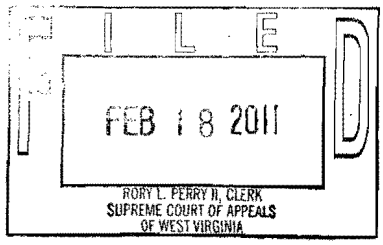
IN THE SUPREME COURT OFAPPEALS OF WEST VIRGINIA



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.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

THE WOOTON LAW FIRM

BY: _____
JOHN D. WOOTON (WV Bar #4138)
P.O. Box 2600
Beckley, WV 25802
Telephone: (304) 255-2188
John@Wootonlaw.com

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QUESTIONS PRESENTED

1. Did one or both defendants, including Petitioner, fail to preserve any claim that the Circuit Court exceeded its legitimate powers by denying The Galloway Group's motions to compel arbitration, to dismiss for improper venue and other related motions?

2. Did the Circuit Court properly deny The Galloway Group's motion to compel arbitration?

3. Did the Circuit Court act within its discretion by denying The Galloway Group's motion to dismiss for improper venue and related motions?

STATEMENT OF THE CASE

The following is offered pursuant to Rule 16(d) and (g) of the Revised West Virginia Rules of Appellate Procedure, for the purpose of correcting inaccuracies and omissions in the statement of the case offered by Petitioner, and offering additional facts relevant and necessary to the questions presented and the relief requested:

The respondent, Fredeking, filed in the Circuit Court of Wyoming County, on June 14, 2010, the Complaint attached as Appendix 1-7 of the Petitioner's Brief, which requested the Court enter an Order compelling the payment over unto Fredeking & Fredeking the One Million Six Thousand Six Hundred Forty-Three Dollars that Galloway represents it paid unto Fredeking, and to make an accounting of the funds received in the various agreements, as well as judgment against Galloway.

The respondent herein has for a period of over three years repeatedly requested information of the financial affairs of the partnership. West Virginia Code 47B-4-3 provides that each partner of the partnership shall furnish to the other partner....without

demand, any information concerning the partnership's business affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement for this chapter; and on demand, any other information concerning the partnership's business and affairs, except to the extent the demanded information is unreasonable or otherwise improper under the circumstances.

The simple issue in this case is the failure of the Galloway Group to provide unto Fredeking the financial information of the partnership, despite repeated requests. In fact, Galloway, in a letter of June 11, 2010, which was the catalyst of the filing of the Wyoming County Circuit Court case, acknowledges the repeated demand for partnership information and the One Million Dollars owed to Mr. Fredeking. The letter of June 11, 2010, clearly states that Galloway declines to pay the One Million Dollars to Mr. Fredeking because, and only because, Mr. Fredeking continuously denies the existence of the August, 2005 agreement.

The August, 2005 agreement is an alleged verbal agreement, the existence of which is disputed by Mr. Fredeking. The existence or non-existence of said 2005 agreement is a matter subject to factual determination and certainly not subject to any claim of arbitration.

On December 1, 2010, the United States District Court For The Southern District Of West Virginia, by Hon. Robert C. Chambers denied related Galloway entities' motions to enjoin related Fredeking entities, and any parties in privity with them, from pursuing claims in the Circuit Court action (at issue in this Petition); and, it further declined to find that R.R. Fredeking, II (hereinafter "Mr. Fredeking") is bound by that Court's October 8, 2010 Order, nor that Mr. Fredeking is in direct privity with the

Fredeking entities named in that action. *Galloway and Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, No. 10-0830, 2010 WL 4953573 (S.D.W.Va. December 1, 2010). (App[1] 159-161) That December 1, 2010 Order was entered on the same date that the parties hereto argued the underlying motions before the Hon. Warren R. McGraw, Judge, Circuit Court of Wyoming County, West Virginia. (App 33) No order was ever entered by any court staying any claim, nor dismissing any claim or party, from the Wyoming County Circuit Court action which is the subject of the Petition before this Court.

All of the Defendant's various motions in the Wyoming County Circuit Court at issue here, were made solely by The Galloway Group; and no motion was made by L.Thomas Galloway d/b/a Galloway & Associates (hereinafter "Mr. Galloway"). (App 82-108; 114-123) Additionally, Mr. Galloway has not filed a responsive pleading, nor joined in the Petition now before this Court. (App 157-158) All Galloway entities in all pending actions are represented by the same counsel, who are, presumably, aware that no pleading nor motion has ever been filed by Mr. Galloway in the underlying Circuit Court action, particularly in light of the Answer of the Galloway Group, filed in the Circuit Court on December 21, 2010. (App 157, line 42)

At the December 1, 2010 hearing on the various motions before the Circuit Court, Petitioner (hereinafter also "The Galloway Group"), by counsel, conceded or admitted the following:

1. The Galloway Group does not challenge the Circuit Court's jurisdiction.

[1] Pursuant to Rules 16 and 7 of the Revised West Virginia Rules of Appellate Procedure, an Appendix is submitted herewith and attached hereto, as a continuation of the Petitioner's Appendix; and its numbering begins where the Petitioner's Appendix ended, at page 159. All references herein to the Appendix pages 1 through 158 refer to the Appendix attached to the Petition. References to page 159 and higher refer to the Appendix attached hereto.

