

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0734

STATE OF WEST VIRGINIA *ex rel.*
MTR GAMING GROUP, INC., *et al.*,

Petitioner,

v.

THE HON. ARTHUR J. RECHT;
and EDSON R. ARNEAULT,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

On a Petition for a Writ of Prohibition to the Circuit Court of Hancock County
(Case No. 09-C-175R)

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PETITION FOR A WRIT OF PROHIBITION

TO: THE HONORABLE CHIEF JUSTICE
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

AND NOW comes Petitioner, State of West Virginia *ex rel.* MTR Gaming, Inc. (hereinafter “MTR”), by and through counsel, Robert J. D’Anniballe, Jr., Esq. and Rochelle L. Moore, Esq. of the law firm Pietragallo Gordon Alfano Bosick & Raspanti, LLP, and hereby petitions this Honorable Court to issue a Writ of Prohibition against Respondents, the Honorable Arthur J. Recht (hereinafter “Judge Recht”), in his official capacity of Judge on the Circuit Court of Hancock County (hereinafter “the Circuit Court”), and Plaintiff, Edson R. Arneault (hereinafter “Arneault” or “Respondent”), thereby prohibiting the Circuit Court from enforcing its order contained within its Findings of Fact and Conclusions of Law finding MTR in civil contempt (Included in the Appendix hereto at pp. 1-6) for allegedly violating its Order of March 1, 2010 (Included in the Appendix hereto at pp. 24-25).

I. Questions Presented

1. Did the Circuit Court err by finding MTR in civil contempt while disregarding its own findings that Arneault’s First Amended Complaint in the United States District Court for the Western District of Pennsylvania arises out of the Settlement Agreement?

2. Did the Circuit Court err by failing to recognize that Arneault waived his right to enforce the forum selection clause by filing an action in the United States District Court in the Western District of Pennsylvania that arose out of the Settlement Agreement?

3. Did the Circuit Court err by not finding Arneault in contempt, allowing him the opportunity to voluntarily dismiss his claims which admittedly violated the forum selection clause, confidentiality and non-disclosure provisions of the Settlement Agreement, while denying the same opportunity to MTR?

4. Did the Circuit Court err by failing to abstain from issuing a ruling before the United States District Court for the Western District of Pennsylvania ruled on the question of waiver, thereby risking inconsistent rulings given differences in federal and state venue law outlined in herein Petitioner's Motion to Stay Proceedings on January 13, 2012?

II. Statement of the Case

A. Statement of Jurisdiction

This Petition for Writ of Prohibition is filed pursuant to Article VIII, § 3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, Rule 16 of the West Virginia Rules of Appellate Procedure, and W.Va. Code §§ 51-1-1 and 53-1-3.

In erroneously finding MTR in civil contempt for violation of the forum selection clause in the February 19, 2010 "Settlement Agreement and Release" (hereinafter "Settlement Agreement") (Included in the Appendix hereto at pp. 12-23) between Arneault and MTR, incorporated *in toto* in the Circuit Court's Order dated March 1, 2010, the Circuit Court disregarded its own findings that Arneault's own action filed in the Western District of Pennsylvania arose out of said Settlement Agreement. The Circuit Court improperly discounted the fact that the First Amended Complaint quotes the same numerous times and Arneault's own counsel admitted that the Settlement Agreement was the "essence" of the action. By disregarding its own findings that Arneault's action filed in the Western District of Pennsylvania arose out of the Settlement Agreement, the Circuit Court likewise failed to find that Arneault waived his right to enforce the forum selection clause.

Remarkably, at the January 25, 2012 hearing on Arneault's Petition for a Rule to Show Cause, Judge Recht stated that he was "vexed" that Arneault's attorney conceded that certain portions of the action do grow out of the Settlement Agreement (Transcript of the Hearing of

January 25, 2012, included in the Appendix hereto at pp. 656-698). The Circuit Court was admittedly aware that Arneault's action arose out of the Settlement Agreement, yet it allowed Arneault the opportunity to withdraw his claim without affording MTR the same opportunity.

A Petition for a Writ of Prohibition is an appropriate vehicle to review a non-final civil contempt order. See *State ex rel. Zirkle v. Fox*, 203 W.Va. 668, 510 S.E.2d 502, 506 (1998). Moreover, a Writ of Prohibition is appropriate here because the civil contempt order in the underlying action is not final. A civil contempt order is not final and appealable until there has been an actual sanction imposed. *Guido v. Guido*, 202 W.Va. 198, 503 S.E.2d 511, 515 (1998) (citing *Coleman v. Sopher*, 194 W.Va. 90, 94, 459 S.E.2d 367, 371 (1995)). No actual sanction will be fully imposed unless and until Counts II, IV and V of MTR's action appropriately filed in the Western District of Pennsylvania are resolved. Therefore, a writ of prohibition is proper in this instance.

B. Parties

Respondent Honorable Arthur J. Recht is a Judge in the Circuit Court of Hancock County, West Virginia, and is the judge that presided over Arneault's Petition for Rule to Show Cause that was filed in the original civil action between Arneault and MTR styled: *Edson R. Arneault v. MTR Gaming, Inc., et al.*, Civil Action Number 09-C-175 R, Circuit Court of Hancock County, West Virginia.

Respondent Edson R. Arneault is an adult individual who currently resides in New Smyrna Beach, Florida. Amended Complaint at ¶ 1 (Included with the Appendix hereto at pp. 85-264). Arneault, a certified public accountant among other things, entered the casino and racetrack industry in 1992 when he was asked to provide accounting expertise in the sale of a racetrack called Mountaineer Park located in New Cumberland, West Virginia. Appendix p.

104, ¶ 36. Arneault was a significant shareholder and Chief Executive Officer of MTR from 1995 through October 2008. MTR Complaint, ¶ 8 (Included in the Appendix hereto at pp. 26-70). Arneault remained CEO until October 2008 having informed the MTR Board of Directors in April, 2008 that he did not intend to continue as CEO when his current term of employment expired. Appendix p. 27, ¶¶ 8-9.

Petitioner, MTR, is a corporation organized under the laws of Delaware and has a principal place of business in Wexford, Pennsylvania and a business address of Route 2 South, Chester, West Virginia 26034. MTR owns and operates gaming businesses, including Presque Isle Downs & Casino (hereinafter “PIDI”) and Mountaineer Casino, Race Track and Resort in Chester, West Virginia. Appendix p. 26, ¶ 1.

C. Facts and Proceedings Below

The Settlement Agreement is at the center of this dispute. The self-described essence of Arneault’s Amended Complaint in the Western District of Pennsylvania is that MTR allegedly violated the Settlement Agreement by failing to turn over documents necessary for his appeal to the Pennsylvania Gaming Control Board (hereinafter “PGCB”), and that this failure led to a deprivation of his constitutional due process rights.

After Arneault stepped down as CEO of MTR in 2008, he entered into a deferred compensation agreement and various amendments to same (hereinafter collectively “DCA”) with MTR. He also entered into a Consulting Agreement with MTR under which MTR paid him a significant sum, in return for his promises and obligations to MTR. In 2009, Arneault initiated the underlying lawsuit in the Circuit Court alleging various contract and tort claims related to the DCA. The parties ultimately resolved this underlying lawsuit through settlement and executed the Settlement Agreement on February 19, 2010. Appendix pp. 12-23. The Settlement

Agreement entered into by the parties was incorporated *in toto* as an Order of the Court which was dated March 1, 2010. Appendix pp. 24-25.

