

**IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA**

**KIRK TRUCKING CO., INC.,  
PLAINTIFF,**

**vs.**

**CIVIL ACTION NO: 09-C-46  
HON. MIKI THOMPSON**

Admitted to Record  
2017 SEP -6 AM 10:03  
Mingo County Circuit Court

**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.**

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REFER  
THIS CIVIL ACTION TO THE BUSINESS COURT DIVISION**

COMES NOW the Plaintiff, Kirk Trucking Co., Inc., by and through counsel, Greg K. Smith and the Law Office of Greg K. Smith, and for its Response to Defendants' Motion to Refer this Civil Action to the Business Court Division, states and alleges as follows, to-wit:

1. This matter has been pending before the Mingo County Circuit Court since February 12, 2009.
2. That this matter has been rescheduled and stayed numerous times throughout its pendency.
3. That this matter was most recently scheduled for a jury trial on August 16, 2017, when the Court continued the matter due to a scheduling conflict.
4. That this matter originally was very complex litigation and involved a dispute over twenty-one (21) Mack Trucks, and various allegations of violations of expressed and implied warranties, however as the Defendants stipulated in the background paragraph of their Motion to Refer this Civil Action to the Business Court Division, the only issues remaining in the matter is whether the Defendants violated Mack's Express Warranty with regards to four (4) GU 713 trucks, and the Plaintiff's damages.
5. West Virginia Trial Court Rule 29.04 (B) defines "Business Litigation" in part as one or more pending actions in Circuit Court which:

"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 law or legal principles that may be applicable”

6. This is not a matter that presents commercial issues which require specialized treatment to improve the expectation of a fair and reasonable resolution.
7. The Defendants acknowledge that the only issues remaining to be decided is the liability issue, i.e., whether Plaintiff had effectively revoked acceptance, i.e., whether the Defendants violated their express warranty, and also a damages issue, i.e. whether the waiver of consequential damages in Defendants’ sales documents were enforceable and precluded Plaintiff from recovering consequential damages in this case.
8. The West Virginia Supreme Court has issued a decision in ***Appalachian Leasing, Inc., v. Mack Trucks, Inc., et al.***, W.Va. S.E.2d 223 (2014). A case which both parties agree is “on all fours” with the case *sub judice*.
9. Defendants counsel Harry F. Bell, Jr., and the Bell Law Firm, PLLC were involved in ***Appalachian Leasing*** which was litigated in the Mercer County Circuit Court.
10. Defendants and their counsel Harry F. Bell, Jr. have experience litigating the issues in this matter in West Virginia Circuit Courts, and given the fact that a case which is “on all fours” the same as the matter currently pending before the Mingo County Circuit Court eliminates the argument that this matter should be sent to the Business Court Division.
11. West Virginia Circuit Courts have heard the exact same matters between substantially similar parties before, therefore the Defendants argument is nothing more than a tactic to remove the matter out of the Circuit Court, and away from a Mingo County jury.
12. Not only does ***Appalachian Leasing*** involve the same Defendant and Defense attorney as this matter; it also involves the same number of Mack Trucks, the same “Pedigreed Protection Plan” which is known as Mack’s “Standard Warranty”, the same disclaimers, the same arguments, the same legal issues, and the same question about damages.
13. Further, the West Virginia Supreme Court has provided a guide with their ruling in ***Appalachian Leasing*** which a Circuit Court can use to better understand the issues at hand.
14. That the Plaintiff would be highly prejudiced by a change of venue in the matter based upon the fact that the Plaintiff’s principal place of business is in Mingo County and the vast majority of it’s witnesses reside in Mingo County.

WHEREFORE, the Plaintiff asserts that this matter should not be referred to the Business Court Division because there are no issues pending before the Court that other Circuit Courts in West Virginia have not handled before.

**KIRK TRUCKING CO., INC.,  
PLAINTIFF,**

BY: 

\_\_\_\_\_  
OF COUNSEL

**GREG K. SMITH, ESQ. (ID NO: 7229)**  
*Law Office of Greg K. Smith*  
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**CERTIFICATE OF SERVICE**

I, Greg K. Smith, Counsel for the Plaintiff, do hereby certify that I served a true and exact copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REFER THIS CIVIL ACTION TO THE BUSINESS COURT DIVISION**, by depositing the same in the United States Mail, postage properly paid and addressed to the following, to-wit:

Mark E. Troy, Esq.  
Troy Law Firm, PLLC  
222 Capitol Street, Suite 200A  
Charleston, WV 25301  
*Counsel for the Defendants*

Carol A. Miller, Executive Director  
Berkeley County Judicial Center  
Business Court Division  
Suite 2100  
380 W. South Street  
Martinsburg, WV 25401

Harry F. Bell, Jr., Esq.  
The Bell Law Firm, PLLC  
P.O. Box 1723  
Charleston, WV 25326  
*Counsel for the Defendants*

Hon. Miki Thompson, Judge  
Mingo County Courthouse  
P.O. Box 1198  
Williamson, WV 25661

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

Rory L. Perry II, Clerk of Court  
Supreme Court of Appeals of WV  
*Office of the Clerk*  
State Capitol, Room E-317  
Charleston, WV 25305

Dated this the 5 day of September, 2017.

**GREG K. SMITH, ESQ. (ID NO: 7229)**  
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