(App 55)

2. The Galloway Group and the agreements at issue in the Circuit Court action were not before of the U.S. District Court in the matter entitled *Galloway and Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, Civil Action No. 10-0830 (referred to throughout the record and herein). (App 51)

3. The Galloway Group and Mr. Galloway (hereinafter collectively "Galloway defendants") refused to produce partnership documents to Mr. Fredeking and Fredeking & Fredeking Law Offices, LC (hereinafter collectively "Fredeking Plaintiffs"), for more than three years prior to suit. (App 42-43; 47-48; 58-59; 60; 64-65; 78-79)

4. The Galloway Defendants placed $1M in attorneys fees owed to the Fredeking Plaintiffs in escrow, rather than pay it, because Mr. Fredeking disputed the terms of an alleged 2005 verbal agreement concerning the payment of the fees. (App 39, 50-51)

5. The Galloway Defendants continue to refuse to produce the partnership documents except to the extent required in arbitration of disputes related to the parties' written agreements. (App 60)

6. The litigation which generated the fees in question involved the pension fund of the United Mine Workers of America and Wyoming County residents. (App 54-55) [This admission is supported by Exhibit A to the Complaint (App 8-9) which states that the partner firms will "work with UMWA representatives in the representation of injured miners or their estates in wrongful death and serious injury actions" and also "UMWA Health & Retirement collection litigation..." That Exhibit is applied to the above-described cases as stated in the Exhibits B, fn 2 (App 12); and C, fn 1 (App 14)]

7. The Galloway Defendants reported to the Internal Revenue Service that they had paid the Fredeking Plaintiffs $1M, (App 39), but this money was actually placed in escrow as early as 2009. (App 66)

The following graphic representation of the captions of the various parties' three cases, pending in three different jurisdictions, shows that, although the parties overlap, they are not identical:

****
IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA
Civil Action No.: 10-C-99 (Filed June 14, 2010)
FREDEKING & FREDEKING LAW OFFICES, LC;
and R.R. FREDEKING, II, Individually
v.
L. THOMAS GALLOWAY, d/b/a GALLOWAY & ASSOCIATES, and
THE GALLOWAY GROUP, a West Virginia Partnership,
****
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Civil Action No.: 310 cv 0830 (Filed June 16, 2010)
GALLOWAY AND ASSOCIATES, PLLC, and
GALLOWAY AND ASSOCIATES,
v.
FREDEKING & FREDEKING LAW OFFICES, LC,
and FREDEKING & FREDEKING.
****
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 10-C-1073 (Filed June 16, 2010)
THE GALLOWAY GROUP
L. THOMAS GALLOWAY,
v.
FREDEKING & FREDEKING LAW OFFICES, LC
and R.R. FREDEKING, II
****

8. It is also important for this Court to note that under the letter agreements, there were several cases previously filed in the Circuit Court of Wyoming County, being styled as follows:

West Virginia Bureau of Employment Programs, Workers' Compensation Division, an agency of the State of West Virginia,
v. Civil Action No: 98-C-74
Jude Energy, Inc., a corporation, Michael J. Webb, an individual, and DOES-100, inclusive;

West Virginia Bureau of Employment Programs, Workers' Compensation Division, an agency of the State of West Virginia,
v. Civil Action No: 98-C-75
Herndon Processing Company, a corporation, K & J Energy, Inc., a corporation, Bruce R. Davis, an individual, Arville Cline, an individual, and Colin Cline, an individual;

West Virginia Bureau of Employment Programs, Workers' Compensation Division, an agency of the State of West Virginia,
v. Civil Action No: 98-C-76
Illusion Coal Company, Inc., a corporation, Avondale Coal Sales, Inc., a corporation, Lumbar, Inc., a corporation, White Horse Mining, Inc., a corporation, Dennis Pruitt, an individual, Frank J. Cline an individual, and Raymond Jeffrey Cline, an individual.

SUMMARY OF ARGUMENT

The Petition presents two questions: whether the Circuit Court exceeded its legitimate powers, first, by failing to compel arbitration, and second, by failing to dismiss for improper jurisdiction. (Pet 1) The Petition fails, entirely, because Petitioner failed to demonstrate error, and error will not be presumed by this Court. *Mountain Communities For Responsible Energy v. Public Service Com'n of West Virginia*, 222 W.Va. 481, 484, 665 S.E.2d 315, 318 (2008) (Emphasis added).

As to the first question, the Petition fails to show any error, let alone that the Circuit Court exceeded its legitimate powers under the "clearly erroneous" standard, when it denied the motion to compel arbitration. The Galloway Group's (and the absent defendant, Mr. Galloway's) many admissions, waivers and concessions, together with the Complaint and its attachments, fully support the Circuit Court's analysis of "whether the claims averred fall within the substantive scope of that arbitration agreement" under, *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W.Va. 450, 456, 693 S.E.2d 815, 821

(2010) (Emphasis added). And, following this precedent, the Court properly determined that the Defendants' refusals to provide partnership documents, over the course of years, violated the "good faith" duty, which is a condition precedent to compulsory arbitration, under the parties' explicit agreements. Where a condition precedent to arbitration is not fulfilled, a party to a contract does not have a right to arbitration. See *Kansas Gas Elec. Co. v. Westinghouse Elec. Corp.,* 861 F.2d 420, 422-23 (4th Cir.1988).

Further, nothing in the record, nor in the argument before the Court, suggests that the Fredeking Plaintiffs' statutory rights to partnership documents, under the West Virginia Uniform Partnership Act, W.Va. Code §47B-1-3 and §47B-4-3, are subject to any arbitration agreement. Thus, Petitioner showed no right to withhold them, except as may be required in arbitration. Fredeking has made numerous demands for partnership records, but all have been denied. There is no arbitration for the enforcement of this statutory right, thus the right of Galloway to arbitration fails. Moreover, there also exists the issue as to whether the 2005 agreement exists between Galloway and Fredeking. That is, the alleged verbal agreement referenced in the letter dated June 11, 2010 (App 106-108), from attorney Wakefield to undersigned counsel. That verbal agreement, the existence of which is disputed by Fredeking, obviously has no arbitration agreement. Thus, that is also not subject to arbitration.