The Settlement Agreement contains several provisions pertinent to this proceeding, including a forum selection clause wherein the parties agreed, *inter alia*, that “any dispute arising from this agreement shall be interpreted pursuant to the laws of West Virginia and venue shall exclusively vest with the Circuit Court of Hancock County, West Virginia.” Appendix pp. 19-20, ¶ 4.4. The Settlement Agreement also contains a confidentiality provision that provides, in pertinent part:

2.4 Confidentiality. The parties agree that the terms of this Agreement are strictly confidential and neither party will disclose the terms of this agreement.

Appendix p. 14, ¶ 2.4. Importantly, the Settlement Agreement also specifically acknowledges that its provisions may be waived by a signed writing by the parties. Appendix p. 19 ¶ 4.1. Finally, the Settlement Agreement indicates that that MTR agreed “to permit Arneault access to non-privileged, non-confidential documents that he may reasonably require in defense of any claims asserted by State Bodies, Law Enforcement Agencies, Administrative Agencies and/or required for any state gaming licensure.” Appendix pp. 15-16, ¶ 2.7.

On July 21, 2011, Arneault filed an action in the United States District Court for the Western District of Pennsylvania (hereinafter referred to as “the Related Action”) against several defendants, including herein Petitioner, MTR.¹ *See generally* Appendix pp. 85-264. Essentially, Arneault alleged violations of numerous constitutional rights, including retaliation for exercising his First Amendment rights and violations of his procedural and substantive due process rights,

¹ Arneault’s original Complaint was filed April 15, 2011. The operative pleading for the purposes of this proceeding is Arneault’s Amended Complaint, filed July 21, 2011.

which he claims ultimately delayed him in renewing his Pennsylvania gaming license with the PGCB. *Id.*

As related to MTR, Arneault's Amended Complaint pending in the Western District of Pennsylvania arises out of the Settlement Agreement. The sole basis underlying these allegations is that MTR purportedly conspired to violate Arneault's due process rights by breaching its contractual duty under the Settlement Agreement to provide Arneault with non-privileged, non-confidential documents necessary to his licensing proceedings before the PCGB. Arneault's entire action against MTR is predicated on the terms and conditions of the Settlement Agreement.

Indeed, Arneault quoted substantially from the Settlement Agreement in his original Complaint, and even attached the Settlement Agreement to the Amended Complaint. Appendix at p. 150, ¶ 200 n.25. As discussed in detail *infra*, many allegations reference the failure to provide documents necessary to Arneault's licensing proceedings as well as other relevant portions of the Settlement Agreement. Appendix at pp. 150, 151-157, 168, 220-26, ¶¶ 197-199, 201-34, 260-62, 419-39, fn. 40. In fact, Arneault quoted specific paragraphs and provisions from the Settlement Agreement in his Amended Complaint. Appendix p. 154, 168, 226 ¶¶ 221, 262, 439, n.40.

On August 4, 2011, MTR moved to dismiss the Related Action, including Count VIII of the Amended Complaint, which directly arises from the Settlement Agreement. In his response to MTR's Motion to Dismiss, Arneault included several pages of legal argument citing directly to the Settlement Agreement and its applicability to Plaintiffs' claims. (Arneault's Response to MTR's Motion to Dismiss included in Appendix hereto at pp. 265-403).

Most remarkably, at oral argument on Motions to Dismiss before the Western District of Pennsylvania on November 21, 2011, Arneault's counsel *admitted* that the Settlement Agreement explicitly bars Count VIII of the Amended Complaint. (Transcript of the November 21, 2011 Hearing Included in Appendix Hereto at pp. 404-538). Arneault's counsel *further admitted* that the "essence" of his claim against MTR is its violation of its contractual duty, *i.e.* its duty under the Settlement Agreement, to provide exculpatory documents to PGCB and Arneault. Appendix p. 485.

Because Arneault launched the first salvo in this action, choosing the Western District of Pennsylvania as a venue, MTR responded with its own claims against Arneault in *the same court*. MTR filed its Complaint in the Western District of Pennsylvania, *the same court selected by Arneault*, alleging breach of numerous provisions of the Settlement Agreement, as well as breach of a covenant not to compete, tortious interference with contractual relations, and violations of Pennsylvania's Trade Secrets Act. Appendix, pp. 26-70. On November 10, 2011, Arneault moved to dismiss MTR's complaint, arguing that MTR violated the forum selection clause in the Settlement Agreement and for failure to state a claim. (Arneault's Motion to Dismiss and Brief in Support is included in the Appendix hereto at pp. 574-592). MTR responded to said Motion on December 19, 2011, arguing that Arneault waived the right to enforce the forum selection clause by filing the Related Action arising from the Settlement Agreement in the Western District of Pennsylvania, and that federal law principles of waiver and estoppel applied to permit the court to exercise venue over the case. (MTR's Response to Arneault's Motion to Dismiss included in the Appendix hereto at pp. 593-617). Arneault filed its Response on January 5, 2012. (Arneault's Reply included in the Appendix hereto at pp. 618-628). The district court has yet to rule on said motion, but should do so in the near future.

In conjunction with his Motion to Dismiss on November 10, 2011, Arneault filed a Petition for a Rule to Show Cause in the Circuit Court for Hancock County, West Virginia, arguing that MTR should be held in civil contempt for violating the Settlement Agreement as incorporated in its order of March 1, 2010. (Included in the Appendix hereto at pp. 7-11). On December 5, 2011, MTR filed its response to Arneault's Petition for Rule to Show Cause. (Included in the Appendix hereto at pp. 72-84). On January 5, 2012, Arneault filed a Response in Opposition to Defendant MTR's Response. (Included in the Appendix hereto at pp. 539-562). On January 13, 2012, MTR filed a Motion to Stay Hearing Scheduled for January 25, 2012 (hereinafter "Motion to Stay"), arguing that the Circuit Court should abstain from ruling on Arneault's Petition for Rule to Show Cause pending the ruling on the same issues in the federal court. (MTR's Motion to Stay Included in the Appendix hereto at pp. 563-573). MTR argued that principles of judicial economy and the risk of inconsistent rulings mandated a stay of the hearing. On January 23, 2012, Arneault filed his Response in Opposition to MTR's Motion to Stay. (Included in the Appendix hereto at pp. 629-635). The Circuit Court ultimately denied said Motion to Stay. (See Order of January 23, 2012 Denying MTR's Motion to Stay Included in the Appendix hereto at pp. 636-637).

On January 25, 2012, Judge Recht held the hearing on Arneault's Petition for Rule to Show Cause where he almost immediately found MTR in civil contempt for violating the Settlement Agreement. Appendix pp. 657-61. Namely, Judge Recht found that Counts II, IV and V of MTR's Complaint arose from the Settlement Agreement. (*Id.*). After considering argument from counsel, Judge Recht also found that at least a portion of Arneault's Amended Complaint arose from the Settlement Agreement but provided to him the benefit of an alleged "cure." Appendix pp. 685-87. On April 4, 2012, Judge Recht issued his Findings of Fact and

Conclusions of Law in which he concluded MTR was in civil contempt for violating the Circuit Court's March 1, 2010 Order and, **contrary to his statements on the record** that Arneault's Related Action does not arise out of the Settlement Agreement. Appendix pp. 1-6.

