

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DAVID L. HENZLER,
Plaintiff,

v.

TURNOUTZ, LLC and,
LARRY MARKHAM,
Defendants.

Civil Action No. 16-C-1580
Judge James C. Stucky

FILED

2018 MAY -7 A 9:57

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On the 18th day of December, 2017, this matter came before the Court for hearing on the Defendants, Turnoutz, LLC and Larry Markham's, motion to dismiss and/or motion for summary judgment, which was previously filed with this Court pursuant to Rule 56 of the W.Va. Rules of Civil Procedure. The Defendants moved this Honorable Court to enter summary judgment against the Plaintiff, David L. Henzler, and in favor of the Defendants, dismissing the plaintiff's complaint with prejudice. The Defendants' also filed documentary exhibits, separately and under seal, numbered Exhibits A-H in support of their motion, which included a Severance and General Release Agreement signed by the Plaintiff, David L. Henzler as Exhibit A, and additional exhibits representing the discovery exchanged between the parties to date.

Prior to hearing, on or about December 14, 2017, the Plaintiff filed a responsive pleading to the Defendants motion entitled "Plaintiff's Response to Defendants' Motion to Dismiss and/or for Summary Judgment," and the Court has considered the same.

Present at the hearing was the Plaintiff, David L. Henzler, in person, and with counsel Paul L. Frampton, Jr., and the Defendants, Larry Markham in person, and with counsel, and Turnoutz, LLC by counsel W. Jesse Forbes, Esq.

Whereupon, counsel for the Defendants presented argument in support of the Defendants' motion to dismiss and/or for summary judgment consistent with the Defendants' written motion,

and asserted that the Plaintiff had waived all rights to bring this age discrimination action against these Defendants due to the terms and conditions of the Severance Agreement and General Release, a contractual agreement that Plaintiff had entered, which released the Defendants, Turnoutz LLC and Larry Markham from the types of claims that Plaintiff has brought in this action. Plaintiff's counsel presented argument against said motion, asserting that the Severance and General Release Agreement was not applicable to Plaintiff's claims against the Defendants herein.

Wherefore, the Court having reviewed the Defendants' written motion, the Severance and General Release Agreement and all discovery materials submitted as exhibits in support thereof, having reviewed the Plaintiff's written response to the motion, having considered the oral arguments of counsel, and reviewed the entire record of these proceedings, and upon review of Rule 56 of the W.Va. Rules of Civil Procedure, and all applicable authorities, the Court **FINDS** that the Defendants' motion for summary judgment and to dismiss this action with prejudice should be and is hereby **GRANTED**.

WHEREFORE, the Court does hereby **ORDER, ADJUDGE, and DECREE**, the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Prior to February 2016, CST Brands, Inc., CrossAmerica Partners LP or their affiliates (including M&J Operations LLC) owned, operated and managed the One Stop convenience stores and related fuel service stations where Plaintiff worked and/or for which Plaintiff had certain responsibilities and obligations (the "One Stop Sites").

2. On or about February 24, 2016, Lehigh Gas Wholesale Services, Inc. ("LGWS/CAP"), an affiliate of CrossAmerica Partners LP, and Turnoutz amended an existing master lease agreement pursuant to which LGW/CAP agreed to lease the One Stop Sites to

Turnoutz. In turn, Turnoutz agreed to manage and operate the One Stop Sites as they were currently constructed and equipped.

3.. In addition, according to the Master Lease Agreement that was produced in discovery in this action, Lehigh Gas Wholesale LLC ("LGW/CAP"), another affiliate of CAP, and Turnoutz entered into a PMPA Franchise Agreement, Fuel Supply Agreement, Proprietary Marks Agreement and Related Agreements applicable to each of the Leased Premises.

4. The Court FINDS that the Defendants, Turnoutz, LLC and Larry Markham are successors in interest to and/or assigns, affiliates, and/or "Company Released Parties" and/or heirs of the Plaintiff's prior employer(s), Cross America Partners LP (hereinafter CAP) and/or One Stop (M & J Operations LLC) by virtue of the aforesaid contractual franchise agreements and/or contractual lease agreements and the amendments thereto, entered between Turnoutz, LLC, Lehigh Gas Wholesale Services, Inc. and/or CAP, and/or One Stop (M & J Operations), and such contractual agreements are of record in this Court.

