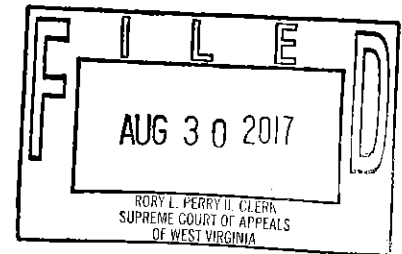


STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS



KIRK TRUCKING CO., INC.,

Plaintiff/Respondent,

v.

Case No. 17-BCD-32  
Mingo. Co. Cir. Ct. Civil Action No. 09-C-46  
Judge Below: Hon. Miki Thompson

MACK TRUCKS, INC., a foreign corporation,  
and WORLDWIDE EQUIPMENT, INC.,  
a foreign corporation; GLEN WEBB, as an agent  
and general manager of WORLDWIDE EQUIPMENT, INC.,  
and RODNEY HUNT, as an agent and sales associate of  
WORLDWIDE EQUIPMENT, INC.,

Defendants/Movants.

DEFENDANTS' MOTION TO REFER THIS CIVIL ACTION TO THE BUSINESS COURT DIVISION

COME NOW the Defendants, by counsel, Harry F. Bell, Jr. and the Bell Law Firm, PLLC, and Mark E. Troy, and the Troy Law Firm, PLLC, and pursuant to *Rule 29* of the *West Virginia Trial Court Rules* hereby request the referral of this civil action to the Business Court Division, Region D. In support of this motion, the Defendants provide the following:

Background

This action arises out of the sale of commercial trucks manufactured by Defendant, Mack Trucks, Inc., and sold by Defendant Worldwide Equipment, Inc., to Plaintiff, Kirk Trucking Co., Inc. Kirk Trucking is a West Virginia Corporation that operates a fleet of heavy trucks used, among other things, for the hauling of coal.

In its Complaint, Kirk Trucking contends that it purchased from Defendants twenty-one trucks with a total purchase price of well over four million dollars. Kirk Trucking contends that the subject trucks were defective and asserts claims for breach of express warranties and of the implied warranties of merchantability and fitness for a particular purpose. See

**“Complaint,” attached hereto as Exhibit 1.** Kirk Trucking seeks to revoke acceptance of the trucks and to recover damages, including lost profits and other consequential damages. *Id.* The Defendants filed a timely Answer with affirmative defenses, denying any liability to the Plaintiff herein. **See Exhibit 2.**

In 2012 the Defendants moved for summary judgment on certain of the Plaintiff's claims. **See Exhibit 3.** A supplemental motion for summary judgment was filed by Defendants in October of 2016, raising issues both as to liability and damages. **See Exhibit 4.** The Plaintiff served its “Response and Objection in Opposition to Defendants’ Motion for Partial Summary Judgment” on January 22, 2013, and it served its “Response to Defendants’ Supplemental Motion for Summary Judgment” on November 29, 2016. **See Exhibits 5 and 6.**

Both of the aforementioned dispositive motions were set for hearing on December 1, 2016. At that hearing, Plaintiff’s counsel agreed on the record to limit Plaintiff’s claims to a claim for breach of express warranty involving just four (4) Mack Trucks. This stipulation effectively mooted many of Defendants’ pending motions on the issue of liability. Remaining to be decided were Defendants’ pending motions on the liability issue, i.e., whether Plaintiff had effectively revoked acceptance, and also a damages issue, i.e. whether the waiver of consequential damages in Defendants’ sales documents were enforceable and precluded Plaintiff from recovering such damages in this case.

A hearing was held on these two limited issues on March 14, 2017. Thereafter, an Order denying the liability aspect of the Defendants’ dispositive motions was entered on June 7, 2017. **See Exhibit 7.** The Court has not yet issued a ruling on the damages aspect of the Defendants’ dispositive motions, and it has yet to reschedule the trial or pretrial dates (or any other dates or deadlines) following a recent continuance of the trial and setting aside of the previously-entered Scheduling Order.