III. Summary of Argument

The Circuit Court's finding MTR in civil contempt was erroneous because: (1) despite overwhelming evidence to the contrary, Judge Recht disregarded his own findings that Arneault's Related Action arises out of the Settlement Agreement; (2) Judge Recht failed to find that by filing an action arising from the Settlement Agreement in the Western District of Pennsylvania, Arneault waived his right to enforce the forum selection clause in the Settlement Agreement and is judicially estopped from arguing otherwise; (3) Judge Recht erroneously found that, by dismissing one count that arose from the Settlement Agreement, Arneault's breach of the same was cured, and denied the same opportunity to MTR; and (4) Judge Recht erred by declining to abstain from ruling until the United States District Court for the Western District of Pennsylvania ruled on the exact same issues, risking inconsistent rulings as described in MTR's Motion to Stay.

Arneault's Related Action arises from the Settlement Agreement. Though he couches alleged violations of the Settlement Agreement in allegations of constitutional violations, Arneault essentially claims that MTR violated his First Amendment, Equal Protection and Due Process rights by failing to provide documents in a timely manner as required by the Settlement Agreement. This alleged violation of the Settlement Agreement is claimed to have hindered Arneault's ability to appeal PGCB's recommendation of denial of his Pennsylvania gaming license. There is significant evidence supporting the contention that Arneault's Amended Complaint against MTR arises from the Settlement Agreement: (1) Arneault's original

Complaint directly quoted the Settlement Agreement, and numerous allegations in the Amended Complaint reference either MTR's obligation to provide documents or other specific provisions of the Settlement Agreement; (2) the Settlement Agreement is attached to the Amended Complaint; (3) in his Response in Opposition to MTR's Motion to Dismiss the Amended Complaint, Arneault includes several pages of legal argument discussing the Settlement Agreement; and (4) at the November 21, 2011 hearing before the Western District of Pennsylvania, Arneault's counsel explicitly stated and acknowledged that at least one count of the Amended Complaint arose from the Settlement Agreement and that the essence of the complaint against MTR is the violation of the contractual duty under the Settlement Agreement to provide documents. Despite this voluminous evidence, the Circuit Court apparently concluded that Arneault's Related Action as a whole did not arise from the Settlement Agreement, though Judge Recht still found that at least one count did, in fact, arise from the Settlement Agreement. Appendix at p. 5, ¶ 16, pp 686-87.

Because Arneault filed the Related Action in the Western District of Pennsylvania, which arises from the Settlement Agreement, Arneault acted in a manner inconsistent with claiming the right to enforce the forum selection clause requiring all disputes arising from the Settlement Agreement to be filed in the Circuit Court for Hancock County, West Virginia. By doing so, Arneault waived his right to seek enforcement of the forum selection clause. MTR filed its action in the **same** jurisdiction chosen by Arneault to litigate claims arising from the Settlement Agreement.

Arneault himself willfully violated the Circuit Court's March 1, 2010 Order by filing the Related Action that alleges claims arising from the Settlement Agreement, including his quoting of the Settlement Agreement in the Original Complaint and his attaching of the Settlement

Agreement to the Amended Complaint when said Settlement Agreement included a confidentiality provision. Judge Recht, therefore, erred by finding that Arneault could cure his violation of the Settlement Agreement without finding him in contempt while refusing to provide the same opportunity to MTR. MTR denies that Arneault can “cure” his violation of the Settlement Agreement by simply dismissing an offending claim because his filing of the federal action set in motion a series of events that led to MTR filing its concurrent federal action. Arneault cannot rob the bank then give the money back.

The United States District Court for the Western District of Pennsylvania is faced with a similar question of whether Arneault waived his right to enforce the forum selection clause, but applying federal statutes and caselaw. *See* Appendix at pp. 593-617. The Circuit Court should have abstained from issuing a ruling in this case. As detailed in MTR’s Motion to Stay, principles of judicial economy and the risk of inconsistent rulings should have mandated that the Circuit Court abstain. The federal court should issue its ruling in the relatively near future, and neither party would have been prejudiced by the Circuit Court’s abstention.

IV. Statement Regarding Oral Argument and Decision

Oral argument is necessary pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as MTR submits that the decision process would be significantly aided by such argument. Oral Argument is appropriate under Rules 19(a)(1), 19(a)(2) and 19(a)(3) because the herein Petition involves: (1) assignments of error in the application of settled law (Rule 19(a)(1)); (2) an unsustainable exercise of discretion where the law governing that discretion is settled (Rule 19(a)(2)); and (3) this result of the underlying action is against the weight of the evidence (Rule 19(a)(3)).

V. Argument

A. The Exercise of Original Jurisdiction is Proper

As this case presents a clearly erroneous legal conclusion that is contrary to both the law and evidence before the Circuit Court, and as the Circuit Court's civil contempt order of April 4, 2012 is non-final, the exercise of original jurisdiction is proper.

In determining whether to entertain and issue the writ of prohibition for cases not involving the 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." Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

A Petition for a Writ of Prohibition is an appropriate vehicle to review a non-final civil contempt order. *Zirkle*, 510 S.E.2d at 506. A civil contempt order remains non-final and non-appealable until a sanction is imposed. *Guido v. Guido*, 503 S.E.2d 511, 515 (*citing Coleman v. Sopher*, 194 W.Va. 90, 94, 459 S.E.2d 367, 371 (1995)).

In the present action, the civil contempt order will not be final until MTR dismisses Counts II, IV and V of its Complaint in the Western District of Pennsylvania and pays the fine imposed by the Circuit Court. Absent the present Petition, MTR's only other avenue to obtain appellate review of the Circuit Court's civil contempt order is to dismiss a meritorious complaint

and pay a fine it argues should not have been imposed in the first instance. Accordingly, for these reasons, the exercise of original jurisdiction is proper.

B. Standard of Review

When reviewing the imposition of a civil contempt order, the standard of review is three-fold: (1) the contempt order is reviewed under an abuse of discretion standard; (2) the underlying factual findings are reviewed under a clearly erroneous standard; and (3) questions of law and statutory interpretations are subject to *de novo* review. *Zirkle*, 510 S.E.2d at 506 (citing Syl. Pt. 1, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996)).

C. Arneault's Related Action Arises From the Settlement Agreement

Without citation to any authority or acknowledgment of the significant evidence to the contrary, Judge Recht, contradicting and disregarding his own factual findings that the Related Action did arise from the Settlement Agreement, concluded that that Arneault's Related Action filed in the Western District of Pennsylvania does not arise from the Settlement Agreement because said action may only be filed in said district. Appendix, p. 5, ¶ 16. This conclusion was in error.

“To ‘arise out of’ means ‘to originate from a specified source.’” *Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 389 (2d Cir. 2007) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 117 (1981)). Generally, “arise out of” indicates a causal connection. *Id.* (citing *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001)); *see also Caperton v. A.T. Massey Coal Co.*, 225 W.Va. 128, 147, 690 S.E.2d 322, 341 (2009) (utilizing the *Phillips* interpretation of “arise out of” to interpret the meaning of a contract clause including the phrase “in connection with”).

The phrase “arise out of” has been interpreted to be more restrictive than such contractual phrases as “in relation to” or “in connection with.” *Phillips*, 498 F.3d at 389; *see also Wyeth & Bro. Ltd. v. CIGNA Intern. Corp.*, 119 F.3d 1070, 1074 (3d Cir. 1997) (reasoning that “in relation to” is broader than “arising under”). As the court in *Phillips* stated, “[w]e do not understand the words “arise out of” as encompassing all claims that have some possible relationship with the contract, including claims that only ‘relate to,’ ‘be associated with,’ or arise in connection with’ the contract.” *Phillips*, 498 F.3d at 389. However, courts in other cases have reached a different conclusion, finding no difference in the broadly worded phrases “relating to,” “in connection with,” and “arising from.” *Roby v. Corporation of Lloyd’s*, 996 F.2d 1353, 1361 (2d Cir. 1993) (citing *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, *reh’g denied*, 419 U.S. 885, 95 S.Ct. 157 (1974)). In *Sherk*, the United States Supreme Court held that controversies and claims “arising out of” a contract for sale of a business covered securities violations related to that sale. *Sherk*, 417 U.S. at 519-20, 94 S.Ct. at 2457.