5. The Court finds that the Master Lease Agreement and all Amendments thereto, are contractual agreements which were entered or made between the Defendants herein and the Plaintiff's previous employer(s). Such contractual agreements were produced by the Defendants to the Plaintiff in discovery, and were attached as exhibits/evidence in support of the Defendants' motion to dismiss and/or motion for summary judgment.

6. The Court FINDS that Plaintiff's own Complaint asserts and essentially admits that the Defendant Turnoutz is a successor in interest, affiliate, and/or assign of CAP, as defined by the "Severance Agreement and General Release" which Plaintiff signed as further discussed herein, wherein the Complaint asserts the existence of a lease agreement(s) entered between Turnoutz and Plaintiff's prior employer, CAP, whereby Turnoutz would lease the forty-one convenience store locations previously operated by CAP.

7. The Court FINDS that on or about April 9, 2016, the Plaintiff entered into and executed a “Severance Agreement and General Release,” (hereinafter the “Release Agreement”). The Release Agreement “irrevocably and unconditionally releases and forever discharges M&J, CST Brands, Inc. (“CST”), CrossAmerica Partners LP (f/k/a Lehigh Gas Partners LP) (“CAP”), each of their respective Affiliates, ...parents, partners, subsidiaries, divisions, assigns, predecessors, and successors (by merger, acquisition or otherwise), and the past, present, future officers, directors, ... managers, employees, agents, representatives...from any and all claims, demands, causes of actions, and liabilities of any nature, both past and present, known and unknown, resulting from any act or omission of any kind occurring on or before the date of execution of this Agreement which arise under...any federal, state or local law, regulation or ordinance.”

8. The Court FINDS that Plaintiff admitted that he signed the Settlement Agreement and General Release with M&J Operations LLC, CST Brands, Inc., Cross America Partners, LP (f/k/a Lehigh Gas Partners LP, and thereby he has released, waived and forever gave up all rights to bring the claims alleged in his Complaint against the Defendants upon his acceptance and receipt of the severance pay provided for thereunder.

9. The Court FINDS that the aforesaid Release Agreement encompasses the claims and causes of action in the instant civil action and thereby releases Turnoutz—among other things, as successor (or Company Released Parties) of M&J Operations LLC, CST Brands, Inc. and CrossAmerica Partners LP— and Larry Markham, as an officer and manager of Turnoutz, from such claims and causes of action and for any liability thereunder. Therefore, the Plaintiff's claims in this action are barred under the terms of the “Severance Agreement and General Release” Agreement, and no genuine issue of material fact exists in this litigation which would circumvent the terms and conditions by which the Plaintiff agreed to release all claims against the Defendants, as

Company Released Parties, and/or affiliates, and/or successors in interest to Plaintiff's prior employer(s).

10. The Court FINDS that under the terms of the aforesaid Severance and General Release Agreement, Plaintiff received a lump sum payment of approximately \$13,721.63 as consideration for the termination of employment and Plaintiff's "irrevocabl[e] and unconditional[] release[] and forever discharge[]" of all claims, causes of action and liabilities against all successors, assigns, affiliates, and/or heirs of M & J Operations, CST Brands, Inc. and CAP, and their respective officers, managers, employees and agents. Because Turnoutz LLC is a Company Released Party, successor in interest to and/or assign, affiliate, and/or heir of M & J Operations, CST Brands, Inc. and CAP, and Larry Markham is an officer and manager of Turnoutz, the Severance and General Release Agreement applies to these Defendants and thereby releases Turnoutz and Larry Markham from any employment related claims based on employment decisions or actions that occurred prior to the execution of that Agreement by Plaintiff, including the waiver and release of all age discrimination and other claims alleged by the Plaintiff in this action.

11. The Court FINDS that according to Plaintiff's Complaint and Plaintiff's answers to interrogatories, the alleged employment action of Defendants wherein the Defendants did not hire him occurred in March 2016. The Court FINDS that Plaintiff has admitted that he subsequently entered into the Severance and General Release Agreement in April 2016, approximately a month after the subject employment action of the Defendants of which Plaintiff complains herein.

12. The Court FINDS that the terms of the Severance and General Release Agreement, which was signed by the Plaintiff with his prior employer in return for valuable consideration clearly releases and discharges the Defendants Turnoutz, LLC and Larry Markham from any liability for any employment actions taken prior to April 2016, therefore, Plaintiff's age discrimination claims against Defendants for decisions made in March 2016 cannot be sustained.

