Group cannot agree to make said decision, the matter shall be submitted to the American Arbitration Association, whose decision shall be final and binding (sic) with no appeal or collateral attack allowed. Each person shall bear his own costs and attorney fees in resolving any dispute.” (emphasis supplied) (*App. 27, ¶13*).

Disputes arose over the distribution of fees and other matters between Fredeking and Galloway & Associates as well as between Fredeking and the Galloway Group. (*App. 1-7*). The parties were unsuccessful in resolving the disputes. With respect to those matters relating to the Galloway Group, a letter was sent on June 11, 2010 to Fredeking’s counsel reciting the failed effort to resolve the parties’ differences and, accordingly, nominating retired circuit court Judge A. Andrew MacQueen to serve as arbitrator. (*App. 106-108*). The letter further requested that Fredeking advise if Judge MacQueen was acceptable and, if not, whether Fredeking had an alternate suggestion. (*App. 106-108*).

Fredeking never responded to the arbitration nomination. Instead, he snubbed the dispute resolution process under the agreements and filed the present civil action in the Circuit Court of Wyoming County on June 14, 2010. (*App. 1-7*). The Complaint contains four (4) Counts. Counts I and II recite the Galloway & Associate agreements and allege that L. Thomas Galloway d/b/a Galloway & Associates breached the agreements, failed to make any accounting of funds in costs involved in the Milberg Weiss litigation and failed to pay Fredeking its share of proceeds

derived from the Milberg Weiss litigation pursuant to the agreements. (*App. 1-4*). It is also alleged that L. Thomas Galloway had defrauded Fredeking by overstating expenses and/or misrepresenting the proceeds received from the Milberg Weiss litigation. (*App. 2-3, ¶9; 4, ¶15*). Count III recites the Galloway Group agreements and contains identical allegations as those set forth in Counts I and II. (*App. 4-5*). Count IV alleges the wrongful withholding of certain monies reported to the IRS as having been distributed to Fredeking under the Galloway Group agreements. (*App. 5-7*).

Subsequent to the filing of the Wyoming County Complaint, Galloway & Associates initiated an action in the United States District Court for the Southern District of West Virginia seeking a determination that the claims asserted in Counts I and II of the Complaint were subject to arbitration.<sup>1</sup> (*App. 146-152*). In a Memorandum Opinion and Order dated October 8, 2010, the District Court granted the motion to compel arbitration “as to claims based on the 1998, 2000 and 2001 agreements between Galloway and Fredeking.” *Galloway & Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, Civil Action No. 3:10cv0830, 2010 U.S. Dist. LEXIS 108175 (S.D.W.Va. October 8, 2010). (*App. 146-152*). Following the entry of this Memorandum Opinion and Order, Fredeking represented to the circuit court that he was not pursuing claims against L. Thomas Galloway or Galloway & Associates. (*App. 36*). Despite this representation, the circuit court denied a motion to dismiss these parties. (*App. 135-145*).

On November 19, 2010, the Galloway Group likewise filed a Motion to Compel Arbitration or, in the Alternative, Motion to Dismiss Due to Improper Venue before the circuit court with respect to Counts III and IV of the Complaint, pointing out the nearly identical nature

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<sup>1</sup> The federal action filed by Galloway & Associates was originally filed as a declaratory judgment action seeking a determination that there were valid arbitration provisions in the agreements and that disputes had to be arbitrated. Galloway & Associates was unaware of the filing of the Wyoming County suit when the declaratory judgment action was filed. After Galloway & Associates became aware of the Wyoming County action the complaint was amended and a motion to compel arbitration was filed.

of the claims as asserted against Galloway & Associates as well as the favorable ruling obtained compelling arbitration from the District Court.<sup>2</sup> (*App. 82-108*). The Galloway Group also filed a Motion to Dismiss Due to Improper Venue as the requirements of W.Va. Code § 56-1-1 had not been satisfied. (*App. 114-123*). Specifically, the Galloway Group maintained that the defendants did not reside in Wyoming County, the agreements did not come into existence in Wyoming County, any alleged breach or violation of duty did not occur in Wyoming County, the manifestation of any alleged breach did not occur in Wyoming County and there was no payment obligation to be made in Wyoming County. (*App. 114-123*).

A hearing on the Galloway Group's motions was held before the circuit court on December 1, 2010. (*App. 33-81*). During oral argument, the circuit court displayed an open hostility to arbitration as demonstrated by the following exchange:

THE COURT: Mr. Wakefield, I hear all those arguments and I've heard them over the years on arbitration business as to law and I can't help but be reminded that one of the complaints -- and I know that this is not an issue that effects you, I suppose, but it affects this Court. One of the principle [sic] issues upon which this nation was founded was the fact that we were being deprived of our jury trial by a Lord and Master at the time and what you propose now is a return to that same kind of conduct.

MR. WAKEFIELD: No, Your Honor.

THE COURT: And you're asking me to engage with you in the enforcement of that I --

MR. WAKEFIELD: No, Your Honor.

THE COURT: Without respect to what other Courts do, it is extremely difficult for me as a lawyer and as a follower and student of government and its development from the Declaration of Independence to this very courtroom today to follow that line of reasoning, that you could just simply contract away your right to have your case heard in public by a public Court. That's hard for me to subscribe to, without regard to what the law says.

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<sup>2</sup> The Galloway Group had also previously filed a declaratory judgment action in the Circuit Court of Kanawha County, West Virginia styled *The Galloway Group v. Fredeking & Fredeking Law Offices, LC, Civil Action No. 10-C-1073*. That action was filed prior to Fredeking effecting service of the Wyoming County action. The action remains pending.