Even applying the *Phillips* court’s restrictive interpretation of “arise out of”, Arneault’s claims against MTR are causally linked, and not merely “related to”, the Settlement Agreement. Arneault disingenuously attempts to disguise this fact by couching breaches of the settlement agreement in allegations of constitutional violations and engaging in semantic gymnastics. *See* Appendix pp. 359-364, 485. Careful review of: (1) the allegations in the Amended Complaint; (2) Arneault’s Response in Opposition to MTR’s Motion to Dismiss the Amended Complaint; and (3) the transcript of the November 21, 2011 hearing reveal numerous direct citations to MTR’s obligations in the Settlement Agreement and admissions before the Western District of Pennsylvania that the “essence” of Arneault’s claims is MTR’s duty under the Settlement Agreement.

In his Amended Complaint, Arneault makes numerous direct references to the Settlement Agreement, and even attaches same as an exhibit. The following excerpts from the Amended Complaint are but a sampling of the references to MTR's obligation to provide documents pursuant to the Settlement Agreement:

197. On or about February 1, 2010, Charles Hardy, an attorney at Sprague & Sprague, called Defendant Rodriguez-Cayro, advised him that he was representing Mr. Arneault in a licensing matter, *and requested that MTR provide Mr. Hardy with information related to the issues in Arneault's appeal of the PGCB's recommendation of denial in his Principal License Renewal.*

199. By email dated February 10, 2010 and in response to Mr. Hardy's request, *defendant Rodriguez-Cayro sent Mr. Hardy copies of two letters relevant to Mr. Arneault's appeal. This response was a very small fraction of the materials Mr. Hardy requested. . . .*

200. Meanwhile, on February 19, 2010, Mr. Arneault and MTR *entered into a confidential Settlement Agreement and Release* to settle a lawsuit filed by Mr. Arneault in Hancock County, West Virginia.

Footnote 25: *A true and correct copy of the Settlement Agreement and Release is attached to this Amended Complaint as Exhibit B. The facts surrounding this Settlement Agreement and Release are discussed in greater detail below.*

204. *Mr. Hardy received no further items of documentation he had requested until about March 17, 2010, when defendant Rodriguez-Cayro sent a small amount of documentation, simultaneously sending copies of the same documents to the attorneys at the OEC who were handling Mr. Arneault's appeal for the opposing side.* Defendant Rodriguez-Cayro made it clear to Mr. Hardy that Rodriguez-Cayro did not want to provide any information to Mr. Hardy without also sharing it with the OEC attorneys representing the opposing side.

207. Mr. Hardy and defendant Rodriguez-Cayro spoke on or about April 1, 2010, and, *instead of responding to Mr. Hardy's verbal requests for documentation, defendant Rodriguez-Cayro asked Mr. Hardy to again put the specific details of his request in writing.*

208. On April 2, 2010, Mr. Hardy emailed defendant Rodriguez-Cayro and included with this email a letter as an attachment containing Mr. Hardy's request to speak with specified employees of MTR with knowledge of the facts at issue in Mr. Arneault's appeal and a *request for specified documents related to Mr. Arneault's appeal.*

209. *Having not received any documents in response the request emailed on April 2, Mr. Hardy again called defendant Rodriguez-Cayro on April 12, 2010. Rodriguez-Cayro indicated that (a) he would "endeavor to produce any non-privileged or non-confidential documents" requested by Mr. Hardy while simultaneously providing them to opposing counsel, (b) that Mr. Hardy would not be permitted to interview MTR employees and should instead schedule their depositions, and (3) that Rodriguez-Cayro did not expect the documents to be produced for another 7-10 days. No documents were produced by MTR within that timeframe.*

214. On or about April 30, 2010 and May 5, 2010, *defendant Rodriguez-Cayro forwarded a significant number of documents to Sprague & Sprague; however, these documents represented only a small portion of the documents that Sprague & Sprague had requested and that they understood MTR to have in their possession and control.*

215. In response, in an email of April 30, 2010, Mr. Hardy advised defendant Rodriguez-Cayro of the fact that Sprague & Sprague *had only received a small portion of the requested documents.* Defendant Rodriguez-Cayro thereafter responded on that same day and indicated that Sprague & Sprague's document requests were becoming unduly burdensome.

219. As late as May 6, 2010, two weeks before Mr. Arneault's appeal hearings began, MTR advised Sprague & Sprague that *many of the documents that they had repeatedly requested since prior to Mr. Hardy's first specific, written request dated on or about February 22, 2010 were in storage and in the process of being retrieved, but would not be ready for production until the next week.*

220. *Defendant Rodriguez-Cayro never stated that any document was being withheld because it was privileged or confidential.*

221. Mr. Hardy never received any privilege log as required by *paragraph 2.7 of the Settlement Agreement and Release* from defendant Rodriguez-Cayro.

222. As a result of the lack of cooperation by MTR *to provide in a timely fashion documents* requested by Mr. Arneault that were relevant to his position in the appeal of the proposed recommendation of denial of his Principal License, his attorneys were forced to look elsewhere to do so.

227. As a result of this process, *which would have been unnecessary if MTR had simply provided the information requested*, 293 of the 389 exhibits (over 75 percent) which Sprague & Sprague identified and presented at the hearing of Mr. Arneault's appeal were derived from the documents secured from Mr. Rubino. Of the 306 documents ultimately entered into evidence by Mr. Arneault at the hearing, 276 (approximately 90 percent) of those exhibits were obtained from Mr. Rubino.

228. *Most, if not all, of the documents provided by Tecnica and Mr. Rubino were in the custody and control of MTR/PIDI*, defendants Griffin, Hughes, Bittner, Azzarello, and Rodriguez-Cayro, and the law firm of Ruben & Aronsen. Such documents were intentionally withheld from Mr. Arneault and were never requested by the PGCB from Tecnica or Mr. Rubino.

230. MTR's *failure to provide Sprague & Sprague with reasonable access to relevant documents* that it or its attorneys had in their custody and control in a reasonable amount of time prior to Arneault's appeal hearing caused attorneys at Sprague and Sprague to expend numerous hours on Mr. Arneault's behalf following up with defendant Rodriguez-Cayro and putting together document requests *that went unanswered or substantially unanswered or were responded to in such an exceedingly dilatory fashion that, as the hearing dates approached, Sprague & Sprague were required to find other sources of the information they needed.*

231. MTR's conduct also required attorneys for Sprague & Sprague expend time seeking access to MTR attorneys *and the documents to which they had easy access to* and to prepare for and conduct Mr. Arneault's appeal hearings without the cooperation of MTR.

232. MTR's refusal to allow Sprague & Sprague to interview MTR employees who might be familiar with the issues and *underlying documents* related to Mr. Arneault's appeal required

attorneys for Sprague & Sprague to schedule, prepare for, and conduct depositions of these employees, retain a court reporting service, and obtain transcripts of the depositions.

233. All of the attorneys at Sprague & Sprague who worked on Mr. Arneault's appeal spent significant extra time on the case *that would not have been necessary if MTR had provided Arneault reasonable and timely access to the documents within MTR's possession and control*, and to the employees and attorneys who were familiar *with those documents and the information contained therein*.