13. The Court FINDS that the Plaintiff produced NO evidence to this Court either in its responsive pleading or at the hearing, which would relieve the Plaintiff of the legally binding terms and conditions of the Severance and General Release Agreement, which he signed and agreed to waive all employment related claims, including the type of age discrimination claims he has alleged in this action, and that under the terms, conditions, and definitions set forth in said Release Agreement, said Release Agreement is clearly applicable to the Defendants herein as Company Released Parties, affiliates, successors, or otherwise by the contractual agreements of record. Therefore, Plaintiff has forever, waived, released and discharged the Defendants Turnoutz LLC and Larry Markham from all types of employment related claims, including but not limited to the age discrimination claims he alleges in his Complaint.

14. The terms and conditions of the Severance and General Release Agreement, which Plaintiff admittedly signed, clearly released the Defendants from all the claims Plaintiff has brought against said Defendants in this litigation, and there are no genuine material facts at issue upon which a reasonable jury could render a verdict for the Plaintiff herein.

CONCLUSIONS OF LAW

1. The West Virginia Supreme Court of Appeals has made clear that when there is no real dispute as to the factual issues in a case, summary judgment is an appropriate mechanism to resolve the controversy. *Johnson v. Mavs*, 191 W.Va. 628, 630, 447 S.E.2d 563, 565 (per curiam) (1994). Further, it is well settled that a court may convert a Motion to Dismiss under Rule 12(b)(6) of the Rules of Civil Procedure to a Rule 56 Motion for Summary Judgment where there is no real dispute regarding facts or law and that a Complaint on its face does not demonstrate sufficient factual disputes such that it would survive a judgment on the pleadings. *Andrew v. Clark*, 561 F.3d 261, 267 (4th Cir. 2009) (citing *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007)). In *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), the Court held,

Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if there essentially "is no real dispute as to salient facts" or if it only involves a question of law. *Painter*, 192 W.Va. at 192 n. 5, 451 S.E.2d at 758 n. 5, quoting *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 22, 207 S.E.2d 191, 194 (1974). Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation. To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message, hereby, is modified.

2. Summary judgment should be granted where "there is no genuine issue as to any material fact and ...[the movant] is entitled to a judgment as a matter of law." W.Va. R.Civ.P. 56(c). A "genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." Syl. Pt. 5 (in part), *Kelley v. City of Williamson*, 655 S.E.2d 528, 530 (W.Va. 2007). Where "there is no evidence to support the non-movant's case and...the evidence is so one-sided that the movant must prevail as a matter of law," summary judgment is appropriate. *Calhoun v. Traylor*, 624 S.E.2d 501, 504 (W.Va. 2005) (internal quotations and citation omitted).

3. When considering a motion for summary judgment, a reviewing court must look at the evidence, and in assessing the motion at the 12(b)(6) stage, take all factual inferences in favor of the non-moving party, and determine whether given the evidence presented the non-moving party may prove any set of facts that would support the claims. Essentially, the inquiry becomes are there any factual disputes that must be resolved or are the claims ripe for determination on the pleadings.

4. In assessing motions for summary judgment, The West Virginia Supreme Court of Appeals has determined,

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavey*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994).

“The essence of the court’s inquiry on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, (W.Va. 2003).

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law.” *Syl. Pt. 2, Painter v. Peavey*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994), *citing Syllabus Point 3, Aetna Casualty & Surety Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963) and *citing Syllabus Point 1, Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Summary judgment is proper where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. West Virginia Rules of Civil Procedure 56(c), *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994), *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995), *Jividen v. Law*, 461 S.E.2d 451 (W.Va. 1995), *Powderidge Unit Owners Ass’n. V. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996); *Dawson v. Norfolk & W. Ry.*, 197 W.Va. 10, 475 S.E.2d 10 (1996); *Greenfield v. Schmidt Baking Co.*, 485 S.E.2d 391 (W.Va. 1997).

“ ‘[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ *Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).” See also, *Syl. Pt. 1, Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329(1995).

5. It is well settled that “settlements are highly regarded and scrupulously enforced, so long as they are legally sound.” *DeVane v. Kennedy*, 519 S.E.2d 622, 637 (W.Va. 1999). Because “[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[,]...it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.” *Syl. pt. 1, Sanders v. Roselawn Mem’l Gardens*, 159 S.E.2d 784 (W.Va. 1968).