MR. WAKEFIELD: I appreciate Your Honor's views on that. I would respectfully submit that a party can indeed enter into a contract, particularly when you're a lawyer, and you agree that arbitrate is --

THE COURT: Lawyers above all else should not have that ability. Lawyers above all else should know that their responsibility is protected by the very thing that they're wanting to abrogate. (*App.* 70-71).

Following the December 1, 2010 hearing, the Galloway Group requested, pursuant to *State ex rel. Allstate Insurance Company v. Gaughan*, 203 W.Va. 358, 508 S.E. 2d 75 (1998), that the circuit court make findings of fact and conclusions of law as the Galloway Group intended to seek extraordinary relief if the motions were denied. (*App.* 153). Fredeking, in obvious recognition that venue was questionable, also made a supplemental filing entitled "Election of Plaintiffs to Proceed in the Circuit Court of Wyoming County, and Reply to Defendant's Motion of Findings of Facts and Conclusions of Law." (*App.* 124-126). Fredeking maintained that as a member of the Galloway Group Partnership, he had elected and consented, on behalf of the Galloway Group, to venue being in the Circuit Court of Wyoming County. (*App.* 124-126). The Galloway Group filed a Motion to Strike the Election contending that the election was self-serving given that Fredeking was directly adverse to the partnership and violated his duty to exercise the utmost good faith and fair dealing toward his partners. (*App.* 127-134).

On January 11, 2011, the circuit court entered an Order which denied Defendant's Motion to Dismiss Due to Improper Venue and Defendant's Motion to Compel Arbitration or, the Alternative, Motion to Dismiss Due to Improper Venue.<sup>3</sup> (*App.* 135-145). In the Order, the circuit court concluded that venue was appropriate in Wyoming County for two (2) reasons. (*App.* 136-139). First, the circuit court determined that because some of the Galloway &

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<sup>3</sup> In fact, the Order denied all motions filed by the Galloway Group, including Defendant's Motion to Dismiss for Breach of Tolling Agreement and Defendant's Motion to Dismiss Counts I and II of Plaintiffs' Complaint and Dismiss L. Thomas Galloway d/b/a Galloway and Associates.

Associates agreements mentioned representation of the United Mine Workers Health and Retirement Fund [“Fund”] and that certain residents of Wyoming County would be beneficiaries of that Fund, there was relief provided to persons in Wyoming County and a concomitant debt for legal services owed to the parties before the Court. (*App. 138*). Second, the circuit court utilized the long-arm statute contained in W.Va. Code § 56-3-33 to assert jurisdiction over the non-resident defendant, L. Thomas Galloway, as being indisputably a party to agreements during litigation involving Wyoming County residents and, thus, Mr. Galloway became a venue giving defendant. (*App. 138-139*).

As to the motion to compel arbitration, the circuit court concluded that the arbitration clause(s) in the Galloway Group agreements were not nearly as broad as those sanctioned by this Court in *Ruckdeschel v. Falcon Drilling Company, LLC*, 225 W.Va. 450, 693 S.E. 2d 815 (2010). (*App. 139-144*). The Court also concluded that the gravamen of the Complaint was to compel enforcement of the underlying Galloway Group agreements and not a dispute as to the percentage of fees which Fredeking was entitled to receive. (*App. 142*). Finally, the Court determined that the requirement that the parties attempt in good faith to resolve any dispute as a prerequisite to arbitration had not been satisfied by the Galloway Group because certain partnership information had not been supplied to Fredeking. (*App. 142-143*). It is from these rulings that the Galloway Group seeks extraordinary relief, as the rulings are in clear contravention of established legal principles.

### **SUMMARY OF ARGUMENT**

The circuit court clearly abused its discretion when it denied the Galloway Group’s motion to compel arbitration. Motivated by an obvious distaste for arbitration, the Court ignored the mandate of the Federal Arbitration Act that arbitration agreements are to be enforced

according to their terms. The circuit court also ignored a long line of decisions from this Court, which have favorably viewed arbitration provisions in a wide variety of disputes including those arising under employment, securities, commercial and consumer contracts. Here, the record clearly demonstrates the existence of an arbitration provision which applies to “a dispute of any type” under the Galloway Group agreements. (*App. 18, 27*). The record is equally clear that the Complaint seeks recovery under those very agreements based upon allegations that monies have not been properly distributed as called for by the agreements. (*App. 4-5*). In fact, these same allegations were found by the District Court to trigger an obligation to arbitrate. (*App. 146-152*). Yet, the circuit court improperly concluded that the reach of the arbitration provision was narrow and that the gravamen of the action was outside of arbitration because it sought to compel enforcement of the agreements. (*App. 139-144*). This conclusion was illogical at best since any dispute under the agreements necessarily seeks to compel enforcement of the agreements.

The alternate rationale embraced by the circuit court – that there was a failure to meet a good faith negotiation condition precedent – is simply wrong. (*App. 142-143*). The Galloway Group did attempt to resolve the dispute and even proposed an arbitrator to decide the controversy. (*App. 106-108*). Those efforts were unsuccessful and it was Fredeking who formalized the dispute by filing the present action. (*App. 1-7*). Once that occurred, the Galloway Group properly sought to compel arbitration as informal means of resolving the controversy had been clearly rejected by Fredeking. (*App. 82-108*). Moreover, even if the rationale was correct, procedural questions affecting arbitrability are to be decided by the arbitrator, not the trial court.

