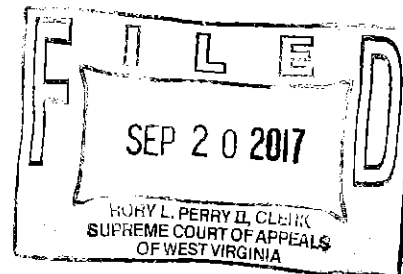




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September 18, 2017

Rory L. Perry II, Clerk of Court  
West Virginia Supreme Court of Appeals  
State Capitol Room E-317  
1900 Kanawha Blvd. East  
Charleston, WV 25305



Re: **Kirk Trucking Co., Inc. v. Mack Trucks, Inc., et al.**  
**WVSCA Case No. \_\_\_\_\_**  
**Mingo Co. Cir. Ct. Civil Action No. 09-C-46**  
**Judge Below: Hon. Miki Thompson**

Dear Mr. Perry:

Enclosed for filing in the above-referenced matter please find the ***"Defendants' Reply to Plaintiff's Response to Defendants' Motion to Refer this Civil Action to the Business Court Division."*** A copy has, this day, been served upon all counsel of record, as well as the Circuit Clerk, Judge Thompson and also Ms. Miller, the Business Court Executive Director.

Thank you for your attention to this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

Sincerely,

  
MARK E. TROY

Enclosure as stated.

cc: Randall Reavis, Esq.  
Irvin Dotson  
Harry F. Bell, Jr., Esq.  
Hon. Miki J. Thompson  
Greg Smith, Esq.  
Lonnie Hannah, Clerk  
Carol A. Miller

STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS

KIRK TRUCKING CO., INC.,

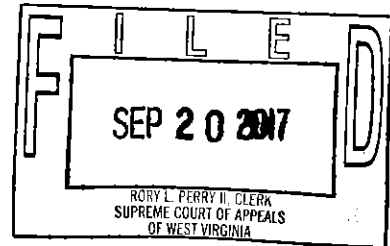
Plaintiff/Respondent,

v.

Case No. \_\_\_\_\_  
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' RESPONSE TO PLAINTIFF'S REPLY TO 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 for their reply to the "Plaintiff's Response to the Defendants' Motion to Refer this Civil Action to the Business Court Division" provide the following:

In its reply to the "Defendants' Motion to Refer this Civil Action to the Business Court Division," the Plaintiff essentially asserts three arguments: (a) that this case "was originally very complex litigation and involved a dispute over twenty-one Mack trucks, and various allegations of express and implied warranties," but now involves just four trucks and the applicability of express warranties; (2) that Defense counsel, Harry Bell, is well-versed in business litigation and should not see the case *sub judice* as particularly challenging or complex; and (3) the Plaintiff will be prejudiced if this matter is litigated in Martinsburg where the Business Court Executive Director is located. The Plaintiff also notes that this case has

been delayed many times since its filing, though this does not appear to be asserted as a basis for denying Defendants' motion; mostly likely because this case has been consistently delayed/continued at Plaintiff's request, and most extensively by the Plaintiff's bankruptcy filing.

Turning to the Plaintiff's three stated arguments for denying Plaintiff's motion, it is clear that two of such arguments are completely inapplicable. First, the assertion that the Plaintiff would be prejudiced by moving the trial of this case to Martinsburg is directly addressed by *W.V.T.C.R., Rule 29.08(e)* which states that: "The Presiding Judge may schedule conferences, motions, mediation, pretrial hearings, and trials in any circuit courtroom within the Assignment Region, with due consideration for the convenience of the parties." As this was filed as a Mingo County Civil Action it would, presumably, be assigned to Region D which would allow for all proceedings to continue to be held in Mingo County.

With regard to the Plaintiff's argument that referral to the Business Court is not justified because defense counsel, Harry Bell, is well-versed in business litigation, a quick reference to the Trial Court Rules relating to the Business Court Division quickly establishes that such consideration has absolutely nothing to do with a motion to refer a case to such Court and, thus, is irrelevant. The decision as to whether or not a case should be referred to the Business Court is to be made pursuant to *Rule 29.04* of the *West Virginia Trial Court Rules* which defines "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

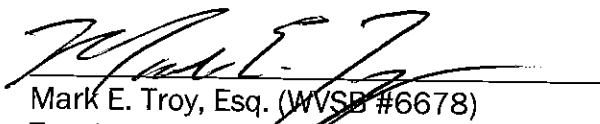
C. the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to 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.

Examining this *Rule* in relation to the Plaintiff's one potentially relevant argument that this case does not constitute "complex business litigation" because the number of vehicles in question has been reduced from twenty-one to four, it is important to note that the Plaintiff's claims relative to these four trucks are essentially the same as they were relative to the original twenty-one trucks (the only difference being that the "implied warranty" claims asserted in the Complaint have since been abandoned by Plaintiff). Moreover, revocation of acceptance claim is, per the Plaintiff, valued at over \$700,000, and Plaintiff is continuing to seek lost profits totaling millions of dollars. Even reduced to 4 trucks, this is clearly a case which involves: (a) "matters of significance to the transactions, operations, or governance between business entities;" and (b) complex/technical issues under the UCC that deserve the attention and expertise of the business court. The Uniform Commercial Code should be interpreted uniformly, and the Business Court is the ideal forum to ensure the same. Accordingly, the Defendants continue to assert that the case *sub judice* is one 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 [UCC]...principles that are be applicable" and, thus, they continue to assert that their motion for referral to the Business Court Division is appropriate and should 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*.

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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