## Argument

The Defendants now move for the referral of this matter to the Business Court Division for further proceedings and resolution, pursuant to **Rule 29** of the **West Virginia Trial Court**

**Rules**. As the Court is well-aware, *T.C.R., Rule 29.06* provides in pertinent part that:

Any party...may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division. The motion shall identify the nature of the action(s) sought to be referred, the basis for the request and, if known, whether additional related actions are pending or may be filed in the future.

**Rule 29.04** of the **Trial Court Rules** goes on to define “Business Litigation” as one or more pending actions in Circuit Court in which:

A. the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

B. the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

C. the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

As is apparent in the attached documents, this case is strictly a U.C.C.-based civil case, involving significant commercial transactions between business entities. The Plaintiff's Complaint raises claims under “**West Virginia's Uniform Commercial Code**, including but not limited to **W.Va. Code § 46-2-313** [express warranties], -314 [implied warranty:

merchantability], -315 [implied warranty: fitness for particular purpose],...” and -608 [revocation of acceptance]. The Defendants’ dispositive motions and Plaintiff’s responses thereto also raise issues related to the following *Code* sections: *W.Va. Code § 46-2-711* [buyer’s remedies in general]; -714 [buyer’s damages for breach]; -715 [buyer’s incidental and consequential damages]; and -302 [unconscionable contract or clause].<sup>1</sup>

This is a single action, and no other related cases are pending or are anticipated. The dispute presents commercial issues (i.e., under the U.C.C.) in which specialized treatment will improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with the U.C.C.-based legal principles that are applicable. As stated in the “Defendants’ Motion to Disqualify the Honorable Judge Miki Thompson,” filed contemporaneously herewith, Judge Thompson has noted at least once in this matter that she is “not well-versed” on the UCC-based laws applicable to this case. See Exhibit 8. Accordingly, and in light of the fact that specialized treatment will improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with the U.C.C.-based legal principles that are applicable, the Defendants assert that this matter is appropriate for referral to the Business Court Division, Region D, that good cause exists for such referral, and that this motion for such referral should, thus, be granted.

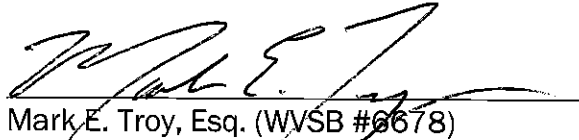
**WHEREFORE** the Defendants assert that this civil action should be referred to the Business Court Division, Region D, pursuant to *Rule 29* of the *West Virginia Trial Court Rules*.

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<sup>1</sup> Again, the Plaintiff stipulated on the record, at the December 2016 hearing, that it would limit its claims to only four of the twenty-one commercial trucks previously identified in the Complaint. Nonetheless, the claims and defenses related to those four trucks remain the same.

The Defendants request the right to supplement this motion through an evidentiary hearing if deemed necessary to or beneficial by the Chief Justice. Respectfully submitted,

MACK TRUCKS, INCORPORATED,  
WORLDWIDE EQUIPMENT, INCORPORATED,  
GLEN WEBB and RODNEY HUNT,  
By Counsel,



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CERTIFICATE OF SERVICE

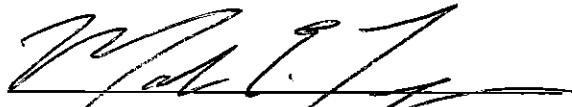
I, Mark E. Troy, hereby certify that a true and correct copy of the foregoing  
"DEFENDANTS' MOTION TO REFER THIS CIVIL ACTION TO THE BUSINESS COURT DIVISION,"  
has been served upon the following, via First Class United States Mail, postage prepaid, on this  
the 29<sup>th</sup> day of August, 2017, to:

Greg K. Smith, Esq.  
Law Offices of Greg K. Smith  
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*Counsel for Plaintiff/Respondent*

Lonnie Hannah, Clerk  
Mingo County Circuit Court  
P.O. Box 435  
75 East Second Avenue  
Williamson, WV 25661

Hon. Mikki Thompson, Judge  
Mingo County Circuit Court  
P.O. Box 1198  
75 East Second Avenue  
Williamson, WV 25661

Carol A. Miller, Executive Director  
Berkeley County Judicial Center  
Business Court Division  
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