234. Sprague & Sprague charged Mr. Arneault a rate of \$400 per hour for their services, which he has paid. Mr. Arneault has borne the cost of all these services provided by Sprague & Sprague and the expenses incurred in the provision of these services.

261. The legal action in the Circuit Court of Hancock County was settled by a *confidential Settlement and Release Agreement that was effective February of 2010*.

262. *The Settlement Agreement and Release requires MTR "permit Arneault access to non-privileged, non-confidential documents and information that he may reasonably require in defense of any claim asserted by State Bodies, Law Enforcement Agencies and Administrative Agencies, and/or required for any state gaming licensure."*

419. Despite repeated requests made by counsel for Mr. Arneault to the Corporate Defendants, they intentionally, with specific intent to harm Mr. Arneault and Mr. Rubino, and to ensure Mr. Arneault never returned to MTR Gaming and that neither Mr. Arneault nor Mr. Rubino could be involved generally in the gaming industry, *failed to provide the bulk of the requested documents, which were in their care, custody and control. Moreover, the limited documents that were provided were not provided until immediately prior to the commencement of Mr. Arneault's licensing hearing*.

420. The Corporate Defendants knew the story that the PGCB wanted to hear about the alleged sham relationship between MTR and Tecnica, and in an effort to curry favor with the state regulators to keep Mr. Arneault from getting his license renewed and to keep Mr. Rubino from succeeding in his efforts to have SOC 58 removed, the Corporate Defendants *repeatedly refused to*

acknowledge the documents existed and despite repeated requests, did not provide the requested documents.

421. *Many of the documents provided by Tecnica and Mr. Rubino to assist Mr. Arneault in his defense were in the care, custody and control of the Corporate Defendants and were intentionally withheld from Mr. Arneault in an effort to deny him his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution. As a licensee of the PGCB, the Corporate Defendants had a legal and fiduciary duty to Mr. Arneault, whose renewal application was investigated, processed, connected with, and par of, the Renewal Application for PIDI's Category 1 Slot Operator's License, to provide the requested documents to the PGCB and Mr. Arneault's counsel. Finally, the Corporate Defendants had a legal and fiduciary obligation to the PGCB to provide the requested documents.*

422. Corporate Defendant MTR Gaming Group, Inc. is vicariously liable for the acts and omissions of its officers, attorneys, directors, employees and agents. Corporate Defendant Presque Isle Downs, Inc. is vicariously liable for the acts and omissions of its officers, attorneys, directors, employees and agents.

Appendix pp. 150, 151-157, 168, 220-22, ¶¶ 197, 199, 204, 207-209, 214-215, 219-222, 227-228, 230-234, 261-262, 419-422 (emphasis added).

Arneault's other court documents also support the conclusion that his claims against MTR arise from the Settlement Agreement. On August 4, 2011, MTR filed a Motion to Dismiss Arneault's claims in the Western District of Pennsylvania, including Count VIII, which arises from the Settlement Agreement. Arneault's brief in opposition to MTR's Motion to Dismiss the Related Action contains *ten pages* of legal argument *specifically asserting the Settlement Agreement* and its applicability to Arneault's claims. Appendix pp. 356-365. Arneault even conceded in his response *that his promissory estoppel claim is barred by the Settlement Agreement.* Appendix p. 364.

Remarkably, at the November 21, 2011 hearing before the Western District of Pennsylvania, Arneault's counsel repeatedly admitted that the claims against MTR were rooted in MTR's duties under the Settlement Agreement.² Arneault's counsel first represented to the district court that that is promissory estoppel claim is barred by the Settlement Agreement:

MR. MIZNER: We concede that the Settlement Agreement and Release are bar [sic] Mr. Arneault's promissory estoppel claim only.

...

THE COURT: All right. So Count VIII was a dual claim, promissory estoppel and unjust enrichment?

MR. MIZNER: That is correct. And we'll *only concede the promissory estoppel claim*.

Appendix pp. 408-409. This concession alone is an admission that Count VIII of the Amended Complaint specifically arose from the Settlement Agreement. Additionally, at pages 78, 110 and 111 of the transcript, Arneault's counsel repeatedly admits that the Settlement Agreement forms

² The arguments made by Arneault's counsel before the United States District Court for the Western District of Pennsylvania are relevant and germane to this matter and are admissible under West Virginia Rule of Evidence 801(d)(2)(C) and (D) as admissions of a party opponent. To that end, attorneys may make evidentiary admissions on behalf of his client. See 30B FED. PRAC. & PROC. 7023 (2011). Statements made by an attorney may be admissible against the party retaining the attorney. *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981). In this regard, it has been noted:

An attorney, as any other agent, may make statements which the law attributes to the principal. Lawyers can, and frequently do, make statements which, had the client made them, would be admissible as admissions. Whether they are admissible against the principal depends, as with any other agency, on the scope of the agent's (attorney's) authority. Such statements as admissions are received as evidence and may be refuted.

Laird v. Air Carrier Engine Service, Inc., 263 F.3d 948, 953 (5th Cir. 1959); see also, *Hanson v. Waller, LVL, Inc.*, 888 F.2d 806 (11th Cir. 1989) (holding that statements contained in a letter from an attorney are admissions of a client under Rule 801(d)(2)(C)); *Harris v. Steelweld Equipment Co., Inc.*, 869 F.2d 396 (8th Cir. 1989) (Statements made by a party's attorney to an expert rehabilitation witness that the plaintiff may be employable were admissible under Rule 801(d)(2)(D)).

Moreover, Arneault is judicially estopped from disavowing these admissions of his counsel. *Jewlcor Jewelers and Distributors, Inc. v. Corr*, 542 A.2d 72, 76 (Pa.Super. 1988) ("A judicial admission is an express waiver made in court or preparatory to trial by a party or his attorney, conceding for the purposes of trial, the truth of the admission.").

the basis for MTR's alleged obligation to provide documents to Arneault, which Arneault is using as the basis for his claims of violations of his constitutional rights in the Related Action:

The documents that MTR promised Mr. Arneault they would provide, *that was part of the Settlement Agreement*

They all knew the documents were important because it was in the Settlement Agreement that Mr. Griffin signed. This was a discussed and understood issue. You guys got documents that I need to prove myself right. That was part of a contractual understanding.

Your Honor, there is a contract that says you are going to cooperate, that you are going to provide documents.

Appendix pp. 480, 512-13 (emphasis added).

At page 83, Arneault's counsel admits that the Settlement Agreement is *the essence* of his claims against MTR:

THE COURT: All right. So just to wrap up, and the Complaint speaks for itself. But tell me, for the purposes of my own post-argument review, what the essence of your claim against MTR really is?

MR. MIZNER: *The essence of the claim is twofold. Number one. They had a contractual and statutory obligation to provide all these exculpatory documents to the Gaming Board and to Mr. Arneault. Their failure to do so continued and aided in the state actors' violation of our constitutional rights.*

Appendix p. 485. Given these judicial admissions, there can be no good faith denial by Mr. Arneault that his Related Action is based on obligations *arising from the Settlement Agreement*. The admitted and self-described "essence of the claim" is based on the Settlement Agreement. It is bad faith and misleading for Mr. Arneault to suggest otherwise to this and any Court.

On page 100 of the transcript of the November 21, 2011 hearing, Arneault's counsel states that paragraph 3.3 of the Settlement Agreement "admittedly bars Mr. Arneault's claims insofar as they are based on a promissory estoppel theory." Appendix p. 502.