The short and simple issue of this case is that Fredeking seeks the financial records under the West Virginia Partnership Act, to which he is entitled, so as to determine if in fact a dispute exists as to the division of fees. Fredeking also seeks monies which, without dispute, are due him, and have been paid into an escrow account, managed solely by Galloway, but which amounts have been reported to the IRS as

income to Fredeking, thus causing Fredeking to pay taxes on said amount. Neither of these (request for financial information under West Virginia Code 47-B-4-3 and the alleged 2005 agreement) are subject to arbitration, and properly before the Circuit Court of Wyoming County.

As to the second question, this Court will not issue a writ of prohibition as to venue unless the Circuit Court abused its discretion in denying the motion to dismiss for improper venue. *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). No such abuse of discretion is shown by Petitioner as to this issue, in light of its failure to *preserve* the issue in the trial court, by conceding and failing to rebut significant facts, at argument before the Circuit Court. See, *State v. Grimmer*, 162 W.Va. 588, 595, 251 S.E.2d 780, 785 (1979). These significant facts fully support the Circuit Court's findings, conclusions and denial of the motion.

Additionally, the parties themselves have voluntarily chosen Wyoming County on previous cases in which to litigate (West Virginia Bureau of Employment Programs, Workers' Compensation Division, an agency of the State of West Virginia,v. Jude Energy, Inc., a corporation, Michael J. Webb, an individual, and DOES-100, inclusive, Civil Action No: 98-C-74; West Virginia Bureau of Employment Programs, Workers' Compensation Division, an agency of the State of West Virginia, v. Herndon Processing Company, a corporation, K & J Energy, Inc., a corporation, Bruce R. Davis, an individual, Arville Cline, an individual, and Colin Cline, an individual, Civil Action No: 98-C-75; and West Virginia Bureau of Employment Programs, Workers' Compensation Division, an agency of the State of West Virginia,v. Illusion Coal Company, Inc., a corporation, Avondale Coal Sales, Inc., a corporation, Lumbar, Inc., a corporation, White

Horse Mining, Inc., a corporation, Dennis Pruitt, an individual, Frank J. Cline an individual, and Raymond Jeffrey Cline, an individual, Civil Action No: 98-C-76); and cannot now challenge venue.

Lastly, the Petition itself is defective and should be dismissed. The Petition (and, indeed, the statements of counsel at the hearing) includes false and misleading statements as to the first decision in the companion case now pending in the Southern District of West Virginia; and it deliberately omits the second decision in that same case, from its Petition and from its Appendix. Its Verification is, on its face, defective as well; and, as a result of these combined defects, the Petition should be dismissed in its entirety.

ARGUMENT

1. STANDARDS OF REVIEW

The Galloway Group conceded the jurisdiction of the Circuit Court (App 55); and, as a result, this Court's standard of review of the Petition is as follows:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) **whether the lower tribunal's order is clearly erroneous as a matter of law;** (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, **it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.**

State ex rel. Corp. of Charles Town v. Sanders, 224 W.Va. 630, 632-633, 687 S.E.2d 568, 570-571 (2009) (Emphasis added). "**A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court**. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syllabus Point 2, *State ex rel Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977) (Emphasis added). Thus, the standard of review is stricter than that on a direct appeal.

The Petition presents two questions: whether the Circuit Court exceeded its legitimate powers, first, by failing to compel arbitration, and second, by failing to dismiss for improper jurisdiction. (Pet 1) As to a failure to compel arbitration, this Court recently held:

> [T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.
>
> ...
>
> Combining the appropriate standards for reviewing a circuit court's legal determinations regarding arbitration agreements and those governing the issuance of a writ of prohibition, we now hold that this Court will preclude enforcement of a circuit court's order compelling arbitration only after a de novo review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.

McGraw v. American Tobacco Co., 224 W.Va. 211, 221-222, 681 S.E.2d 96, 106-107 (2009).

As to improper venue, "[t]his Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005).

But no standard of review applies to errors waived in the trial court. See, *WV Dept. of Health & Human Resources Employees Federal Credit Union v. Tennant,* 215 W.Va. 387, 393, 599 S.E.2d 810, 816 (2004).

2. THE CIRCUIT COURT CORRECTLY DENIED THE GALLOWAY GROUP'S MOTION TO DISMISS DUE TO IMPROPER VENUE.

This Court will not issue a writ of prohibition as to this issue unless the Circuit Court abused its discretion in denying the motion to dismiss for improper venue. See, *Blosser*, 218 W.Va. at 383, 624 S.E.2d at 820, (2005). No such abuse of discretion is shown by Petitioner as to this issue, in light of its failure to *preserve* the issue in the trial court. See, *State v. Grimmer*, 162 W.Va. 588, 595, 251 S.E.2d 780, 785 (1979) ("When there is an opportunity to speak, silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial"). This "raise or waive rule" "prevent[s] a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error." *Wimer v. Hinkle*, 180 W.Va. 660, 663, 379 S.E.2d 383, 386 (1989). It also "prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result)." *State v. LaRock*, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996) (Cited with approval in *WV Dept. of Health & Human Resources Employees Federal Credit Union v. Tennant,* 215 W.Va. 387, 393, 599 S.E.2d 810, 816 (2004)).