Compounding the obvious error committed in denying arbitration is the equally fundamental mistake of finding venue in Wyoming County. (*App. 136-139*). But for this conclusion, the Court would not have been able to derail arbitration. With respect to individuals

or partnerships, W.Va. Code § 56-1-1 permits a civil action to be brought only in a county where any of the defendants reside or the cause of action arose. The record is unequivocal that the Galloway Group's principal place of business is Kanawha County, West Virginia. (*App. 1*, ¶2; 22, ¶22). It also demonstrates that Fredeking is a resident of Cabell County. (*App. 8; 12; 14; 22; 29; 31; 134*). There are no allegations in the Complaint that any cause of action arose in Wyoming County. (*App. 1-7*). Instead, the circuit court seized upon a mistaken belief that the Fund was a client of the Galloway Group and then took judicial notice that there would be residents of Wyoming County who would be beneficiaries of the Fund. (*App. 136; 138-139*). From that notice, the circuit court further concluded that the agreements concerned the representation of residents of Wyoming County and that relief was obtained which gave rise to fees being owed by the Galloway Group to Fredeking related to conduct in Wyoming County. (*App. 136; 138-139*). This analytical stretch is flawed as it does not demonstrate that any conduct occurred in Wyoming County, that any contract was breached in Wyoming County, that any contract was formed in Wyoming County or that any monies are due and owing in Wyoming County. Indeed, this analysis would permit venue to rest in any county in the United States where an individual might reside who arguably was a shareholder or beneficiary of an entity represented by attorneys. There is nothing within statutory or case law surrounding venue to support such a broad reach.

The circuit court also committed fundamental error when it applied the long-arm *in personam* jurisdiction statute to L. Thomas Galloway to find venue. (*App. 138- 139*). L. Thomas Galloway is not a proper party to the Wyoming County action as the claims against him have been ordered to arbitration. (*App. 4-5; 146-152*). Moreover, counsel for Fredeking stipulated at the beginning of the December 1, 2010 hearing that the case was proceeding only

against the Galloway Group and not against Mr. Galloway or Galloway & Associates. (*App.* 4-5). More importantly, the use of the long-arm statute is for the purpose of establishing jurisdiction over an individual or corporation. It is not the means by which venue is established. Instead, venue principles are set forth in W.Va. Code § 56-1-1 and the requirements of that statute are clearly not met as to either the Galloway Group or the individual defendant.

In short, the circuit court rendered rulings which are unquestionably at odds with clear precedent from this Court with respect to both arbitration and venue. The errors committed are clear-cut and cannot be corrected on appeal. Extraordinary relief is therefore warranted.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Galloway Group respectfully requests oral argument pursuant to Rule 19 of the *Revised West Virginia Rules of Appellate Procedure*. A Rule 19 argument is appropriate because the petition involves assignments of error in the application of settled law as well as an unsustainable exercise in discretion where the law governing that discretion is settled. The Galloway Group further believes the case is appropriate for a memorandum decision.

#### **ARGUMENT**

This Court should award a writ of prohibition and preclude the circuit court from refusing to compel arbitration and from continuing to exercise jurisdiction over the dispute. “[A] petition for a writ of prohibition is an appropriate method by which to obtain review by this Court of a circuit court’s decision to compel arbitration.” *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 772 613 S.E. 2d 914, 920 (2005); *see also McGraw v. Am. Tobacco Co.*, 224 W.Va. 211, 681 S.E. 2d 96, 104 (2009) (“[T]his Court has traditionally addressed challenges to orders compelling arbitration in proceedings seeking writs of prohibition.”); *State ex rel. City Holding Company v. Kaufman*, 216 W.Va. 594, 609 S.E. 2d 855 (2004) (circuit court’s denial of motion to compel

arbitration subject to review through a writ of prohibition); *State ex rel. Wells v. Matish*, 215 W.Va. 686, 600 S.E. 2d 583 (2004); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E. 2d 265 (2002). Likewise, when a lower court is without venue or otherwise exceeds its legitimate powers, prohibition may be employed for testing and examining the abuse of power by such lower court. *State ex rel. Ritchie v. Triplett*, 160 W.Va. 599, 236 S.E. 2d 474 (1977).

In determining whether to entertain and issue a writ of prohibition for cases where the lower tribunal has exceeded its legitimate powers, this Court will examine five (5) factors: (1) whether the party seeking the writ has no other adequate means 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; (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *State ex rel. AT&T Mobility v. Wilson*, No. 35537 (W.Va. October 28, 2010). A petitioner need not establish all five (5) factors but the third factor, the existence of a clear error as a matter of law, should be given substantial weight. *Id.* The standard for review of legal determinations by the lower court is *de novo*, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E. 2d 265 (2002), while a review of a decision on a motion to dismiss for improper venue is for an abuse of discretion. *Caperton v. A.T. Massey Coal Company*, 225 W.Va. 128, 690 S.E. 2d 322 (2009).

Here, the factors necessary to establish entitlement to a writ of prohibition are clearly satisfied. There are no other adequate means for the Galloway Group to obtain relief from the circuit court's order denying arbitration and dismissal for lack of venue. In fact, this Court has recognized that prohibition is the appropriate vehicle for obtaining review of orders relating to

arbitration. Moreover, the Galloway Group will be prejudiced if the error is not corrected. It will be required to defend itself in a civil action where venue does not lie and despite the parties having specifically contracted to resolve disputes through arbitration. Once the merits of Fredeking's claims are adjudicated in litigation, it will be too late to compel arbitration. The error committed by the circuit court is clear in that it is at odds with the Federal Arbitration Act as well as a long line of decisions from this Court upholding arbitration in a number of different controversies. It also violates clear and long established venue standards. Finally, the Order of the circuit court manifests a disregard for clear legal principles and appears to be motivated by an open hostility to arbitration.