On pages 134-35 of the transcript of the November 21, 2011 hearing, in a display of semantic gymnastics, Arneault's counsel states that because Arneault did not plead a "count" labeled "breach of contract," he did not plead any claims arising out of the Settlement Agreement. Rather, according to Arneault's counsel, he is permitted to couch allegations of breach of contract in other claims provided he does not label the count "breach of contract." Appendix pp. 536-37. *See Butts v. Royal Vendors, Inc.* 202 W.Va. 448, 453-54, 505 S.E.2d 911, 915-16 (1998) (labels used for cause of action are immaterial in light of averments when determining whether a claim is covered by an insurance policy). In his Reply Brief in support of his Motion to Dismiss MTR's Complaint, Arneault makes the same absurd argument, grasping at the *Phillips* court's restrictive interpretation of "arising out of" and claiming that the duty provide documents stemmed not only from the Settlement Agreement but also a "variety" of other vague and unnamed sources or said duty. Appendix pp. 618-628. At the Rule to Show Cause hearing on January 25, 2012, Arneault's counsel makes similar remarks, noting that promissory estoppel and unjust enrichment claims do not "arise from" the Settlement Agreement but are merely ancillary to it. Appendix p. 681. These arguments are disingenuous and simply defy logic. Arneault is well aware that he has pleaded claims arising from the Settlement Agreement in the Western District of Pennsylvania, and, as discussed *infra*, waived his right to enforce the forum selection clause.

These statements and their implications were made perfectly clear to the Circuit Court below, and Judge Recht even had difficulty reconciling Arneault's counsel's remarks at the January 25, 2012 Rule to Show Cause hearing:

But I am vexed by statements made by Mr. Arneault's attorney which, in essence, *do concede that there is certain portions [sic] that do grow out of the Settlement Agreement, and they should be dismissed.*

Appendix p. 686 (emphasis added). Judge Recht acknowledged that at least a certain portion of Arneault's claims arose from the Settlement Agreement, though this acknowledgement was contradicted in his decision.

The allegations in the Amended Complaint, the legal argument in Arneault's Response to MTR's Motion to Dismiss the Amended Complaint and the vexing admissions of Arneault's counsel lead to one inescapable conclusion: Arneault's claims against MTR arise from the Settlement Agreement, specifically the duty to provide non-privileged and non-confidential documents upon request. Arneault claims violations of his constitutional rights to due process, but these claims are undeniably rooted in MTR's alleged breach of its contractual duties under the Settlement Agreement. Arneault's claims against MTR are causally connected to the contract and meet even the *Phillips* court's restrictive interpretation of the term "arise out of." Therefore, Arneault's claims against MTR *arise from the Settlement Agreement*.

D. Because He Alleged Claims Arising From the Settlement Agreement, Arneault Waived His Right to Enforce the Forum Selection Clause and is Judicially Estopped from Asserting Inconsistent Positions

Judge Recht concluded, without any citation to authority or acknowledgement of the significant evidence to the contrary, that Arneault did not waive his right to enforce the forum selection clause for purposes of finding MTR in Civil Contempt. Appendix p. 5, ¶ 17. Because Arneault brought claims arising from the Settlement Agreement in the Western District of Pennsylvania rather than the Circuit Court for Hancock County, West Virginia, this conclusion was in error.

In West Virginia, a material breach of a contract by one party excuses the other party from further performance under the contract. *West Virginia Human Rights Comm'n v. Smoot Coal Co., Inc.*, 186 W.Va. 348, 353, 412 S.E.2d 749, 754 (1991) (*per curiam*); *Emerson Shoe*

Co. v. Neely, 99 W.Va. 657, 661, 129 S.E.2d 718, 719 (1920). The corollary of Arneault's decision to breach the forum selection provision by filing an action arising from the Settlement Agreement in the Western District of Pennsylvania is that MTR is no longer bound by these same provisions.

In his Motion to Dismiss MTR's Complaint, Arneault himself admits that a court may decline to enforce a forum selection clause if there is "a strong reason to set it aside." Appendix p. 125, quoting *Krauss v. Steelmaster Bldgs, LLC*, 2006 US Dist. LEXIS 78885 (E.D. Pa. 2006) (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-79 (3d Cir. 1995)). There are several strong reasons to set aside the agreement in this case. Arneault himself brought claims arising from the Settlement Agreement in a different forum. Also, the Settlement Agreement specifically acknowledges that its provisions may be waived by a writing signed by the parties. Appendix p. 19, ¶ 4.1. By *selecting* the Western District of Pennsylvania to adjudicate his own disputes arising from the Settlement Agreement against MTR, Arneault has waived his right to enforce the forum selection clause. Arneault has abandoned any contractual right to seek enforcement of the clause by filing the Related Action in the *same court*. Likewise, as a matter of law, MTR was relieved of any duty to bring claims arising out of the Settlement Agreement in the Circuit Court for Hancock County, West Virginia.

Forum selection clauses are treated as a manifestation of the parties' preference to a convenient forum. While the parties' agreement on a particular forum is entitled to substantial consideration, it does not receive dispositive weight. *Vangura Kitchen Tops, Inc. v. C&C North America, Inc.*, 2008 WL 4540186, at *8 (W.D. Pa. 2008) (citing *Jumara*, 55 F.3d at 880).

Traditionally, there are three circumstances under which a forum selection clause will be disregarded: (1) where the clause was procured by fraud or overreaching; (2) where enforcement

would violate a strong public policy; or (3) where enforcement of the clause would be unreasonable. *In re Rationis Enterprises*, 1999 WL 6364 (S.D.N.Y. 1999); *see also Sauvageot v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 2680508 (S.D. W.Va. 2011). Where, as here, the party resisting enforcement can demonstrate that it would be ‘unreasonable’ under circumstances to enforce the clause, it may be avoided. *Rationis*, 1999 WL 6364, at *2 (citing *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15 (1972)). Unreasonableness has applied in situations where enforcement would result in litigation in a jurisdiction so seriously inconvenient that it would effectively foreclose adjudication, or where, as here, **a party has waived the right to enforce the clause by its conduct or action.** *Rationis*, 1999 WL 6364 at *2; *Building Servs. Inst. v. Kirk Williams Servs. Co.*, 2008 WL 747657, at *2 (Oh. 2008). *See also American Intern. Group v. Vago*, 756 F. Supp 2d 369, 379 (S.D.N.Y. 2010). Like other contract provisions, they may be waived by agreement or by conduct or action by one of the parties that is inconsistent with an intent to enforce its terms. *Building Serv’s Inst.*, 2008 WL 747657 at *1; *See also Mundy v. Arcuri*, 267 S.E.2d 454, 457-58 (W.Va. 1980); *Building Constr. Enter. v. Gary Meadows Constr.*, 2007 WL 1041003, at *3 (E.D. Ark. 2007) (“Waiver occurs when a party with full knowledge of material facts does something which is inconsistent with the right or his intention to rely on that right.”). Here, Arneault waived his right to enforce the forum selection clause in the Settlement Agreement, as was specifically contemplated in paragraph 4.1 of same. Appendix pp.19-20, ¶ 4.1.

The circumstances of this case are indeed peculiar. Some time after executing the Settlement Agreement, Arneault filed an action in a forum other than Hancock County, West Virginia that arises from the Settlement Agreement, including numerous allegations that either quote or reference MTR’s obligations under same. Arneault also attached the Settlement

Agreement to the Amended Complaint, further evidence that this Related Action arises from the Settlement Agreement. Through these actions, Arneault disregarded and disavowed his alleged right to enforce the forum selection clause. In other words, Arneault waived such right through conduct inconsistent with same. Faced with this exact issue, other federal and state courts have correctly held that in such circumstances the right to enforce the forum selection clause is waived. *See, e.g., Vangura*, 2008 WL 4540816; *Building Constr. Enters.*, 2007 WL 1041003, at *4 (“The court agrees that Plaintiff waived his right to have the action adjudicated in Jackson County, Missouri by electing to file his Complaint in this Court”); *Unity Creations, Inc. v. Trafcon Indus.*, 137 F. Supp. 2d 108, 112 (E.D.N.Y. 2001); *Rationis*, 1999 WL 6364; *American Intern. Group.*, 756 F.Supp.2d at 380.

In the present action, enforcing the forum selection clause against MTR after Arneault specifically waived enforcement of the clause by filing an action arising from the settlement agreement in the Western District of Pennsylvania would be unreasonable and unjust. Any presumption of enforceability of the forum selection clause is overcome by Arneault’s waiver. Arneault selected the Western District of Pennsylvania to adjudicate his claims against MTR. By making this choice, he waived his right to seek enforcement of that contract provision.

It is clear from a review of the January 25, 2012, transcript that Judge Recht understood that Arneault would dismiss both his claims of unjust enrichment and promissory estoppel in the Related Action:

Now, what is being withdrawn is the claim for unjust enrichment and promissory estoppel. Those are acknowledged to grow out of the Settlement Agreement, and that’s what is being dismissed. And if there was to be a contempt, that’s what it would be, and there is no longer a reason for the contempt.

Appendix, p. 689. However, Arneault dismissed **only** his promissory estoppel claim in the Related Action in an attempt to remove a portion of the Amended Complaint that he conceded arises from the Settlement Agreement, in an effort to “cure” his violation of the forum selection clause. *See* Order of the United States District Court for the Western District of Pennsylvania, signed by the Honorable Sean J. McLaughlin and dated January 25, 2012, included in the Appendix hereto at pp. 638-39. In any event, the Circuit Court recognized that such dismissal amounts to a concession that “no claim exists.” Appendix, p. 685. The federal court then dismissed all of Arneault’s remaining claims, including his “unjust enrichment” claim. Then, on April 27, 2012, Arneault *re-filed* his claim of unjust enrichment *in the Court of Common Pleas of Erie County, Pennsylvania*. *See* Complaint, styled *Edson R. Arneault v. Mountaineer Gaming Group, Inc. and Presque Isle Downs, Inc.*, filed in the Court of Common Pleas of Erie County Pennsylvania on or about April 27, 2012, Case Number 11589-12, included in the Appendix hereto at pp. 640-655.³ This disingenuous conduct establishes that Arneault has no intention of pursuing any claim arising out of the Settlement Agreement in the Circuit Court, as required by paragraph 4.1 of said Settlement Agreement. Indeed, the re-filing of his unjust enrichment claim in Erie County is further evidence of Arneault’s waiver of his right to enforce the forum selection clause.

In light of his counsel’s admissions before the United States District Court for the Western District of Pennsylvania, Arneault should also be judicially estopped from asserting that his Amended Complaint does NOT arise from the Settlement Agreement. As discussed in detail above, Arneault’s counsel described to the federal court that the Settlement Agreement was the “essence” of Arneault’s Amended Complaint against MTR. The doctrine of judicial estoppel

³ This document is subject to Petitioner’s Motion to Include Document not in the Record Pursuant to Rule 16(e)(5) of the West Virginia Rules of Appellate Procedure.

bars Arneault from stating a contradictory position before the Circuit Court. *Jewlcor Jewelers and Distributors, Inc. v. Corr*, 542 A.2d 72, 76 (Pa.Super. 1988) (“A judicial admission is an express waiver made in court or preparatory to trial by a party or his attorney, conceding for the purposes of trial, the truth of the admission.”).

Under West Virginia law, judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or earlier in the same case; (2) the positions were taken in a proceeding involving the same adverse parties; (3) the party taking the inconsistent positions received some benefit from the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. Syl. Pt. 2, *West Virginia Dep’t of Trans., Div. of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005).

All elements are met here. First, his positions at the federal court and the Circuit Court are clearly inconsistent. At the federal court, Arneault is taking the position that his claims in the Amended Complaint arise from a breach of the provisions of the Settlement Agreement requiring MTR to provide ready access to non-privileged and non-confidential documents, while before the Circuit Court Arneault argues that his claims in the Amended Complaint do not arise from the Settlement Agreement. Second, the proceedings at the federal and Circuit Court levels involve the same adverse parties. Third, Arneault will receive the benefit of proceeding with his claims in federal court while foreclosing the same opportunity to MTR. Finally, allowing Arneault to take such obviously inconsistent positions injures MTR. MTR may be required to pay a contempt penalty and possibly dismiss portions of its federal action while Arneault will be able to proceed with his concurrent federal action and freshly re-filed state court action in Erie

County, Pennsylvania, that also arise out of the Settlement Agreement. Therefore, Arneault must be judicially estopped from disavowing his position that the “essence” of his claims in the Western District of Pennsylvania is MTR’s alleged breach of duties listed in the Settlement Agreement.

E. Arneault Likewise Was In Contempt For Violation of the Circuit Court’s March 1, 2010 Order

The Circuit Court ultimately found MTR in contempt of court for violating the Circuit Court’s March 1, 2010 Order by filing portions of an action that arise from the Settlement Agreement in a forum other than Hancock County, West Virginia. At the January 25, 2012 Rule to Show Cause hearing, the Court entertained arguments regarding whether Arneault likewise should be in contempt for likewise violating the March 1, 2010 Order. Appendix pp. 678-94. Judge Recht gave Arneault an opportunity to cure by allowing him to dismiss claims his counsel conceded arose from the Settlement Agreement:

THE COURT: The way to really approach that is, if that, in fact, is the case, then there should be a partial dismissal of that claim in the Western District of Pennsylvania. To be consistent with that acknowledgement, there is a concession of that, then there is just no claim, and your position is that there is nothing to be found in contempt if you have already conceded that no claim exists.

Now, the way to do that is to simply dismiss it.

Appendix p. 685. Upon learning that Arneault was going to dismiss the offending claim that very day, Judge Recht declined to find Arneault in contempt. This was in error.

Because Arneault filed an action arising from the Settlement Agreement in the Western District, Arneault violated the Circuit Court’s March 1, 2010 Order. Though he ultimately agreed to dismiss one of the claims that his counsel conceded arose out of the Settlement Agreement, Arneault still violated the Order and was in contempt at least from July 21, 2011

until January 25, 2012. Arneault cannot rob a bank and then “cure” that wrong by giving the money back. By filing the original Complaint, and subsequently the Amended Complaint, Arneault set into motion a series of events that ultimately led to the proceeding in the Circuit Court below. Arneault chose as the forum the Western District of Pennsylvania. To properly assert its interests arising out of the same contract relied upon by Arneault in the federal action, MTR filed its own action in the same forum. Further, dismissing the promissory estoppel claim does not “cure” Arneault’s violations of the Settlement Agreement. Even after dismissing the promissory estoppel claim that Judge Recht found to violate the Settlement Agreement, much of the Amended Complaint is still grounded in MTR’s duties under the Settlement Agreement, namely to provide ready access to non-privileged and non-confidential documents.