Here, both Galloway Defendants waived any claim related to improper venue, as follows:

A. MR. GALLOWAY WAIVED ANY ERRORS

First, Mr. Galloway waived any rights to challenge the Circuit Court's Order, by failing to join in the relevant motions, which were made solely by the Galloway Group. (App. 82-108; 114-123) Mr. Galloway did not join in the motion to dismiss for improper venue, nor the motion to compel arbitration, nor the related motion to dismiss for breach of tolling agreement and motion to dismiss Counts I and II of the Complaint and to dismiss L. Thomas Galloway d/b/a Galloway and Associates. He also waived any right to petition this Court for a writ of prohibition as a result of any alleged error regarding venue, because he is not a Petitioner herein. The Petition is explicitly brought only by The Galloway Group. (Pet 1: 26)

B. PETITIONER WAIVED ERRORS AND CONCEDED VENUE

Next, The Galloway Group waived any error in the Circuit Court's denial of the "Defendant's Motion to Dismiss for Breach of Tolling Agreement" and "Defendant's Motion to Dismiss Counts I and II of Plaintiff's Complaint and Dismiss L. Thomas Galloway d/b/a Galloway and Associates" because it failed to address those motions in argument to the Circuit Court and in its Petition to this Court. To the extent those motions had any bearing on venue (or the motion to compel arbitration, discussed below), they are waived.

The same is true for "Plaintiffs motion to Deposit monies into court". At argument of the motions, The Galloway Group failed to provide the Circuit Court with authority for its opposition to the motion and it failed to address the motion in the Petition before this Court; and, thus, it waived any error as to the ruling on it.

As to specific facts supporting a finding of proper venue in Wyoming County, The Galloway Group admitted, conceded or failed to rebut numerous statements of fact clearly establishing proper venue in Wyoming County, and it waived legal arguments, as follows:

It conceded the jurisdiction of the Circuit Court (App 55) which fully supports the Circuit Court's finding to that effect. (App 136) It is also noteworthy that this entity has done business in the Circuit Court of Wyoming County by filing at least 3 prior suits, being Civil Action No(s) 98-C-74, 98-C-75, and 98-C-76, and thus the attorney fees derived therefrom were subject to and split in accordance with the agreement then in existence. The fact that the Circuit Court of Wyoming County has had jurisdiction and venue then, precludes the petitioner herein from seeking dismissal on venue. For this reason, the Petition's challenge to the use of the long arm statute as to Mr. Galloway is explicitly waived.

Next, the Galloway Group has no standing to Petition this Court for a writ of prohibition as a result of any ruling regarding Mr. Galloway, nor, of standing in the Circuit Court, to make any motion, nor raise any objection, as to in personam jurisdiction over Mr. Galloway, nor as to venue as to Mr. Galloway, nor whether he should be dismissed from this action on any grounds. Mr. Galloway himself made no such motion and does not join in the Petition. This Court established the elements for standing:

> First, the party must have suffered an "injury-in-fact"-an invasion of a legally protected interest. Second, there must be a causal connection between the injury and the conduct forming the basis of action. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Guido v. Guido, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998).

Because the Galloway Group has not demonstrated its standing to petition this Court regarding Mr. Galloway's involvement in this action, its objection to the Circuit Court's ruling as to jurisdiction and venue with regard to Mr. Galloway, are waived.

Next, the Petition challenges venue in Wyoming County by claiming that "The record is unequivocal that the Galloway Group's principal place of business is Kanawha County, West Virginia." (Pet 10) But, at the hearing, the Fredeking Defendants' counsel represented to the Court that the listed Kanawha County place of business for The Galloway Group is false; and counsel for the Galloway Group did not refute this:

> MR. WOOTON: ...It [The Galloway Group] did business throughout the entire state of West Virginia. The partnership address they list for Kanawha County, it is a beauty salon. Now sir, I actually served them there three times and finally they said, "Hey, this is a beauty salon; it's always been one." And so I think this Court does have venue and does have jurisdiction. And with regard to this arbitration issue, Judge Chambers specifically said that he does not have authority over this Court to order arbitration...

(App 48)

The Galloway Group thus failed to establish the location of its place of business.

Next, it actually **led** the Circuit Court to find that "[a]mong the litigation specifically enumerated in the agreements was certain litigation involving UMWA pensions, which counsel for defendants conceded involved the representation of persons residing in Wyoming County." (App 136, 138) It **led** the Circuit Court to conclude that these agreements regarded legal representation of Wyoming County Residents; and to take judicial notice that the undertaking led to relief for those persons and a debt for legal services owed to the parties herein, based, at least in part, on conduct in Wyoming County. (App 138) The Galloway Group **led** the Circuit Court to these findings and conclusion, as follows:

THE COURT: Somewhere in all of this pile of papers that have been filed, it may be in some of the exhibits, I read that some of this litigation involves the pension fund of the United Mind Workers of America.

MR. WAKEFIELD: *Yeah. Over the course of the years now –*

THE COURT: I don't know, it may be your exhibits; it may have been the Plaintiffs' exhibits. At any rate, there has been raised before this Court an issue involving money which presumably was paid in this case as a result of people in this county being a part of a group that benefitted from that litigation or that case. Am I incorrect in that?

...

THE COURT: Without debating the issue, it's clear to me and it may not be so within the rules or the statutes but it's clear to me that judicial notice of the fact that that there are literally thousands of people in this county who have contributed to this fund that are within the jurisdiction of this court.

...

MR. WAKEFIELD: *...The citizens of this county, whether they're members of the United Mine Workers or any other association or union, are not affected by this litigation at all...*

...

THE COURT: But funds presumably were collected from those people or on their behalf who paid you guys, you lawyers, and apparently some of the lawyers got their money and some didn't.