**I. THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWERS BY FAILING TO ENFORCE ARBITRATION PROVISIONS UNDER THE LAW PARTNERSHIP AGREEMENTS.**

**A. THE FEDERAL ARBITRATION ACT AND WEST VIRGINIA LAW MANDATE ENFORCEMENT OF AGREEMENTS TO ARBITRATE A DISPUTE OF ANY TYPE ARISING UNDER LAW PARTNERSHIP AGREEMENTS.**

Fredeking, a lawyer, agreed to arbitrate "a dispute of any type" arising under the Galloway Group agreements. (*App. 18, ¶10; 27, ¶13*). He made a similar agreement under the Galloway & Associates agreements. (*App. 10- 11, ¶13*). He deliberately ignored the agreements and filed the action pending in the Circuit Court of Wyoming County. He has now been directed by the United States District Court for the Southern District of West Virginia in a final order to arbitrate the claims against Galloway & Associates as set forth in Counts I and II of the Complaint. (*App. 146-152*). The circuit court should have acted as the District Court did and entered an order directing arbitration of the claims against the Galloway Group in Counts III and IV. The court's failure to do so was result driven and clearly erroneous.

The "primary purpose" of the Federal Arbitration Act ["FAA"], as the U.S. Supreme

Court has stated repeatedly, is to “ensure[e] that private agreements to arbitrate are enforced according to their terms.” *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). This Court has similarly recognized the purpose of the FAA and held that arbitration is favored where there is an agreement to arbitrate by the parties. *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 685 S.E. 2d 693 (2009). In fact, this Court has rendered several decisions in recent years which have looked favorably upon arbitration provisions. *State ex rel. AT&T Mobility v. Wilson*, No. 35537 (W.Va. October 28, 2010) (determining that an arbitration provision in a consumer contract which required that arbitration be conducted on an individual basis did not violate public policy); *Ruckdeschel v. Falcon Drilling Company, LLC*, 225 W.Va. 450, 693 S.E. 2d 815 (2010) (holding, in part, that the trial court needed to resolve whether a valid contract existed and whether a claim for indemnification is subject to the arbitration provision of contract); *State ex rel. T.D. Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E. 2d 293 (2010) (holding that trial court wrongfully addressed merits of underlying dispute after referring securities case to arbitration); *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 685 S.E. 2d 693 (2009) (upholding trial court’s decision to enforce an arbitration provision in an employment contract ); *McGraw v. Am. Tobacco Co.*, 224 W.Va. 211, 681 S.E. 2d 96, 104 (2009) (upholding trial court’s decision to order arbitration under the Master Settlement Agreement contained in a tobacco settlement); *State ex rel. Wells v. Matish*, 215 W.Va. 686, 600 S.E. 2d 583 (2004) (upholding arbitration provision in employment contract between a newscaster and television station). In doing so, this Court has made it clear that the circuit court’s role is confined to determining: (1) whether a valid arbitration agreement exists between the parties, and (2) whether the claims averred fall within the substantive scope of

the arbitration agreement. *Ruckdeschel v. Falcon Drilling Company, LLC*, 225 W.Va. 450, 693 S.E. 2d 815 (2010).

In this case, the validity of the arbitration provisions in the Galloway Group agreements was not contested by Fredeking nor did the circuit court find the provisions invalid. (*App. 1-7, 135-145*). Instead, the Court's analysis was confined to a discussion that the claims contained in Counts III and IV of the Complaint somehow fell beyond the reach of arbitration notwithstanding the broad language that "a dispute of any type" was to be resolved by arbitration. (*App. 18, ¶10; 27, ¶13; 142-143*). The circuit court's reasoning ran counter to the extensive analysis conducted by the United States District Court for the Southern District of West Virginia in *Galloway & Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, Civil Action No. 3:10cv0830, 2010 U.S. Dist. LEXIS 108175 (S.D.W.Va. October 8, 2010). There, Judge Chambers had little difficulty concluding that the allegations in the Wyoming County action triggered the application of arbitration provisions. (*App. 146-152*). Significantly, the claims contained in Counts I and II, arising under the Galloway & Associates agreements, are virtually identical to the allegations set forth in Count III arising under the Galloway Group agreements. (*App. 1-7*).

Thus, the trial court's order simply cannot stand because it ignores well settled jurisprudence applying arbitration provisions. Its reasoning is seriously flawed and, as will be demonstrated below, the conclusion that the claims against the Galloway Group fall beyond the reach of arbitration is unquestionably erroneous.

**B. THE ALLEGATIONS IN THE WYOMING COUNTY COMPLAINT FALL WITHIN THE ARBITRATION PROVISIONS.**

As previously noted, this Court has held that a circuit court is to determine whether the claims averred fall within the substantive scope of an arbitration agreement. *Ruckdeschel v.*

*Falcon Drilling Company, LLC*, 225 W.Va. 450, 693 S.E. 2d 815 (2010). However, it has also been held that, “[i]f it cannot be said ‘with positive assurance’ that a dispute is excluded from arbitration by a contract’s arbitration clause, the doubt should be resolved in favor of an interpretation that submits the dispute to arbitration.” *Local Union #637, Int’l Broth. of Elec. Workers v. David H. Elliott Company, Inc.*, 13 F. 3d 129, 132 (4<sup>th</sup> Cir. 1993), citing *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582-85 (1960). Further, the Fourth Circuit Court of Appeals and the U.S. Supreme Court have both found that a court may not deny a party’s request to arbitrate an issue “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *American Recovery Corporation v. Computerized Thermal Imaging*, 96 F. 3d 88 (4<sup>th</sup> Cir. 1996), quoting *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582-85 (1960).