6. To be entitled to summary judgment in an employment discrimination context, an employer must persuade court that even if all inferences that could reasonably be drawn from evidentiary materials of record were viewed in light most favorable to employee, no reasonable jury could find for employee. *Conrad v. ARA Szabo*, 480 S.E.2d 801, 198 W.Va. 362 (1996).

7. Pursuant to the "Severance Agreement and General Release" admittedly signed by Plaintiff, and the severance package and payments he accepted in exchange, Plaintiff has released all claims against the Defendants under the terms and conditions thereof, as follows:

"Employee hereby irrevocably and unconditionally releases and forever discharges M&J, CST Brands, Inc. ("CST"), CrossAmerica Partners LP (f/k/a Lehigh Gas Partners LP) ("CAP"), each of their respective Affiliates (as hereinafter defined) parents, partners, subsidiaries, divisions, assigns, predecessors, and successors (by merger, acquisition or otherwise), and the past, present and future officers, directors, trustees, partners, shareholders, managers, employees, agents, representatives, volunteers, consultants, insurers and attorneys of and for each of the foregoing, and their respective heirs, executors, administrators, legal representatives and assigns (hereinafter referred to as the "Company Released Parties") from any and all claims, demands, causes of actions, and liabilities of any nature, both past and present, known and unknown, resulting from any act or omission of any kind occurring on or before the date of execution of this Agreement which arise under...any federal, state or local law, regulation or ordinance." (See Exhibit A, § 2.2, et seq.)

8. The "Severance Agreement and General Release" specifically defines the term "Affiliate" as follows: "'Affiliate" is a person or entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person or entity specified."

9. § 2.3 of the "Severance Agreement and General Release," in pertinent part, specifically bars the claims asserted in Plaintiff's Complaint, as the conditions of the aforesaid section thereof provides as follows:

2.3 Employee additionally hereby irrevocably and unconditionally releases and forever discharges Company Released Parties from any and all claims, demands, causes of action and liabilities arising out of or in any way connected with, directly or indirectly, Employee's employment with M&J or any incident thereof,

including, without limitation, his treatment by M&J or any other person, the terms and conditions of his employment, and any and all possible state or federal statutory and/or common law claims, including but not limited to:

(a) All claims which he might have arising under Title VII of the Civil Rights Act of 1964, as amended; ...the Age Discrimination in Employment Act, as amended; the Older Worker Benefit Protection Act of 1990; the West Virginia Human Rights Act and any other applicable West Virginia law; ...the retaliation provisions of the Labor Laws of West Virginia...

...

(d) All other claims, whether based on contract, tort (personal injury), or statute arising from Employee's employment, the separation from that employment, or any investigation and/or interview conducted by or on behalf of M&J.

10. The Plaintiff voluntarily signed a release agreement with his prior employer in return for valuable consideration, which released all successors, assigns, "Company Released Parties", affiliates, heirs or otherwise contractually related entities of his prior employer.

11. Turnoutz, LLC and Larry Markham are Company Released Parties, affiliates, successors, franchisees, and contractually related parties of Plaintiff's prior employer(s) according to the terms, definitions and conditions in the Release Agreement signed by Plaintiff which released all claims against such entities. Therefore, Plaintiff's Complaint, and each purported cause of action alleged therein, is barred by the actions of Plaintiff which amount to and constitute waiver and release of any right or rights that Plaintiff may have had in relation to any matters alleged in the Complaint; and no genuine issues of material fact exist for trial.

12. Plaintiff waived any and all rights to assert any employment related claims against the Defendants herein, as the Defendants are successors, affiliates, assigns, heirs and/or "Company Released Parties" of the Plaintiff's prior employer under the terms and conditions of the "Severance Agreement and General Release" a legally binding contractual agreement that Plaintiff voluntarily signed.

13. The Plaintiff is prohibited from asserting any of the claims asserted in his Complaint against the Defendants herein by the terms and conditions of the "Severance Agreement and General Release" that Plaintiff signed, which clearly releases the Defendants from all liability for the claims asserted herein. Thus, no genuine issue of material fact remains upon which any rational trier of fact could find in favor of the Plaintiff, and the Plaintiff's Complaint fails to state a claim upon which relief can be granted.