MR. WAKEFIELD: *Well we believe that everybody who was entitled to money got their money... The cause of action has nothing to do with any individual or entities or associations or organizations that may have been represented.*

(App 54-57)

Thus, The Galloway Group conceded its representation of UMWA members, and failed to object, at the hearing, to the Court's pronouncement of judicial notice as to the involvement of Wyoming County residents. The Court's findings and conclusion are thus clearly supported by the statements of defense counsel and, in the alternative, because counsel failed to object to judicial notice, any error is waived, according to

Wimer, LaRock, Tennant and *Grimmer, supra.*

The Court's further finding that "each successive agreement appears to subsume and reaffirm provisions contained in preceding agreements." (App 136) is further supported by Exhibit A to the Complaint (App 8-9) which states that the partner firms will "work with UMWA representatives in the representation of injured miners or their estates in wrongful death and serious injury actions" and also "UMWA Health & Retirement collection litigation..." That Exhibit is applied to the above-described cases as stated in the Exhibits B, fn 2 (App 12); and C, fn 1 (App 14) as well. And Petitioner did not rebut these aspects of the agreements, when given the opportunity, as shown in the above exchange. "[S]ilence may operate as a waiver of objections to error." *State v. Grimmer*, 162 W.Va. 588, 595, 251 S.E.2d 780, 785 (1979).

Defense counsel allowed that the litigation "involved the pension fund of the United Mine Workers " saying: *Yeah. Over the course of the years now.* (App 54) This conceded that "there has been raised before this Court an issue involving money which presumably was paid in this case as a result of people in this county being a part of a group that benefitted from that litigation or that case." (App 54)

The Petition challenges (Pet 8, 10) the Court's conclusion that Mr. Galloway was undisputably a party to the agreements during the litigation involving Wyoming County residents; and its conclusion that, under our long-arm statute, the Defendants have sufficient contacts to confer jurisdiction and venue. (App 139) But this challenge is meritless in light of Mr. Galloway's signatures on the Agreements attached as Exhibits to the Complaint (App 8-28), and in light of defense counsel's explicit waiver of jurisdiction challenges. (App 55)

The Petition does not challenge the Circuit Court's determination that W. Va. Code §56-1-1 is non-exclusive means of establishing venue, waiving any claim to error on that issue. It led the Court to find and conclude that debt (originating from litigation involving Wyoming County Residents), in the form of attorneys' fees (some portion of which is held in escrow by Defendants), is claimed to be owed to the parties (including the non-resident defendant, Mr. Galloway). The Circuit Court's Order as to venue is well supported by the decisions of this Court on this issue. The Court clearly "review[ed] the entire sequence of events underlying the claim" pursuant to *Savarese v. Allstate Ins. Co*, 223 W.Va. 119, 126-7 (2008). It carefully considered whether the causes of action are "divisible" and where some "portion of the conduct relating to the cause of action arose", pursuant to *McGuire v. Fitzsimmons*, 197 W.Va. 132, 136, 475 S.E.2d 132 (1996). Thus, no abuse of discretion occurred as to the finding that venue is proper under W. Va. Code §56-1-1.

The Circuit Court did not exceed its powers in denying the motion to dismiss for improper venue; and, as a result, the Petition as to this issue should be dismissed.

3. THE CIRCUIT COURT PROPERLY DENIED THE MOTION TO COMPEL ARBITRATION

The Circuit Court (App 141) properly quoted and applied this Court's standard of review of motions to compel arbitration:

> A contract providing a procedure for arbitration of disputes, and providing that: (1) all claims, disputes or other matters in question arising out of, or relating to the contract shall be decided by arbitration, **unless the parties mutually agree otherwise;** (2) the arbitration agreement shall be specifically enforceable under the prevailing arbitration law; (3) the arbitration award shall be final; and (4) the judgment may be entered upon the award in accordance with applicable law in any court having

> jurisdiction thereof-, creates a condition precedent to any right of action arising under the contract.

Ruckdeschel v. Falcon Drilling Co., L.L.C., 225 W.Va. 450, 456, 693 S.E.2d 815, 821 (2010) (Emphasis added). This Court extended its recent holding in *State ex rel. TD Ameritrade, Inc., v. Kaufman,* 225 W.Va. 250, 692 S.E.2d 293 (2010), to apply to all actions involving arbitration agreements: "[W]hen a circuit court is presented with the issue of whether an arbitration agreement is applicable, the court must determine the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) **whether the claims averred fall within the substantive scope of that arbitration agreement.**" *Ruckdeschel.*, 225 W.Va. at 457, 693 S.E.2d at 822 (Emphasis added).

In determining whether the claims averred are within the substantive scope of the arbitration agreements, the Circuit Court found that "at least one condition precedent to compulsory arbitration was violated by the defendants." (Order 8-9) It noted that the arbitration clauses in question required the parties to "work in good faith to reach a reasonable and fair disposition" of any dispute (Order 6); and that the Federal Arbitration Act, at 9 U.S.C. §§ 3, 4, recognizes that a party in default may not seek to compel arbitration (Order 9). The Circuit Court found that it is undisputed that Mr. Fredeking has been denied partnership records for a number of years, and concluded that he is absolutely entitled to those records by the West Virginia Uniform Partnership Act, W. Va. Code §47B-1-3 and §47B-4-3. (Order 9) It further concluded that these denials "conclusively demonstrate that the defendants did not abide by the good faith requirement, which is a condition precedent to arbitration here." (Order 9)

The Circuit Court's analysis, findings and conclusion are fully supported by the admissions of defense counsel that the partnership records were being withheld and would be made available only to the extent required by the discovery process at arbitration (App 42-43; 47-48; 58-59; 60; 64-65; 78-79). At the hearing, defense counsel, Mr. Wakefield, attempted to circumvent the issue of refusals to produce partnership documents, by repeatedly, and patently falsely, representing to the Court that Counts I and II of the Circuit Court Complaint were already ordered into arbitration by U.S. District Court Judge Chambers, and that Mr. Fredeking was subject to that order:

> MR. WAKEFIELD: *[T]here has already been a judicial determination by Judge Chambers in the Southern District of West Virginia that those claims in Counts I and II of the complaint must be subject to arbitration and an order compelling arbitration has in fact been entered on October 8th, 2010.*

(App 41, lines 6-10)