The circuit court ignored these principles and apparently found all the claims in the Complaint to be outside of the arbitration provisions. (*App. 139-144*). The Court found that “[t]he arbitration clause at issue here pertained only to disputes arising under the agreement. The clause is further limited to factors related to determining apportionment of fees between partners in any given case.” (*App. 142*). The court then concluded that under Fredeking’s Complaint “there does not appear to be a dispute as to the percentage of fees which the Plaintiff is entitled to receive. Rather the gravamen of the above-styled matter is to compel enforcement of the underlying agreements.” (*App. 142*). The reasoning of the circuit court is specious. First, the arbitration provisions are not narrowly drafted. Instead, the language is clear that the dispute resolution provisions will apply to “a dispute of any type” arising under the agreements. (*App. 18, ¶10, 27, ¶13*). It encompasses any disputes under the agreements, including those raised by

Fredeking in the Complaint. Second, the circuit court concluded that the gravamen of the matter was to compel enforcement of the underlying agreements but somehow believed that compelling enforcement of the underlying agreements did not constitute a dispute under the agreements. (*App. 142*). Simply stated, one cannot seek to compel enforcement of obligations under an agreement unless there is a dispute as to the obligations which the agreement imposes. Finally, the Court also stated that claims for fraud based on overstating expenses and understating partnership income, misrepresenting Plaintiff's income to the IRS and a request for an accounting were also not to be arbitrated, but provided no elaboration as to why it felt those claims did not constitute disputes arising under the agreement. (*App. 143*).

“A dispute ‘arises under’ an agreement when it concerns an obligation arguably created by the [] agreement, so that the resolution of the claim hinges on the interpretation ultimately given to the contract clause which engendered the claim.” *Cumberland Typographical Union No. 244 v. Times & Alleganian Co.*, 943 F.2d 401, 405 (4<sup>th</sup> Cir. 1991); *Nolde Bros. v. Bakery & Confectionary Workers Union*, 430 U.S. 243, 249 (1977) (overruled in part on unrelated grounds). Recently, the United States District Court for the Southern District of West Virginia considered a motion to compel arbitration where the key issue was whether the written agreements purported to cover the dispute at issue. *Chandler v. Journey Educ. Mktg.*, Civil Action No. 2:10cv00839, 2010 U.S. Dist. LEXIS 128001 (S.D.W.Va. December 3, 2010). There were three (3) agreements at issue and the agreements required arbitration for: 1) any disputes or controversies arising under this agreement and 2) any controversy or claim arising out of or relating to this agreement. *Id.* Chandler claimed that Journey wrongfully withheld the balance of the purchase price owed to him pursuant to two (2) of the agreements and that he was owed compensation pursuant to a third agreement. *Id.* Suit was filed asserting claims for declaratory

relief, fraud, breach of contract, breach of fiduciary duties and conversion. *Id.* Because Chandler did not demonstrate any grounds for revocation of the parties' agreement to arbitrate their disputes, including the disputes in the suit, the District Court granted a motion to compel arbitration. *Id.*

The same court also recently held that an employee's claims for breach of fiduciary duty, accounting, negligent and intentional misrepresentation, promissory estoppel, conspiracy to commit fraud, fraud and intentional infliction of emotional distress were all subject to an arbitration provision. *Beachum v. Phillips*, Civil Action No. 2:09cv00378, 2009 U.S. Dist. LEXIS 94195 (S.D.W.Va. October 8, 2009). The arbitration provision in *Beachum* required arbitration "for any dispute between the parties arising out of or with respect to this agreement or any of its provisions or Employee's employment with the Company." *Id.* Phillips alleged that the arbitration clause did not apply because he had not made a claim for wrongful discharge. *Id.* He further argued that because the arbitration clause did not contain the phrase "or relating to," the District Court should read the arbitration clause narrowly. *Id.* The District Court rejected these arguments and determined that Phillips' employment was "fundamentally tied to" the issues he sought to litigate in state court, regardless of the fact that he did not bring a wrongful discharge claim. *Id.* It, therefore, found that the arbitration clause covered the disputes and further concluded that "as a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration..." *Id.*, quoting *Long v. Silver*, 248 F.3d 309, 316 (4<sup>th</sup> Cir. 2001) (internal quotation marks omitted).

Even more instructive is Judge Chambers' recent discussion in *Galloway & Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, Civil Action No. 3:10cv0830, 2010 U.S. Dist. LEXIS 108175 (S.D.W.Va. October 8, 2010). (*App. 146-152*). There, the District Court

considered an arbitration provision which stated that “[a]ll disputes of any kind under this agreement shall be submitted to arbitration under the standards established by the American Arbitration Association...” *Id.* (*App.* 146). The District Court’s analysis focused upon Counts I and II of the Wyoming County Complaint in which Fredeking claimed that Galloway & Associates breached the agreements by failing to make an adequate accounting of funds received and costs incurred in litigation and by refusing to pay Fredeking its share of the proceeds derived from matters related to that litigation. *Id.* (*App.* 1-4; 146-152). Further, Fredeking contended that Galloway & Associates had overstated its own expenses, and misrepresented both proceeds it received and payments it claimed to have made to Fredeking after completing work on cases. *Id.* (*App.* 2, ¶9; 4, ¶15; 147). The District Court determined the agreements at issue before it (the 1998, 2000 and 2001 agreements) partially constituted the basis of the Wyoming County action and “Fredeking’s action for recovery in Wyoming County depends on the validity of the agreements in the first instance.” *Id.* The court, therefore, granted the motion to compel arbitration. *Id.* (*App.* 151).

There can be no serious suggestion that the claims asserted against the Galloway Group in Counts III and IV of the Complaint aren’t “fundamentally tied to” the Galloway Group agreements. Fredeking claims that the Galloway Group has refused to pay him his share of proceeds derived from matters related to various pieces of litigation. (*App.* 4-5). As a part of that allegation, there is the contention that expenses have been overstated and that proceeds received from litigation have been misrepresented. (*App.* 4-5). All of these contentions and any rights Fredeking believes he possesses arise under the agreements and fall well within the arbitration provisions.<sup>4</sup>

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<sup>4</sup> It should be noted that claims are required to be arbitrated even if other claims within a complaint fall beyond the

**C. THE GALLOWAY GROUP SATISFIED ALL CONDITIONS OF THE DISPUTE RESOLUTION PROVISIONS BEFORE SEEKING ARBITRATION**

Perhaps sensing that its finding that Fredeking's claims fell beyond the arbitration provisions was tenuous, the circuit court further concluded that the Galloway Group had failed to satisfy a condition precedent to the invocation of arbitration. (*App. 142-143*). Specifically, the court found that the Galloway Group had failed to provide partnership information requested by Fredeking and that such failure demonstrated that the Galloway Group had not abided by the requirement that the parties engage in good faith efforts to resolve any dispute. (*App. 143*). This finding is both factually and legally unsustainable. (*App. 154-156*).

From a factual perspective, the record demonstrates that the Galloway Group met all conditions of the dispute resolution provisions. Information was supplied and there were communications which reflected a disagreement as to the scope of information to which Fredeking would be entitled. (*App. 106-108, 154-156*). When it became clear that the dispute could not be resolved informally, it was the Galloway Group that proposed retired Circuit Judge A. Andrew MacQueen to serve as an arbitrator as called for under the dispute resolution provisions. (*App. 106-108*). Rather than respond to the nomination of Judge MacQueen, Fredeking completely ignored the dispute resolution provisions and initiated the civil action in the circuit court. Thus, it is Fredeking who went outside the dispute resolution process to which he agreed, not the Galloway Group.

The circuit court's conclusion is equally flawed from a legal perspective. Whether the Galloway Group failed to comply with contractual procedures which would entitle it to arbitrate

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arbitration provision. See *Leonard v. Alcan Rolled Products – Ravenswood, LLC*, Civil Action No. 2:09cv00971, 2009 U.S. Dist. LEXIS 102655 (S.D.W.Va. November 3, 2009). Thus, even if this court were to find that not all of Fredeking's claims are subject to arbitration, those claims which fall under the agreements would still be subject to the arbitration requirement.

the claims under the agreements is a procedural issue. Such procedural issues are left to the arbitrator to decide. In fact, Judge Chambers addressed this very point in a footnote in his Memorandum Opinion and Order in *Galloway & Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, Civil Action No. 3:10cv0830, 2010 U.S. Dist. LEXIS 108175 (S.D.W.Va. October 8, 2010). (*App. 151*). It was noted that Fredeking had suggested during oral argument that there was some dispute as to whether Galloway & Associates had failed to comply with contractual procedures that would entitle it to arbitrate claims under the agreements. (*App. 151*). Importantly, Judge Chambers properly concluded that such procedural questions should be reserved for the arbitrator. (*App. 151*). As stated by the District Court:

Fredeking appeared to advance the contention at oral argument that there is some dispute as to whether Galloway has failed to comply with contractual procedures that would entitle it to arbitration of claims it has made under the agreements. However, other ‘procedural’ questions...grow[ing] out of the dispute and bear[ing] on its final disposition should be left to the arbitrator. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 557 (1964); *Howsam* 537 U.S. 79, 84-85 (2002) (noting that the “presumption is that the arbitrator should decide ‘allegations of waiver, delay, or a like defense to arbitrability.’”) (quoting *Moses H. Cone*, 460 U.S. at 24-25). (*App. 151*).

In this vein, the circuit court clearly intruded upon an area left to the arbitrator as this Court has made it abundantly clear that the trial court’s role is limited to determining whether a valid arbitration provision exists and whether the claims fall within the arbitration provision. See *Ruckdeschel v. Falcon Drilling Company, LLC*, 225 W.Va. 450, 693 S.E. 2d 815 (2010). Procedural questions are not within the scope of that inquiry. As a result, the circuit court’s decision to allow Fredeking to escape arbitration based upon an alleged failure by the Galloway Group to engage in good faith negotiations should be rejected as both factually and legally unsound.

**II. THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWERS IN FINDING VENUE IN WYOMING COUNTY EVEN THOUGH NONE OF THE PARTIES RESIDE IN WYOMING COUNTY AND THE PARTNERSHIP AGREEMENTS WERE NOT FORMED OR BREACHED AND DID NOT CREATE ANY OBLIGATION IN WYOMING COUNTY.**

Compounding the circuit court's error in failing to compel arbitration was the finding that venue properly rested in Wyoming County. But for the venue determination, the Court could not have addressed the arbitration issue. Yet, the venue analysis is fundamentally in error as nothing within the record supports a conclusion that the venue statute, W.Va. Code § 56-1-1, is in any manner satisfied.

In actions involving non-corporations, W.Va. Code § 56-1-1(a) limits venue to a county where any of the defendants reside or the cause of action arises. *See also Wetzel County Savings and Loan Co. v. Stern Brothers, Inc.*, 156 W.Va. 693, 195 S.E. 2d 732 (1973) (recognizing that legislative enactments limit venue in that one of the defendants must reside in the forum county or the cause of action must arise there in order for an action to be properly brought). In actions involving breach of contract, the cause of action arises within the county: (1) in which the contract was made, that is, where the duty came into existence; or (2) in which the breach or violation of duty occurred; or (3) in which the manifestation of the breach – substantial damage occurs. *Id*; *see also McGuire v. Fitzsimmons and Fitzsimmons & Parsons, LC*, 197 W.Va. 132, 475 S.E. 2d 132 (1996). Here, none of the prerequisites for establishing venue are found within the record.

In the first instance, the Galloway Group is not a resident of Wyoming County. (*App. 1-7*). Its principal place of business is Kanawha County and, significantly, the Complaint does not allege that the Galloway Group was a Wyoming County resident. (*App. 2, ¶2; 22, ¶2*). The individual defendant, L. Thomas Galloway d/b/a Galloway & Associates, though no longer a

proper party, is also not a resident of Wyoming County. (*App. 1, ¶1*). Not even Fredeking is a resident of Wyoming County which leads to the inescapable conclusion that the agreements were not entered into in Wyoming County and the record certainly doesn't reflect otherwise. (*App. 137*).

As to whether the cause of action arose in Wyoming County, the Complaint is devoid of any allegations that the agreements were made in Wyoming County, were breached in Wyoming County or there was any manifestation of a breach in Wyoming County. (*App. 1-7*). The agreements themselves, attached as exhibits to the Complaint, do not demonstrate any relationship whatsoever to Wyoming County. (*App. 8-28*). Nonetheless, the circuit court drew a nexus with Wyoming County by concluding incorrectly that the Galloway Group had represented the Fund at one point. (*App. 136-139*). The Galloway Group never represented the Fund and the record does not demonstrate that any cases were ever filed on behalf of the Fund or, for that matter, any fees received. Despite the paucity of the record, the court concluded that such representation would be the representation of persons who were residents of Wyoming County. (*App. 136-139*). The court then took judicial notice that "the undertaking led to relief for those persons and a concomitant debt for legal services owed unto the parties now before this court. Moreover, such relief and fees gave rise to a debt owed from these defendants to these plaintiffs and was related to and based, at least in part, on conduct occurring in Wyoming County." (*App. 138*). Nothing supports these conclusions.<sup>5</sup>

Also, the court's additional conclusion that "non-resident L. Thomas Galloway was

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<sup>5</sup> The circuit court's reasoning, aside from being inaccurate, doesn't support the venue determination. Factually, the document in the record which reflected any connection with the UMWA is a Galloway & Associates agreement dated December 31, 1997. (*App. 8, ¶3*) None of the Galloway Group agreements contain any reference to the UMWA. (*App. 16-28*) Even the circuit court later appreciated that the record "is less than clear on whether UMWA litigation had been completed when the Galloway Group was formed pursuant that one of the agreements underlying this action...." (*App. 139*)

indisputably a party to the agreements during that litigation involving Wyoming County residents” is unfounded. (*App.* 139). Pursuant to the October 8, 2010 Memorandum Opinion and Order of the United States District Court for the Southern District of West Virginia, the claims against Galloway & Associates were subject to arbitration and Fredeking’s own counsel acknowledged at the beginning of the December 1, 2010 hearing that the action was only proceeding against the Galloway Group and not against Mr. Galloway and Galloway & Associates. *Galloway and Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, 2010 U.S. Dist. LEXIS 108175, Civil Action No. 3:10cv0830 (S.D.W.Va. October 8, 2010). (*App.* 36, 146-152). Thus, the circuit court’s reliance upon any activity of Mr. Galloway was misplaced and improper.

More basic, however, is the fact the circuit court’s conclusion that the representation of the Fund is the equivalent of representing residents of Wyoming County and engaging in conduct in Wyoming County is legally unsupportable. In a related context, this Court granted a petition for writ of prohibition due to improper venue when it was found that a corporation’s use of law firms with offices in a county did not establish the required minimum contract required for a corporation. *Westmoreland Coal Co. v. Kaufman*, 184 W.Va. 195, 399 S.E. 2d 906 (1990), *citing Austead Co. v. Pennie & Edmonds*, 823 F. 2d 223 (8<sup>th</sup> Cir. 1987) (holding that an attorney client relationship did not confer jurisdiction over an out-of-state law firm); *Kowalski v. Doaherty, Wallace, Pillsbury and Murphy Attorneys at Law*, 787 F. 2d 7 (1<sup>st</sup> Cir. 1986) (holding that New Hampshire lacked jurisdiction over Massachusetts law firm representing a New Hampshire client on several matter in Massachusetts); *Mayes v. Leipziger*, 674 F. 2d 178 (2<sup>nd</sup> Cir. 1982) (holding that New York lacked jurisdiction over a California law firm representing a New York resident in litigation in California). As a result, this court issued a writ of prohibition

commanding the respondent to dismiss the civil action. *Westmoreland Coal Co. v. Kaufman*, 184 W.Va. 195, 399 S.E. 2d 906 (1990).

*Westmoreland Coal* is persuasive as it teaches that the mere representation of an entity that might be located in a particular county cannot serve as the basis for establishing venue when the representation itself did not occur within that forum. *Id.* Here, no litigation related to the Fund has been alleged or found to have been conducted in Wyoming County. Instead, the circuit court reasoned that venue would be proper simply because there are UMWA members in Wyoming County. (*App.* 138). If the representation of a fund which may have some beneficiaries residing in a county is sufficient to establish venue in a contract dispute arising under a law partnership, then every single representation would expose the partnership to actions in any county in the United States. For instance, according to the reasoning of the circuit court, if a beneficiary of the Fund moved to another state, venue would properly rest in the county where that Fund beneficiary resided. Such a result would be absurd and would violate basic tenants of venue law.

The final error committed by the circuit court with respect to venue was its use of the long-arm *in personam* jurisdiction statute to establish venue. (*App.* 138-139). Due to the fact that the only defendant properly before the circuit court is the Galloway Group, a West Virginia Partnership, there is no out-of-state individual upon whom the long-arm statute can be applied. (*App.* 1, ¶2; 22, ¶22; 36). Moreover, the use of the long-arm statute is inappropriate since its purpose is to assert jurisdiction over the non-resident. If a non-resident has contracted to perform services or is otherwise doing business in a county, jurisdiction may be appropriate but venue is not necessarily established. Moreover, even the circuit court's use of the long-arm statute failed to establish that Mr. Galloway was conducting any business in Wyoming County.

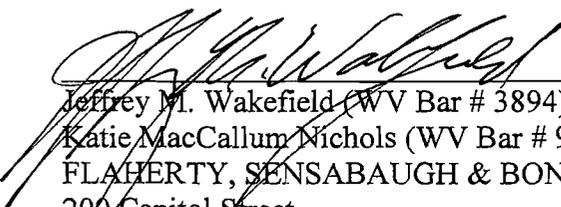
## CONCLUSION

For the reasons set forth above, the petitioner, the Galloway Group, prays:

- a. That the Petition for Writ of Prohibition be accepted for filing;
- b. That this Court issue a rule directing the Respondents to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;
- c. That the action pending in the Circuit Court of Wyoming County be stayed until resolution of the issues raised in the petition;
- d. That the Court award a Writ of Prohibition against the Respondents, directing that the circuit court dismiss the Complaint due to improper venue and/or compel arbitration; and
- e. Award such other and further relief as the Court deem proper.

**THE GALLOWAY GROUP,**

**By Counsel,**

  
\_\_\_\_\_  
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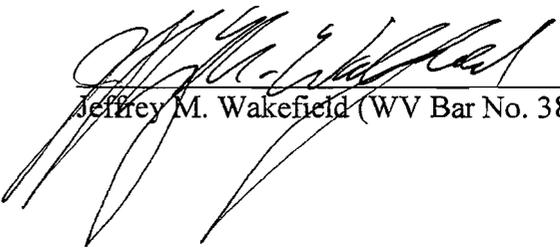
Telephone: (304) 345-0200

**CERTIFICATE OF SERVICE**

I, Jeffrey M. Wakefield, counsel for The Galloway Group, do hereby certify that the “**Petition for Writ of Prohibition**” and “**Appendix in Support of Petition for Writ of Prohibition**” were served upon the following respondents by depositing true copies thereof in the United States Mail, first class, postage prepaid, this 28<sup>th</sup> day of January, 2011:

John D. Wooton, Esquire  
The Wooton Law Firm  
PO Box 2600  
Beckley, WV 25802-2600  
*Counsel for Respondents, Fredeking & Fredeking  
Law Offices, LC and R.R. Fredeking*

The Honorable Warren R. McGraw, II  
Chief Judge, 27<sup>th</sup> Jud. Cir.  
Wyoming County Courthouse  
Main & Bank Streets  
P.O. Box 581  
Pineville, WV 24874  
*Respondent*

  
\_\_\_\_\_  
Jeffrey M. Wakefield (WV Bar No. 3894)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.  
THE GALLOWAY GROUP,  
a West Virginia Partnership

Petitioner,

v.

Upon Original Jurisdiction  
in Prohibition,  
No. \_\_\_\_\_

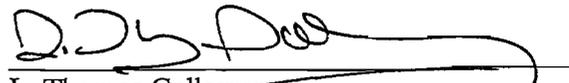
THE HONORABLE WARREN MCGRAW,  
Judge of the Circuit Court of Wyoming County,  
FREDEKING & FREDEKING LAW OFFICES, LC,  
and R.R. FREDEKING, II, INDIVIDUALLY,

Respondents.

VERIFICATION

STATE OF COLORADO  
COUNTY OF BOULDER, to-wit:

L. Thomas Galloway, being first duly sworn, deposes and says that he is a member of the Galloway Group, the Petitioner herein; that he is duly empowered to verify pleadings and other papers in actions and proceedings brought by or against the Galloway Group; that he has read the Petition for Writ of Prohibition and that he has personal knowledge of the facts alleged therein or, to the extent he does not have personal knowledge, he believes, based upon information made known to him, the same to be true.

  
L. Thomas Galloway

Taken, subscribed and sworn to before the undersigned Notary Public this 26th day of January, 2011.

ERIC FIALA  
Notary Public, District of Columbia  
My Comm. Expires May 14, 2014

My commission expires \_\_\_\_\_

(seal)

  
\_\_\_\_\_  
Notary Public