14. There is no dispute before this Court that Plaintiff voluntarily entered into the Severance Agreement and General Release, which conclusively bars all Plaintiff's claims and causes of action that he has asserted in his Complaint.

15. In the instant case, the Defendants are clearly entitled to summary judgment, as no reasonable or rational jury could find in favor of the Plaintiff, and as all evidence favors the Defendants, due to the terms and conditions of the "Severance Agreement and General Release" with Plaintiff's prior employer(s) that Plaintiff accepted for valuable consideration, which Release Agreement clearly contemplated that the claims made by the Plaintiff in the case at bar were forever released and discharged against these Defendants as successors, affiliates, and/or otherwise as "Company Released Parties" as defined therein.

16. Due to Plaintiff's admission, signature, acceptance of valuable consideration and his agreement to be legally bound by the terms and conditions of the "Severance Agreement and General Release," there is absolutely no evidence to support the Plaintiff's case, therefore, no genuine issues of material fact remain to be tried as to the Plaintiff's claims against the Defendants in this matter.

17. The Severance Agreement and General Release provided substantial and valuable consideration to the Plaintiff for the release of all claims such as the ones made against the

Defendants herein. The agreement is legally sound, lawfully binding, and must be upheld and enforced by this Court by granting the Defendants' motion for summary judgment herein.

18. The Defendants' Rule 12(b)(6) motion to dismiss herein, should be and is hereby converted to a Rule 56 motion for summary judgment as the Plaintiff's acceptance of valuable consideration in return for his execution of the Severance and General Release Agreement in April 2016, one month after the Defendants' subject employment action, released and discharged these Defendants from any liability for any employment actions taken prior to April 2016; therefore, Plaintiff's age discrimination claims against Defendants for decisions made in March 2016 cannot be sustained in this litigation and no genuine issue of any material fact exists related to the application of the Severance and General Release Agreement to Plaintiff's claims against the Defendants, and the terms and conditions of the release agreement constitute undisputed facts upon which the Defendants are entitled to summary judgment as a matter of law.

19. Therefore, the Defendants are entitled to the entry of summary judgment as a matter of law against said Plaintiff which dismisses this action with prejudice.

CONCLUSION

WHEREFORE, the Court hereby **ORDERS** that summary judgment is hereby **GRANTED** in favor of Defendants, Turnoutz, LLC and Larry Markham and against the Plaintiff, David L. Henzler, and the Plaintiff's Complaint is hereby **DISMISSED** with prejudice.

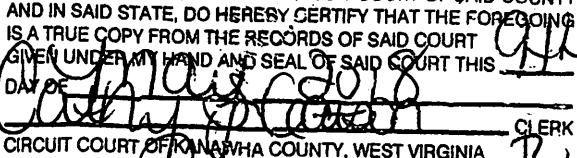
The Court hereby notes Plaintiff's objections and exceptions to the Court's Order.

The Court further hereby **ORDERS** the Clerk to remove this action from the active docket of the Court, and to send a certified copy of this Order to counsel of record for all parties.

Entered this 7th day of May, 2018.

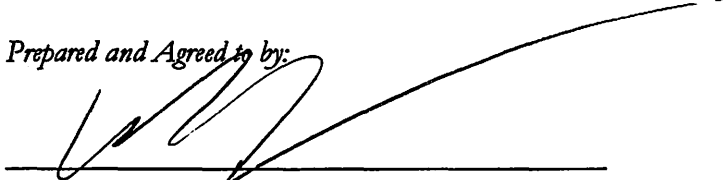


THE HONORABLE JAMES C. STUCKY
JUDGE 13TH JUDICIAL CIRCUIT

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7th
DAY OF May, 2018.

CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

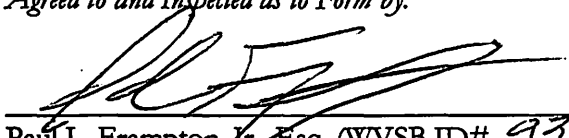
nan W. Forbes Stucky

Prepared and Agreed to by:



W. Jesse Forbes, Esquire (WVSB ID# 9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
Counsel for the Defendants

Agreed to and Inspected as to Form by:



Paul L. Frampton, Jr., Esq. (WVSB ID# 9340)
ATKINSON & POLAK, PLLC
P.O. Box 549
Charleston, WV 25322-0549
Counsel for Plaintiff, David Henzler