> MR. WAKEFIELD: *Judge Chambers has already granted the motion to compel arbitration as to those claims, so Counts I and II are gone.*

(App 45, lines 20-22)

> MR. WAKEFIELD: *[T]wo Counts of this complaint have already been mooted by Judge Chambers' order compelling arbitration.*

(App 61, lines 17-19)

> MR. WAKEFIELD: *Judge Chambers did not allow Mr. Fredeking to ignore the arbitration provision in the agreements that are parts of Counts I and II of the complaint and neither should this Court allow Mr. Fredeking to ignore the arbitration provision in the agreements in Counts III and IV.*

(App 64, lines 11-16)

> MR. WAKEFIELD: *This was Mr. Fredeking's agreement. He agreed to do this. He doesn't want to do what he agreed to do. Judge Chambers said, "No, you must do what you agreed to do."*

(App 70, lines 14-16)

Counsel for the Fredeking Plaintiffs corrected these mis-statements:

> MR. WOOTON: The Court noted very clearly that Judge Chambers did not rule arbitration and has no jurisdiction over a West Virginia partnership and we spoke to him, Mr. Wakefield and I, yesterday and he declined again to intervene in this and hear it and it is obvious that that we can go forward. If we have the discovery [partnership records], Judge, that may well resolve these issues and that's all we've been trying to do and we've been trying to get that for over three years."

(App 43, lines 7-14) And, in fact, the December 1, 2010 Order resulting from the discussion with Judge Chambers, alluded to by Mr. Wooton, includes the following:

> Plaintiffs contend that Defendants are simply ignoring the Court's Order by using [Mr.] Fredeking-who is, admittedly, not a party to the instant proceedings-to prosecute their action in Wyoming County under the 1998, 2000 and 2001 agreements. **Plaintiffs argue that [Mr.] Fredeking** is in direct privity with Defendants, and **is therefore bound by the Court's Order.** Plaintiffs further allege that Defendants mask their attempt to violate the Court's Order by proceeding against the Galloway Group, rather than Plaintiffs, as the named party. **The Court finds this position untenable in light of its prior holding.**
>
> Even if Plaintiffs are correct that [Mr.] Fredeking is bound by the October 8, 2010 Order by virtue of privity or equitable estoppel, **this Court may still not exceed its subject matter jurisdiction.**

Galloway and Associates, PLLC v. Fredeking & Fredeking Law Offices, LC, No. 10-0830, 2010 WL 4953573 at *2 (S.D.W.Va. December 1, 2010) (Emphasis added). (App 159-161)

Nevertheless, Mr. Wooton was again forced to correct Mr. Wakefield's mis-statements, as a part of the last exchange on the subject:

> MR. WAKEFIELD: *[There were] five agreements, Your Honor, three of which there has already been a determination made, the claims under which have to be subjected to arbitration.*

(App 74, lines 6-8)

MR. WOOTON: That's not true. That's not true, Your Honor...

(App 74) And, in fact, Petitioner continues to make these mis-statements in its Petition: "Several claims set forth in the Complaint have already been ordered to arbitration by the U.S. District Court for the Southern District of West Virginia." (Pet 1) This statement is on its face, objectively false, because (1) Mr. Fredeking, a plaintiff herein raising those claims, was never subject to the jurisdiction of the District Court; (2) Nor was the Galloway Group a party in that Court; and, (3) As shown above, the District Court's December 1, 2010 Order denied the Galloway entities' motions to make any order with regard to claims pending in this Court, or regarding Mr. Fredeking or the Galloway Group. (App 159-161)

At the hearing before the Circuit Court, Mr. Wakefield did not deny that the partnership records were requested, repeatedly, for three years; nor did he claim that the Fredeking Plaintiffs are not entitled to them, by the West Virginia Uniform Partnership Act; nor did he deny that the records were withheld, except as their disclosure might be required in arbitration. Instead, he admitted as much in the following exchanges:

> MR. WAKEFIELD: *...We're more than willing to engage in discovery in the arbitration process. What Mr. Fredeking –*
>
> THE COURT: Why are you unwilling to do that outside of the arbitration process?
>
> MR. WAKEFIELD: *Because they have filed a civil lawsuit where they are trying to abuse the civil process in order to get the information and we maintain that clearly under the agreement we are suppose to subject this to arbitration.*

(App 43, line 17 through 44, line 1)

> MR. WOOTON: ...It's incorrect to say that we filed suit that's why he didn't give us the financial information. Judge, for over three years

> we've asked not only this firm but the predecessor firm in D.C. for various financial information and for whatever reasons they refused to give them...

(App 47, line 22 through 48, line 3)

> MR. WOOTON: He's put this money somewhere; I'm entitled to know where it is, in whose account, and that's basically all I want to do is just see what the financial records are.

(App 59, lines 11-13)

> MR. WAKEFIELD: *They can prepare their case by asking for the information in the context of arbitration.*

(App 60, lines 23-24)

> MR. WAKEFIELD: *And he can find out, Your Honor, in arbitration.*

(App 79, lines 13-14) Nothing in the record, nor in the argument before the Court, suggests that the Fredeking Plaintiffs' statutory rights to partnership documents, under the West Virginia Uniform Partnership Act, W.Va. Code §47B-1-3 and §47B-4-3, are subject to any arbitration agreement.

The Court's decision to deny the motion to compel arbitration is further supported by the June 11, 2010 letter of defense counsel, attached as Exhibit 1 to the Memorandum of Law in support that motion. (App 106-108) This letter demonstrates that defendants failed and refused to provide the requested partnership documents, prior to the filing of the first of the three suits pending among the parties, (the Circuit Court action herein, filed on June 14, 2010) (App 157), unless and until Mr. Fredeking agreed to participate in arbitration: "My client continues to be willing to provide information on fees received and expenses incurred, but only if Mr. Fredeking honors the express provisions of the agreements." (App 108) All of this demonstrates the Galloway Defendants' bad faith. That same letter of June 11, 2010 also demonstrates a dispute as to the 2005 agreement.