Moreover, Arneault violated the confidentiality and non-disclosure provisions of the Settlement Agreement by disclosing certain terms of the Settlement Agreement in both his original and Amended Complaint and also attaching the Settlement Agreement itself to the Amended Complaint. Appendix p. 14, ¶ 2.4; *see also* Appendix p. 692.

By first filing an action arising from the Settlement Agreement in the Western District of Pennsylvania and by violating the confidentiality provisions of the Settlement Agreement, Arneault violated the Circuit Court’s March 1, 2010 Order. The Circuit Court, therefore, erred by declining to impose a sanction of contempt upon Arneault while imposing such a sanction on herein Petitioner. Further, the Circuit Court erroneously found that Arneault’s violation would be cured by dismissing the portion of the Amended Complaint that violated the Settlement Agreement.

Judge Recht ignored this significant evidence before him when concluding that Arneault’s Related Action does not arise from the Settlement Agreement. In ignoring this

evidence, he incorrectly concluded that Arneault did not waive his right to enforce the forum selection clause in the Settlement Agreement. For these reasons, Judge Recht abused his discretion when imposing civil contempt sanctions on MTR.

F. The Circuit Court Should Have Abstained From Issuing a Ruling Until the Western District of Pennsylvania Ruled on the Same Issue

Both the Circuit Court and the United States District Court for the Western District of Pennsylvania are confronted with the question of waiver, though the underlying issues in the two cases are different. *See, e.g.* Appendix, MTR's Response in Opposition to Arneault's Motion to Dismiss MTR's Complaint, pp. 593-61; Transcript of November 21, 2011 Hearing, pp. 408, 481, 486, 502, 512-12, 536-37. The Circuit Court erred by declining to abstain from ruling until after the federal court issued its ruling.

Herein petitioner raised the abstention issue before the Circuit Court in its Motion to Stay and at the Rule to Show Cause Hearing on January 25, 2012. Appendix, pp. 664, 693. On April 16, 2012, the federal court heard oral argument on, *inter alia*, the question of waiver and should issue a ruling in the near future. Arneault has not objected to the federal court deciding this issue, nor has he objected to the federal court for making such a determination. To the contrary, he has expressly requested the federal court to decide this issue by raising same in his Motion to Dismiss MTR's Complaint.

Based on principles of deference to a pending federal proceeding and judicial economy, the Circuit Court should have postponed its January 25, 2012 hearing pending the federal court's resolution of issues in the federal action. Such a postponement creates the least interference with judicial proceedings and least likelihood of inconsistent rulings. Appendix p. 568.

At the hearing, Arneault argued for the application of the forum selection clause based on West Virginia law, citing the *Caperton* case out of the West Virginia Supreme Court. However,

in a federal diversity case, the procedural issue of venue is determined by federal law. *Jumara*, 55 F.3d at 877.⁴ By issuing a ruling based on West Virginia law, the Circuit Court created the risk that the United States District Court for the Western District of Pennsylvania will issue a different ruling under federal venue law.

The Circuit Court also should have abstained from issuing a ruling based on the principles of judicial economy. Though no rule of procedure governs a motion to stay a proceeding, courts have authority to decide such motions under their general equity powers and generally look to principles of judicial economy and prejudice to the parties when deciding such a motion. *See CSX Transport, Inc. v. Gilikson*, No. 5:05CV202, 2009 WL 1587236, at * 2 (N.D. W.Va. June 5, 2009) (citing *Wilford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983)); *see also Bernardo v. Eastern Associated Coal, LLC*, No. 1:08CV221, 2009 WL 564445, *1 (N.D. W.Va. March 3, 2009). Based on principles of judicial economy, the Circuit Court should have deferred to the federal proceeding prior to issuing its ruling. Moreover, abstaining from ruling would not have prejudiced either party. Both parties are on record agreeing that the issue of whether the forum selection clause has been waived, thereby discharging the parties' duties agreement (as the Settlement Agreement expressly permits), be decided by the federal court. Further, the federal court indicated that it will be deciding the issue in the fairly near future.

The Circuit Court has risked the potential of inconsistent rulings. The federal court could conceivably reach the exact opposite result, finding based on federal law that Arneault's action arises from the Settlement Agreement and, therefore, Arneault waived his right to enforce the forum selection clause. Had the Circuit Court abstained, it would have avoided this risk and

⁴ In any event in the *Caperton* case, the court was interpreting Virginia law, based on a Virginia forum selection clause, but adopted the federal procedural approach set forth by the United States Court of Appeals for the Second Circuit in *Phillips*, 494 F.3d at 378.

confirmed that to which both parties agreed, that the United States District Court for the Western District of Pennsylvania decide these issues.

VI. Conclusion

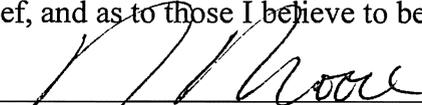
For the foregoing reasons, the Circuit Court abused its discretion in finding MTR in contempt. Further, the factual findings were clearly erroneous and contrary to the Circuit Court's other factual findings, to wit, that Arneault did file a claim which arose from the Settlement Agreement. Finally, the questions of law (non-waiver) are entitled to *de novo* review.

WHEREFORE, the Petitioner prays for the following relief:

- a. That this Petition for Writ of Prohibition be accepted for filing;
- b. That this Honorable Court issue a rule to show cause against the Respondent directing him to show cause as to why a Writ of Prohibition should not be awarded against them;
- c. That enforcement of the Circuit Court's Civil Contempt Order be stayed in the underlying action, Civil Action No. 09-C-175R
- d. That this Honorable Court issue a Writ of Prohibition against the Respondent directing the Circuit Court to vacate its Findings of Fact and Conclusions of Law finding Petitioner in contempt; and
- e. Such other relief as this Honorable Court deems necessary, appropriate and proper.

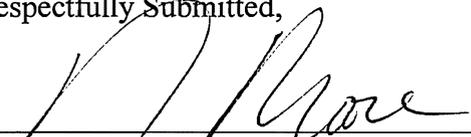
VII. Verification

I, Rochelle L. Moore, hereby declare, under penalty of perjury under the laws of the State of West Virginia, that I have read the above Petition and I know it is true of my own knowledge, except to those things stated upon information and belief, and as to those I believe to be true.



Rochelle L. Moore, Esq.
Declarant

Respectfully Submitted,



ROBERT J. D'ANNIBALLE, JR., ESQ. (WV ID # 920)
ROCHELLE L. MOORE, ESQ. (WV ID # 8908)

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Email: RJD@Pietragallo.com
Counsel for Petitioner

CERTIFICATE OF SERVICE AND
MEMORANDUM OF PERSONS TO BE SERVED

I do hereby certify that on this 15th day of June, 2012, I served the foregoing **Petition for Writ of Prohibition and Appendix** by U.S. first-class mail as set forth below. The Court's Rule to Show Cause should be served on these same parties at the addresses set forth below:

The Honorable Arthur M. Recht
Ohio County Courthouse
1500 Chapline Street, Room 503
Wheeling WV 26003

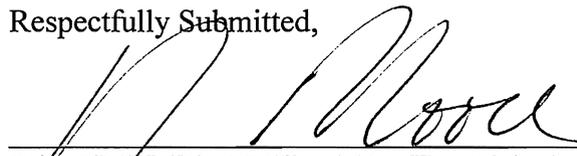
Respondent

Daniel J. Guida, Esq.
3374 Main Street
Weirton, WV 26062

Robert P. Fitzsimmons, Esq.
Fitzsimmons Law Offices
1609 Warwood Avenue
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Attorneys for Respondent, Edson R. Arneault

Respectfully Submitted,



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