Galloway asserts that an agreement exists, and Fredeking denies it. This, at most, was a verbal agreement, and that clearly contains no arbitration clause as to the existence, validity, and terms of any alleged 2005 agreement. Moreover, Galloway refuses to pay the One Million Dollars to Fredeking because, and only because, Mr. Fredeking continues to deny the existence of the 2005 agreement.

Where a condition precedent to arbitration is not fulfilled, a party to a contract does not have a right to arbitration. See *Kansas Gas Elec. Co. v. Westinghouse Elec. Corp.,* 861 F.2d 420, 422-23 (4th Cir.1988) (Holding that an unfulfilled condition precedent renders arbitration inappropriate). Where the plain language of an article demonstrates that the purpose of the article is to limit arbitration, then such clauses will be enforced. *Clinchfield Coal Co. v. Dist. 28, United Mine Workers of Am.,* CA-97-41-A, 1998 WL 808188, at *1 (4th Cir. Nov.23, 1998) (unpublished decision) ("[A]ny arbitration decision must draw its essence from the parties' agreement and may not contradict the agreement's plain language.") (citing *United Steel Workers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). Cited with approval by *Perdue Farms, Inc. v. Design Build Contracting Corp.* 263 Fed.Appx. 380, 383 (4th Cir. 2008) (unpublished decision).

Defendants' admitted failures to abide by the West Virginia Uniform Partnership Act, W.Va. Code §47B-1-3 and §47B-4-3, and resulting failures to fulfill the "good faith" condition precedent to arbitration, are not mere *procedural matters* to be resolved by the arbitrator, as Petitioner claims, because they are questions of contract interpretation.

> Whether the arbitration agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide

> otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (citing *United Steelworkers of America v. Warrior and Gulf Nav. Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 1353 (1960)).

West Virginia and other federal Courts have expanded the analysis of *AT & T Technologies, supra,* distinguishing substantive from procedural questions of arbitrability.

> Although the question of arbitrability involves contract interpretation-a province usually reserved for the courts-the parties may by contract assign the duty to make the arbitrability determination directly to the arbitrator. See *Carson*, 175 F.3d at 329 ("parties can agree to let an arbitrator determine the scope of his own jurisdiction."). However, absent clear and unmistakable language to the contrary the court, not the arbitrator, is the gatekeeper of the substantive question of arbitrability. See *Cumberland Typographical,* 943 F.2d at 404; see also *AT & T Technologies,* 475 U.S. at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

United Food and Commercial Workers Union Local 400 v. West Virginia-American Water Co., (Not Reported in F.Supp.2d), 2006 WL 2822262 at *13 (S.D.W.Va.,2006). And, "[o]nce the court defines the matters that the agreement between the parties commits to arbitration, then the procedural questions surrounding the matters may be resolved by the arbitrator along with the merits." *Local Union No. 637, Intern. Broth. of Elec. Workers, AFL-CIO v. Davis H. Elliot Co.,* 13 F.3d 129, 132 (4th Cir. 1993).

The Circuit Court's Order followed the analysis prescribed by this Court in *Ruckdeschel*, as well as by the 4th Circuit Court of Appeals and United States Supreme Court, as shown above, as regards the failure of a condition precedent to arbitration. Its

denial of the motion to compel arbitration is amply supported by the factual admissions of the Galloway Group's refusal to produce partnership records, discussed throughout this Response. Even the document attached to the Galloway Group's memorandum of law in support of its motions demonstrates its bad faith through refusing partnership records prior to the filing of this suit (App 106-108): This Exhibit 1 is the June 11, 2010 letter of defense counsel refusing what are, from context, Fredeking Plaintiffs' repeated requests for relevant partnership financial records related to attorneys' fees generated.

The Fredeking Plaintiffs Complaint claims fraud (App 1-7), which are, in turn, supported by the documents attached to the Complaint (App 29-32): Exhibits G & H are K-1's issued by the Galloway Group to "Fredeking & Fredeking Law Offices" in 2008 and 2009. Both parties noted the fraud claims at the hearing before the Circuit Court (App 42; 50); and the Circuit Court correctly noted that "claims for fraud are not required to be arbitrated" (App 143)

> The FAA, initially enacted by Congress in 1925, promotes the enforcement of arbitration agreements involving interstate commerce, including employment-related arbitration agreements, FN4 but only when such agreements constitute valid contracts under state law.FN5
>
> ...
>
> FN5. As the U.S. Supreme Court explained in *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), "generally applicable contract defenses, such as **fraud**, duress, or unconscionability, **may be applied to invalidate arbitration agreements** without contravening [the FAA]." Id. at 687, 116 S.Ct. 1652.

State ex rel. Saylor v. Wilkes, 216 W.Va. 766, 772, 613 S.E.2d 914, 920 (2005) (Emphasis added).

Thus, The Galloway Group has not borne its burden to show that the Circuit Court exceeded its authority in denying the motion to compel arbitration, under the

"clearly erroneous" standard enunciated in *Sanders,* 224 W.Va. at 632-633, 687 S.E.2d at 570-571 (2009). In fact, it has not demonstrated any reversible error under the lesser standard of review on direct appeals.

> An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. **Error will not be presumed, all presumptions being in favor of the correctness of the judgment.'** Syllabus Point 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966)." Syllabus Point 2, *WV Dept. of Health & Human Resources Employees Federal Credit Union v. Tennant,* 215 W.Va. 387, 599 S.E.2d 810 (2004).

Mountain Communities For Responsible Energy v. Public Service Com'n of West Virginia, 222 W.Va. 481, 484, 665 S.E.2d 315, 318 (2008) (Emphasis added).

The Circuit Court did not exceed its powers in denying the motion to compel arbitration; and, as a result, the Petition as to this issue should be dismissed.

4. THE PETITION IS DEFECTIVE AND SHOULD BE DISMISSED

The Petition's Verification is defective because it indicates that it was signed by L. Thomas Galloway in Boulder County Colorado, and witnessed by a Notary commissioned in the District of Columbia. (Petition, un-numbered p 28) The Revised West Virginia Rules of Appellate Procedure, Rule 16(d)(9) requires: "In the case of a petition for mandamus or prohibition, the petition must contain a verification as required by West Virginia Code § 53-1-3." An "oath on information and belief" has been found by this Court to be a sufficient Verification. *State ex rel. United Fuel Gas Co. v. De Berry*, 43 S.E.2d 408, 130 W.Va. 418 (1947). But no authority has been found to support

an oath administered in a jurisdiction other than where the Notary is authorized to administer oaths.

It is also defective because the Appendix attached to it does not contain a crucial Order. The Petition attempts to mislead the Court by making no reference to, and by omitting from its Appendix, the December 1, 2010 Order of the federal district court, companion case, denying the Petitioner's motions therein, seeking to enjoin Fredeking entities from proceeding with this underlying Circuit Court action: *Galloway and Associates, PLLC v. Fredeking & Fredeking Law Offices, LC*, No. 10-0830, 2010 WL 4953573 (S.D.W.Va. December 1, 2010).

In conjunction with this omission, the Petition continues to affirmatively claim, falsely, that: "Several claims set forth in the Complaint have already been ordered to arbitration by the U.S. District Court for the Southern District of West Virginia" (Pet 1); and, "[Mr. Fredeking] has now been directed by the U.S. District Court for the Southern District of West Virginia in a final order to arbitrate the claims... set forth in Counts I and II of the Complaint." (Pet 13)

These statements are objectively false in light of the District Court's two separate decisions iterating that it had no jurisdiction over claims made in the Circuit Court by Mr. Fredeking who is not a party to the District Court action, nor over The Galloway Group, nor Mr. Galloway, for the same reason. (App 146-152; 159-161)

The Petition claims that: "[Mr.] Galloway is not a proper party to the Wyoming County action as the claims against him have been ordered to arbitration." (Pet 10) Again, this is objectively false, in light of the District Court's decisions (App 146-152; 159-161) and, in light of the fact that Mr. Galloway is not a party to the District Court

action. The Petition also falsely claims, with regard to Mr. Galloway: "The circuit court also committed fundamental error when it applied the long-arm in personam jurisdiction statute to [Mr.] Galloway to find venue." (Pet 10) But, Petitioner explicitly waived any challenge to the Circuit Court's jurisdiction. (App 55) As a result, its claim of "fundamental error" with regard to the exercise of jurisdiction over Mr. Galloway is an attempt to mislead this Court.

These defects are fundamental, and this Court should dismiss the Petition as a result.

CONCLUSION

On the basis of all of the above and foregoing, it is respectfully requested that this Honorable Court dismiss the Petition for Writ of Prohibition in this matter.

FREDEKING & FREDEKING LAW OFFICES, LC and
R.R. FREDEKING, II Individually,

BY COUNSEL:

THE WOOTON LAW FIRM

BY:

JOHN D. WOOTON (4138)
P.O. Box 2600
Beckley, WV 25802

IN THE SUPREME COURT OFAPPEALS 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.

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF Cabell

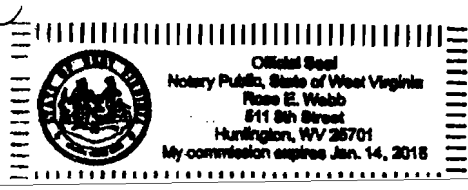
I, R.R. Fredeking, II, after being first duly sworn, depose and say that I am one of the Respondents herein; and that I am a member of Fredeking & Fredeking Law Offices, LC, the other Respondent herein; and, that I am duly empowered to verify pleadings and other papers on behalf of Fredeking & Fredeking Law Offices. I have read the Response to Petition for Writ of Prohibition and I have personal knowledge of the facts alleged therein, or, to the extent that I do not have personal knowledge of those facts, I believe them to be true, upon information made known to me.

R. R. Fredeking
R.R. Fredeking, II

Taken, subscribed and sworn to before me this 15th day of February 2011.

My commission expires January 14, 2018

Rose E. Webb

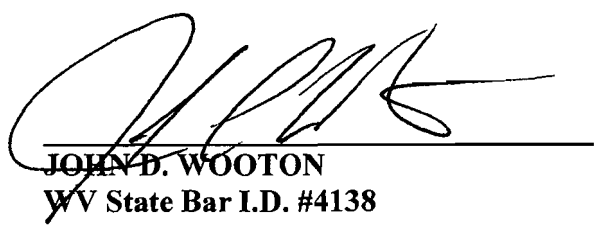


CERTIFICATE OF SERVICE

I, John D. Wooton, counsel for Respondents, do hereby certify that a true and exact copy of the foregoing **Response to Petition for Writ of Prohibition**, was this day served at the addresses shown below, and mailed to the following by First Class Mail, postage prepaid, this 18th day of February 2011

The Hon. Warren R. McGraw, II
Chief Judge, 27th Judicial Circuit
Wyoming County Courthouse
Main & Bank Streets
P.O.Box 581
Pineville, West Virginia 24874
Respondent

Jeffrey M. Wakefield
Katie MacCallum Nichols
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
P.O.Box 3843
Charleston, West Virginia 25338-3843



JOHN D. WOOTON
WV State Bar I.D. #4138

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE