**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**JAMES K. ABCOUWER,**

**Plaintiff,**

**v.**

**Circuit Court of Kanawha County**
**Civil Action No. 13-C-56**
**Honorable Carrie L. Webster**

**TRANS ENERGY, INC.,**
**a foreign corporation,**
**WILLIAM F. WOODBURN,**
**and LOREN E. BAGLEY,**

**Defendants.**

## PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO REFER TO THE BUSINESS COURT DIVISION

Now comes plaintiff, James K. Abcouwer, and asserts the following in opposition to the Defendants' motion to refer this case to the Business Court Division. Contrary to Defendants' arguments, this case does not involve matters of significance to transactions or operations between business entities, or involve complex commercial issues requiring specialized treatment. Instead, this case involves claims between an individual, Mr. Abcouwer, and two individual officers of Trans Energy, Defendants Woodburn and Bagley, concerning a private agreement made by Woodburn and Bagley in order to induce Mr. Abcouwer to enter into an employment agreement with Trans Energy. Mr. Abcouwer resigned from his position with Trans Energy in 2010. Not only does a simple agreement to vote to sell the company if a certain price per share can be reached not present any "complex commercial issues" requiring special treatment, the agreement was made to induce Mr. Abcouwer to enter into an employment agreement with Trans Energy, bringing the litigation into the type of "employee suit" exempted from reference to the Business

Court Division by Rule 29.04(c) of the West Virginia Trial Court Rules. Moreover, this matter has been pending in the Circuit Court of Kanawha County, West Virginia since 2013 – while Defendants' motion may have been filed after time to answer the complaint expired, as required by Rule 29, that does not make it timely.

This case does not involve "matters of significance to the transactions, operations, or governance between business entities" as asserted by Defendants. At its heart, this matter involves a private agreement between three individuals; Abcouwer, Woodburn, and Bagley. In fact, in moving for summary judgment, Defendants argued Trans Energy (the only business entity that is a party) was not a party to the agreement. **Ex. A, at 7.**

Nor does this case involve complex commercial issues that require specialized treatment beyond what can be provided in the circuit court. Defendants' attempt to cite to the complexities of the oil and gas business is without merit. The facts at issue here do not involve 'difficult mineral rights and real property issues' cited by the Defendants, or 'complex and risky' drilling processes. The facts a jury must decide here are ordinary facts involving the existence and terms of the oral agreement between Abcouwer, Woodburn, and Bagley, and the subsequent breach of that agreement by Woodburn and Bagley.

Instead, by Defendants' own arguments, this case should be excepted from referral to the Business Court Division pursuant to Rule 29.03(a)(3) of the West Virginia Trial Court Rules as an "employee suit." Abcouwer alleges the oral agreement between himself, Woodburn, and Bagley, was made to induce him to enter into an employment agreement with Trans Energy to serve as its CEO. **Mot., Ex. A.** Defendants argue that even if the agreement existed, it was superseded by Abcouwer's *employment agreement.* **Ex. A, at 7-9.** The cases cited by Defendants to suggest that Abcouwer was not an "employee" under

Rule 29 of the West Virginia Trial Court Rules are inapposite. Whether or not a person is an "employee" under statutory definitions entirely unrelated to this matter is of no concern here. Moreover, in *Hanlon*, which was cited by Defendants to support their argument that Abcouwer was not an employee for the purposes of Rule 29, this Court found guidance in *Paxton v. Crabtree,* 184 W. Va. 217, 400 S.E.2d. 245 (1990), in which the Court reasoned that an employee was one "hired to work at [one's] direction in return for a regular salary." *Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d. 741 (1995).

Finally, while Defendants argue their motion is "timely" simply because the time to answer the complaint has passed, the motion is anything but. This case has been pending for nearly *five* years. The parties have undertaken much discovery and have just entered into a new Scheduling Order citing a need for additional discovery. **Ex. B.** Surely the case does not suddenly now require the expeditious resolution of the Business Court Division.

Plaintiff therefore respectfully opposes referral to the Business Court and asks this Court to deny Defendants' motion requesting the same.

JAMES K. ABCOUWER

By Counsel

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**Plaintiff,**

**v.**

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**TRANS ENERGY, INC.,**
**a foreign corporation,**
**WILLIAM F. WOODBURN,**
**and LOREN E. BAGLEY,**

**Defendants.**

**CERTIFICATE OF SERVICE**

I, Kimberly K. Dotson, counsel for plaintiff, do hereby certify that true and exact copies of the foregoing *Plaintiff's Response in Opposition to Defendants' Motion to Refer to the Business Court Division* were served upon:

Kevin L. Carr
Mitchell J. Rhein
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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail this 23rd day of April 2018.

Kimberly K. Dotson
West Virginia State Bar No. 9093

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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|---|---|---|
| JAMES K ABCOUWER,<br><br>Plaintiff,<br><br>v.<br><br>TRANS ENERGY, INC., a foreign corporation, WILLIAM F. WOODBURN, and LOREN E. BAGLEY,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civil Action No. 13-C-56<br>Judge Carrie L. Webster |

**DEFENDANTS TRANS ENERGY, INC., WILLIAM F. WOODBURN, AND LOREN E. BAGLEY'S MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56(b) of the West Virginia Rules of Civil Procedure, Defendants Trans Energy, Inc. ("Trans Energy"), William F. Woodburn ("Woodburn"), and Loren E. Bagley ("Bagley"; collectively with Trans Energy and Woodburn, the "Defendants") file this Memorandum Brief in Support of Motion for Summary Judgment (the "Motion") as to all claims asserted in the Complaint (the "Complaint") filed by Plaintiff James. K Abcouwer ("Abcouwer") and, in support, respectfully show the Court as follows:

## I. INTRODUCTION

Abcouwer is a former President and CEO of Trans Energy. He began his employment in January 2006 pursuant to a written employment contract between himself and Trans Energy that addressed all aspects of his employment, including various components of his compensation.

Abcouwer resigned in June 2010. Years later, he filed this litigation and asserted for the first time that (i) he, Woodburn, and Bagley had entered into a separate oral agreement shortly before he executed his written employment contract (which Abcouwer drafted), and (ii) his written employment agreement includes the terms of the oral agreement in their entirety, except a term whereby Woodburn and Bagley purportedly agreed with Abcouwer to sell Trans Energy



after its stock value increased to a certain level or higher. Based on this alleged term, Abcouwer asserts claims in this lawsuit for breach of contract, constructive fraud, and punitive damages. As shown below, however, each claim fails as a matter of law.

First, with respect to Abcouwer's breach of contract claim against Trans Energy, Abcouwer admits that Trans Energy was not even a party to the alleged oral contract. Moreover, even if Woodburn and Bagley made the representations alleged, which they did not, they did not have the authority to do so on Trans Energy's behalf.

Abcouwer's breach of contract claim further fails as to all Defendants because, under West Virginia law, it is well established that a written employment agreement supersedes any prior oral representations. Even more fundamentally, however, the terms of the oral agreement whereby Woodburn and Bagley allegedly agreed to sell the company are unenforceable because (i) the terms are too indefinite because they do not set forth the terms of a sale to which Woodburn and Bagley were allegedly required to acquiesce, and (ii) they violate public policy and applicable law by limiting Woodburn's and Bagley's business judgment and ability to perform their fiduciary duties to Trans Energy and its shareholders when voting on a potential sale of the company. Notwithstanding the foregoing, even if an agreement existed, which it did not, it was never breached, because Abcouwer never presented anything to Trans Energy's Board of Directors (the "Board") to vote on regarding a potential sale.

Abcouwer's claim for constructive fraud, which is indistinguishable from his breach of contract claim, further fails as a matter of law because the alleged oral agreement does not involve an important public policy concern, no fiduciary duty existed between Abcouwer and Defendants, and Abcouwer could not have been deceived because he admits that he at all times

understood that Defendants did not have the authority to sell the company due to the fact that any sale requires Board and shareholder approval.

Without any claim that can support compensatory damages, Abcouwer's claim for punitive damages also fails as a matter law. Therefore, Defendants are entitled to judgment as a matter of law dismissing all of Abcouwer's claims with prejudice.

## II. STATEMENT OF UNDISPUTED FACTS

In early 2005, Woodburn and Bagley began discussions with Abcouwer regarding joining Trans Energy as its Chief Executive Officer, President, and Chief of Trans Energy's Board. Complaint ¶ 6; Ex. A 11:22–12:2.[1] According to Abcouwer, he first rejected Woodburn and Bagley's offer to focus on his own oil and natural gas company. Complaint ¶ 5; Ex. A 13:4–13:15. Ultimately, however, Abcouwer asserts that he changed his mind based on an oral agreement between himself, Woodburn, and Bagley that was finalized in or about December 2005. *Id.* ¶¶ 9, 12; Ex. A 10:2–10:13, 21:10–21:17. Specifically, he asserts that Trans Energy was in significant financial difficulties, but he ultimately agreed to help revitalize the company based on him, Woodburn and Bagley agreeing to the following:

(1) Abcouwer would join Trans Energy as its CEO, President, and Chief of the Board in an effort to resurrect the company, Complaint ¶¶ 6, 8;

(2) Abcouwer would receive a salary, *see* Ex. A 26:10–26:17, 33:2–33:9, 34:1–35:7;

(3) Abcouwer would receive a cash bonus, *id.* 33:2–33:9, 34:1–35:7;

(4) the parties would structure an incentive program in addition to a salary and annual bonus that would enable Abcouwer to own a significant piece of the company, including in the form of stock grants and stock options, Complaint ¶ 9, Ex. A 15:14–15:16:, 26:10–26:17, 33:2–33:14, 34:1–35:7; and

[1] A true and correct copy of the relevant excerpts from the May 20, 2014 deposition of James K. Abcouwer is attached hereto as **Exhibit A** and incorporated by reference.

(5) if Abcouwer increased the value of Trans Energy to a certain level or higher, the company would be sold, Complaint ¶¶ 9, 12, Ex. A 10:2–10:13.

(the "Alleged Oral Agreement").

However, Abcouwer admitted during his deposition (i) that the terms of his employment with Trans Energy are expressly set forth in a written Executive Employment Agreement, dated as of January 6, 2006, between Trans Energy and Abcouwer (the "Employment Agreement"), *see* Ex. A 24:10–25:18, Ex. B-1;[2] and (ii) Abcouwer himself drafted the Employment Agreement and it expressly includes all terms of the Alleged Oral Agreement, except the alleged agreement to sell the company, *see* Exs. A 10:21–10:23, 24:10–24:12, 33:2–35:7, 36:8–36:21, B-1 §§ 3, 5.

The Employment Agreement had an initial two-year term expiring at the end of 2007, unless terminated earlier. Ex. B-1 § 1(a). From 2006 to 2010, Abcouwer drafted and executed multiple amendments to his employment agreement, and neither the amendments nor Abcouwer's correspondence to the Board regarding his requests for additional compensation ever reference the alleged oral agreement to sell Trans Energy. Exs. B-2,[3] B-3 §§ 4, 5,[4] B-4,[5] B-5,[6] B-6;[7] *see also* Ex. A 24:10–24:11, 37:14–37:15, 41:18–41:23, 45:3–45:7, 49:9–49:14, 50:15–50:17, 52:5–52:7, 52:19–52:21, 54:2–54:4, 55:8–55:14, 56:21–57:21.

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[2] The Affidavit of Scott P. Drake ("Drake Affidavit") is attached hereto as **Exhibit B.** A true and correct copy of the of the Employment Agreement is attached to the Drake Affidavit as **Exhibit B-1** and incorporated herein by reference.

[3] A true and correct copy of Abcouwer's letter to the Board, dated May 10, 2007, requesting that it extend the term of the Employment Agreement is attached to the Drake Affidavit as **Exhibit B-2** and incorporated herein by reference.

[4] A true and correct copy of the Amendment to Executive Employment Agreement, dated June 21, 2007, between Trans Energy and Abcouwer, is attached to the Drake Affidavit as **Exhibit B-3** and incorporated herein by reference.

[5] A true and correct copy of Abcouwer's letter to the Board, dated December 10, 2008, requesting that it extend the Employment Agreement is attached to the Drake Affidavit as **Exhibit B-4** and incorporated herein by reference.

[6] A true and correct copy of Abcouwer's letter to the Board, dated March 18, 2009, requesting that it extend the term of the Employment Agreement is attached to the Drake Affidavit as **Exhibit B-5** and incorporated herein by reference.

Before the expiration of the Employment Agreement's term, as extended by an Extension of the Employment Agreement, Abcouwer resigned from Trans Energy in June 2010. Complaint ¶ 21; Exs. A 139:13:–139:21, B-6. In connection with his resignation, Abcouwer sent a letter to the Board, dated June 21, 2010. *See* Ex. B-7.[8] It outlined Trans Energy's purported problems, and discussed his employment with Trans Energy. *See id.* Although Abcouwer alleges that, by this date, Defendants had breached their agreement in the Alleged Oral Agreement to sell the company (Ex. A 153:13–154:8), Abcouwer himself drafted the June 21 letter, and it does not reference the alleged breach. Ex. A 154:12–154:16; *see also* Ex. B-7.

Three months after his resignation and Defendants' alleged breach of their Alleged Oral Agreement, Abcouwer sent the Board another letter, dated September 23, 2010. Exs. A 154:1–154:8, Ex. B-8.[9] Abcouwer himself drafted the letter, and it is undisputed that the letter does not reference the alleged agreement to sell the company. Ex. A 154:1–154:11; *see also* Ex. B-8.

Further, it is undisputed that Abcouwer never (i) informed the Board or anyone else at Trans Energy of the Alleged Oral Agreement, *id.* 153:3–155:10, 164:14–164:23, or (ii) disclosed it in any filings with the U.S. Securities and Exchange Commission ("SEC"), including after his resignation while he remained a member of the Board, *id.* 163:17–164:23. In fact, to date, no written contract, letter, or document contains or references the alleged agreement to sell the company, except documents created or filed for purposes of this lawsuit. *See* Ex. A 10:21–10:23, 153:13–153:24, 164:14–164:23; *see also generally* Complaint.

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[7] A true and correct copy of the Extension of Employment Contract, back dated to January 1, 2009, between Abcouwer and Trans Energy is attached to the Drake Affidavit as **Exhibit B-6** and incorporated herein by reference.

[8] A true and correct copy of Abcouwer's letter dated June 21, 2010 is attached to the Drake Affidavit as **Exhibit B-7** and incorporated herein by reference.

[9] A true and correct copy of Abcouwer's letter dated September 23, 2010 is attached to the Drake Affidavit as **Exhibit B-8** and incorporated herein by reference.

In sum, long after the termination of Abcouwer's employment with Trans Energy, Abcouwer for the first time alleged that the Alleged Oral Agreement existed, notwithstanding the fact that he had a written employment contract with Trans Energy that includes all the terms that he alleges are part of the Alleged Oral Agreement, except a sale of the company — his alleged main consideration. Accordingly, for the reasons discussed herein, Abcouwer's attempt to avoid the express written terms of his employment contract fails as a matter of law, so the Court should grant this Motion and dismiss all causes of action in the Complaint with prejudice.

## III. SUMMARY JUDGMENT STANDARD

Pursuant to West Virginia Rules of Civil Procedure Rule 56(c), this Motion should be granted and judgment rendered forthwith for Defendants "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [Defendants are] entitled to a judgment as a matter of law."

## IV. ARGUMENT & AUTHORITIES

### A. Abcouwer's Claim for Breach of Contract Fails as a Matter of Law.

#### 1. Elements of Breach of Contract Claim

"Under West Virginia law, the elements of a claim for breach of contract are: (1) the existence of a valid, enforceable contract between the parties; (2) performance by the plaintiff; (3) breach by the defendant; and (4) injury to the plaintiff as a result of breach." *See Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 730 (S.D. W. Va. 2009) (citation omitted)." "There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement." *EurEnergy Res. Corp. v. S & A Prop. Research, LLC*, 720 S.E.2d 163, 168 (W. Va. 2011) (citations omitted).

**2. Abcouwer admitted under oath that Trans Energy is not a party to the Alleged Oral Agreement.**

Abcouwer admits throughout his deposition that Trans Energy is not a party to the Alleged Oral Agreement. Ex. A 10:14–10:20; *see also id.* 16:17–16:21, 22:12–22:20, 155:17–156:15, 157:7–157:11, 161:3–161:7. In one of multiple examples, Abcouwer stated:

> Q. Any other parties to this alleged agreement besides Mr. Bill Woodburn, Mr. Loren Bagley and yourself?
>
> A. It was the three of us that made the agreement.
>
> Q. No one else was a party to this agreement?
>
> A. No.

*Id.* 10:14–10:20. Because Abcouwer admits Trans Energy was not a party to this Alleged Oral Agreement that forms the basis of his breach of contract claim, his breach of contract claim against Trans Energy fails as a matter of law.

To the extent Abcouwer attempts to backtrack and assert that Woodburn and Bagley acted as Trans Energy's agent, such an argument fails as a matter of law because they did not have the requisite authority to represent on Trans Energy's behalf that it would agree to sell the company. *See Bluefield Supply Co. v. Frankel's Appliances*, 142 S.E.2d 898, 908 (W. Va. 1965); *Magruder v. Hagen-Ratcliff & Co.*, 50 S.E.2d 488, 494 (W. Va. 1948); *Varney v. Hutchinson Lumber & Meg. Co.*, 73 S.E. 321, 323 (W. Va. 1911).

**3. Even if the Alleged Oral Agreement existed, which it did not, it was superseded by Abcouwer's written Employment Agreement.**

Abcouwer contends that the Alleged Oral Agreement was discussed through a series of communications between him, Woodburn, and Bagley in 2005, and ultimately finalized in late December 2005. Ex. A 20:10–20:17, 21:10–21:17. Abcouwer alleges that the agreement to sell the company was the consideration that he agreed to receive for serving as CEO. Complaint ¶

12. However, almost immediately after the parties allegedly agreed to the Alleged Oral Agreement, on or about January 6, 2006, Abcouwer executed the written Employment Agreement. It contains the following provision expressly stating that it and a Long-term Incentive Plan Agreement (the "Incentive Agreement") constitute the entire agreement between the parties and supersede any prior understandings relating to his employment with Trans Energy:

> Entire Agreement. This Agreement, along with the Long-term Incentive Plan Agreement between the Executive and The Company set forth the parties' final and entire agreement, and supersede any and all prior understandings, with respect to the subject matter hereof.

Ex. B-1 § 12; *see also* Ex. A 25:10–25:13, 35:2–36:21.

It is undisputed that Abcouwer drafted the Employment Agreement and Incentive Agreement — including the foregoing clause — and that neither contain nor even reference the alleged oral agreement to sell the company. *See* Exs. A 10:21–10:23, 24:10–24:11, 36:8–36:21, B-1, B-9.[10] Moreover, Abcouwer admits that the Employment Agreement properly set forth all terms agreed to in the Alleged Oral Agreement, other than this completely undocumented "agreement" to enter into a sale transaction:

> Q. And these are all components of the compensation which you agreed to in exchange for taking on the role of CEO and president of Trans Energy in January of 2006; is that right?
>
> MR. MASTERS: Objection to form.
>
> A. These are the components that were discussed by Mr. Woodburn, Mr. Bagley and myself as part of the agreement we made.
>
> Q. Is there any other compensation or benefits which you believe was part of the agreement for you to become president, CEO, that are not detailed here in Paragraph 3 [of the Employment Agreement]?

[10] A true and correct copy of the Incentive Agreement is attached to the Drake Affidavit as **Exhibit B-9** and incorporated herein by reference.

A. None come to mind.

Ex. A 33:2–33:14.

In other words, Abcouwer's untenable position is that he memorialized the parties' entire oral agreement in the Employment Agreement, except the term whereby Defendants agreed to sell the company, his alleged primary consideration — ***notwithstanding the fact that he drafted a provision in the Employment Agreement stating that all prior understandings between the parties would be superseded and the Employment Agreement constituted the entire agreement of the parties***. Allowing a party to assert a breach of contract claim based on an alleged statement made prior to the execution of a written contract would permit a party to avoid the express terms of a written contract and defeat the purpose of a written contract. Thus, it is well established that a written contract merges all prior negotiations and representations into the contract. The Supreme Court of Appeals of West Virginia has explained:

> Mr. Marshall next asserts that various oral negotiations and representations occurred ***before*** the express, written contract was signed to show that the express, written contract was a per acre charge. However, we have long held that a written contract merges all negotiations and representations which occurred before its execution[.]

*Marshall v. Elmo Greer & Sons, Inc.*, 456 S.E.2d 554, 557 (W. Va. 1995) (citations and internal quotation marks omitted) (emphasis in original); *see also Iafolla v. Douglas Pocahontas Coal Corp.* 250 S.E.2d 128, 135 (W. Va. 1978). In fact, this rule is even more strictly applied when a contract is between sophisticated commercial parties, like here. *See Iafolla*, 250 S.E.2d at 135. Accordingly, because Abcouwer's claims are all based on alleged representations made prior to the execution of the Employment Agreement, they fail as a matter of law because such representations were superseded by and merged into the Employment Agreement. As a result, the breach of contract claim should be dismissed in its entirety.

**4. Abcouwer never disclosed the Alleged Agreement to the SEC.**

As CEO, Abcouwer understood that any material agreement that could require a sale of a company would have to be disclosed by Trans Energy to the SEC on a Form 8-K or 10-K. *See SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 70 (D.C. Cir. 1980); 17 C.F.R. §§ 240.13a-1, 240.13a-11. However, during the approximately four and half years while Abcouwer was employed by Trans Energy, he never disclosed the Alleged Oral Agreement to the SEC on a Form 8-K, 10-K, or otherwise — despite admitting that it would be a material transaction. *See* Ex. A 159:3–159:22, 162:21–163:2, 164:14–164:23.

Moreover, in his capacity as an owner of more than five percent of Trans Energy's stock, pursuant to Sections 13(d)(1)(A)–(E) of the Securities Exchange Act of 1934, Abcouwer would be required to disclose the Alleged Oral Agreement to the SEC on a Schedule 13D.[11] However, it is undisputed that he has never done so. Ex. A 30:10–30:18, 163:22–164:23. Thus, Abcouwer's own actions from 2006 to 2010 are consistent with the summary judgment evidence submitted herewith — namely that even Abcouwer never contended there was such an agreement . . . until it was first alleged as part of this lawsuit.

**5. The Alleged Oral Agreement is not enforceable.**

**(i) The Alleged Oral Agreement's purported terms are too indefinite and uncertain.**

A contract is unenforceable unless all material terms are agreed upon and are sufficiently definite and certain. *See Exec. Risk Indem., Inc., 681 F. Supp. at 730; EurEnergy Res. Corp., 720 S.E.2d at 168*; *Hermann v. Goddard*, 96 S.E. 792, 793 (W. Va. 1918); *see also Ways v. Imation Enters. Corp.*, 589 S.E.2d 36, 44 (W. Va. 2003). The Alleged Oral Agreement does not

[11] Even if the agreement were only with Bagley and Woodburn as individuals it would be a required to be disclosed given that all three were directors and shareholders own more than 5%. *See* 17 C.F.R. §§ 240.13d–1, 240.13d–5(b)(1); *see also generally id.* §§ 240.13d–1, 240.13d–2, 240.13d–5, 240.13d–101.

satisfy these requirements, because it lacks any definitive terms regarding the parameters of a sale to which Woodburn and Bagley were required to acquiesce. Instead, as alleged by Abcouwer, it was simply an agreement by Woodburn and Bagley that they would agree to a sale in the future. *See* Complaint ¶¶ 9, 12; Ex. A 10:2–10:13. Indeed, Abcouwer admits that the parties did not agree on (i) a set price, *id.* 11:1–11:4;[12] (ii) the time period for a sale, *id.* 11:12–11:14, 17:1–17:3; (iii) what would be sold, *i.e.* a sale of stock or assets, *id.* 11:5–11:7, 16:22–16:24; or (iv) any of the other terms at all, including those that are generally part of a purchase and sale agreement, such as representations and warranties, covenants, conditions to closing, and indemnity provisions, *id.* 10:5–10:13, 10:24–11:14, 16:17–17:5. *See also* Complaint ¶¶ 9, 12.

**(ii) Woodburn and Bagley did not have the authority to sell Trans Energy, as Abcouwer knows and admits.**

The Alleged Oral Agreement's term whereby Defendants purportedly agreed to sell Trans Energy is further unenforceable because neither Woodburn, Bagley, nor Trans Energy had the requisite authority to agree to sell the company. Instead, a sale had to be agreed upon by the Board and Trans Energy's shareholders — a fact known at all times by Abcouwer and that he readily admits. *See* Ex. A 17:10–18:9, 66:7–66:11; W. Va. Code § 31D-12-1201, 31D-12-1202; *Magruder v. Hagen-Ratcliff & Co.*, 50 S.E.2d 488, 494 (W. Va. 1948).

**(iii) Alleged Oral Agreement is unenforceable because it conflicts with applicable law and is against public policy.**

Abcouwer alleges that the Alleged Oral Agreement **required** Woodburn and Bagley to agree to a sale if an offer was received for five dollars per share or higher. Ex. A 160:24–161:2 ("It required them to effectuate the sale as in their positions as board members if we achieved a share price higher than five dollars."); *see also* Ex. A 10:24–11:4, 160:21–161:2. Assuming

[12] The required terms of an enforceable sale contract is illustrative, because the Alleged Oral Agreement is one step removed from such an agreement, *i.e.* it is an agreement to agree to a sale in the future. In this regard, it is well settled that the terms of payment constitute an essential element of a contract. *See Hermann*, 96 S.E. at 793.

*arguendo* that Woodburn and Bagley agreed to this — which they did not — under the terms of the Alleged Oral Agreement, they would have to accept a five dollar per share offer even if they thought Trans Energy was actually worth more per share. Moreover, they would have to accept a properly valued offer of five dollars per share when it was made, even if they believed that the value was going to increase substantially within a short period of time. When asked about such potential situations during his deposition, Abcouwer for all practical purposes refused to answer the question. Ex. A 109:12–109:21; *see also* 104:7–109:11. Nonetheless, he admitted that Woodburn and Bagley owed fiduciary duties to Trans Energy and its shareholders, and agreed that they have a duty to maximize the value for shareholders. *Id.* 19:24–20:5, 102:20–102:24.

Because the Alleged Oral Agreement would prevent Woodburn and Bagley, as members of the Board, from exercising their business judgment and fiduciary duties when voting on a potential sale, it violates applicable law, public policy, and is unenforceable. *Paramount Commc'ns Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (De. 1993) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); *see also Finch v. Inspectech, LLC*, 727 S.E.2d 823, 835 (W. Va. 2012) (holding a contract unenforceable because it violated public policy); *Rollyson v. Jordan*, 518 S.E.2d 372, 380 (W. Va. 1999) ("[T]his Court enforces private agreements between parties, to the extent that such agreements do not conflict with the applicable law."); *State ex. Rel. Boone Nat'l Bank of Madison v. Manns*, 29 S.E.2d 621, 647 (W. Va. 1944), *overruled on other grounds by State v. Chase Secs., Inc.*, 424 S.E.2d 591 (1992); *Wellington Power Corp. v. CAN Sur. Corp.*, 614 S.E.2d 680, 686 (W. Va. 2005).

For example, with respect to a director's duty to maximize the value for a corporation's shareholders, the U.S. District Court for the Southern District of New York has explained:

> Moreover, interpreting the Agreement to prohibit Ness's officers from discussing unsolicited proposals would produce an unreasonable result: Ness would be obligated by contract to violate governing law. Ness is a Delaware corporation, and under Delaware law, ***a corporation's directors have a fiduciary duty to obtain the highest value for the corporation's shareholders when the company is sold. Contractual provisions that limit full exercise of fiduciary duties are "invalid and unenforceable" because "directors cannot contract away their fiduciary obligations."***

*Vector Capital Corp. v. Ness Techs., Inc.*, 2012 WL 913245, at *4 (S.D.N.Y. Mar. 19, 2012), *vacated on other grounds by* 511 Fed. Appx. 101 (2nd Cir. 2013) (emphasis added) (citations omitted); *see also Omincare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003); *Quickturn Design, Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998).

**(iv) Woodburn and Bagley are protected by the business judgment rule.**

To the extent Woodburn and Bagley maintained fiduciary duties (which is what Abcouwer suggests in his deposition testimony), they are protected by the business judgment rule. Ex. A 19:24–20:5. In fact, Abcouwer agreed that Woodburn and Bagley "maintained their ability to exercise their business judgment on any potential transaction for the company to undertake." *Id.* 19:10–19:13. Therefore, to the extent they rejected any proposed sale, it is presumed that they did so in good faith and that the action taken was in the best interest of the company. Thus, any alleged agreement which required them to agree to a sale is enforceable as a matter of law.

**6. Even if Alleged Oral Agreement existed, which it did not, there was no breach by Woodburn, Bagley, or Trans Energy.**

The last element of a breach of contract claim requires a breach. *See Exec. Risk Indem., Inc.*, 681 F. Supp. 2d at 730. Abcouwer alleges that Defendants breached the Alleged Oral Agreement, because "[w]hen Plaintiff presented Defendants with the commitments by one or more buyers, Defendants negligently, carelessly and wrongfully and in violation of its contract

refused to sell the company." Complaint ¶ 19. During his deposition, he identified Chesapeake Energy as the entity that indicated a willingness to pay at the highest level to purchase Trans Energy. *See* Ex. A 127:20–128:11; *see also id.* 60:2–60:15, 133:24–134:6. However, Abcouwer admits he never asked the Board to approve the signing of a binding letter of intent or purchase and sale agreement with Chesapeake:

> Q. Was there ever a time you went to the board of Trans Energy and asked them to approve you entering into a PSA with Chesapeake?
>
> A. That was the intent – I mean, that's what all the discussions were about. That's the reason that I was communicating with Chesapeake for the intent of doing that and they had me doing that.
>
> Q. Right. But did you ever ask for – is it true that you, as CEO, to sign a binding letter of intent with Chesapeake, before signing it, you would have to get the board's approval?
>
> A. Certainly.
>
> Q. Did you ever ask the board for formal approval to sign a binding letter of intent with Chesapeake?
>
> A. I don't recall doing so.

Ex. A 129:13–129:15. In fact, Abcouwer admits that he also never asked the Board to approve a binding letter of intent with any potential purchaser, let alone a purchase and sale agreement. Ex. A 129:16–129:19. Therefore, Defendants never even had an opportunity to breach the Alleged Oral Agreement in the manner Abcouwer alleges. *See id.*; Complaint ¶ 19.

Why did Abcouwer never submit a binding letter of intent or purchase agreement for the Board's approval? Because the alleged deal with Chesapeake did not exist in the terms Abcouwer alleges. Specifically, in a June 9, 2010 email, Abcouwer himself rejected Chesapeake's offer for multiple reasons before he ever presented it to the Board, including an undervaluation of Trans Energy. In the email, Abcouwer states:

> The reduction in the overall value of the deal to $177, the unwillingness to identify the acreage that mortgages the advanced mayment [sic], and the last minute addition of language pertaining to the JDA leaves us with no recourse but to bow out. ***I can't (and won't) present it to my Board.***
>
> I would rather break on relatively cordial terms at this point and keep Chesapeake as a candidate to do a deal a year or two from now than fuss about these 11th-hour changes.

Ex. C-1 (emphasis added).[13] In sum, Abcouwer refused to submit the best offer he received to the Board, because he believed the purchase price was too low.

B. Abcouwer's Claim for Constructive Fraud Fails as a Matter of Law.

1. **Constructive fraud requires a fiduciary relationship or the involvement of an important public policy concern, neither of which is present in this case.**

"Constructive fraud is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 683 (W. Va. 1981). "[C]onstructive fraud is generally reserved for those cases where a fiduciary relationship exists between the parties or the fraud violates an important public policy concern." *White v. Nat'l Steel Corp.*, 938 F.2d 474, 489–90 (4th Cir. 1991). Neither of those situations pertain here, and Abcouwer has not pled otherwise. *See generally* Complaint.

At the time of the Alleged Oral Agreement, no fiduciary relationship existed between Abcouwer and Defendants. *See Elmore v. State Farm Mut. Auto. Ins. Co.* 504 S.E.2d 893, 898 (W. Va. 1998) (defining fiduciary duty). Rather, Abcouwer was as sophisticated businessman with equal or greater bargaining power than Defendants. *See* Complaint ¶¶ 5, 8; *Vercellotti v. Bowen*, 371 S.E.2d 371, 374 (W. Va. 1988) (discussing situations where constructive fraud

[13] A true and correct copy of an email chain that includes Abcouwer's June 9, 2010 email is attached hereto as **Exhibit C-1** and incorporated herein by reference. Attached hereto as **Exhibit C** is the Affidavit of Richard L. Burleson, which authenticates **Exhibit C-1**.

might apply, including "a close relationship where the facts prove that the parties are not dealing on an equal basis" and "unequal relationships where one party is a dependent or aged person.").

Further, Abcouwer's allegations relating to his constructive fraud claim do not involve an important public policy concern — they relate merely to the breach of an alleged oral contract between private sophisticated commercial parties. *See id.*; *Miller v. Huntington & Ohio Bridge Co.*, 15 S.E.2d 687, 697-98 (W. Va. 1941); *see also generally* Complaint.

Lastly, this is not even a situation where Abcouwer could have been deceived by the alleged representations. Indeed, he admits that he has always known that Defendants did not have the ability to sell the company, because shareholder and Board approval is required. Ex. A 17:10–17:12, 17:18–18:9, 66:7–66:11. Thus, Abcouwer's constructive fraud claim does not satisfy any of the required criteria of a constructive fraud claim and fails as a matter of law.

**2. Abcouwer erroneously attempts to equate breach of contract with constructive fraud.**

Abcouwer's pleadings further illustrate that his claims do not constitute constructive fraud as a matter of law. Complaint ¶¶ 25–26. ***In fact, Abcouwer asserts that the alleged misrepresentation on which he bases his constructive fraud claim became a term of the Alleged Oral Agreement.*** *Id.* ¶¶ 12, 19, 23–26; *see also generally id.* (Abcouwer does not assert a claim for fraud or fraudulent inducement). Thus, if Abcouwer has sufficiently pled a claim for constructive fraud, every breach of contract would constitute constructive fraud — and every plaintiff in every simple breach of contract case could avoid the prohibition on recovering punitive damages by merely pleading a constructive fraud claim. *See C.W. Dev., Inc. v. Structures, Inc. of W. Va.*, 408 S.E.2d 41, 45 (W. Va. 1991) ("[W]e agree that, generally, punitive damages are unavailable in a breach of contract action[.]"); *Prestige Magazine Co. v. Panaprint, Inc.*, 2010 WL 425398, at *6 (S.D. W. Va. Oct. 26, 2010) ("In West Virginia, a

breach of contract action generally cannot sustain an award for punitive damages.") (citation omitted). However, contrary to Abcouwer's attempt to equate the two, West Virginia courts have recognized that "a mere breach of [an] oral contract does not, of itself, necessarily amount to either actual or constructive fraud." *Bennett v. Neff*, 42 S.E.2d 793, 803 (W. Va. 1947).

That Abcouwer is attempting to convert a breach of contract claim into a tort is further illustrated by Abcouwer's admissions during his deposition; he asserts that the Alleged Oral Agreement was agreed to in late 2005, but Defendants lived up to their end of the agreement through at least 2010. Ex. A 81:22–82:2; *see also id.* 69:14–69:19, 70:19–70:21, 75:18–75:21, 146:16–146:19. In fact, Abcouwer admits that, as late as July 2009, Woodburn and Bagley were ready to sell Trans Energy. *Id.* 146:16–146:19. Therefore, according to Abcouwer, Defendants performed all of their alleged obligations for at least five years. *Id.* That is not fraud, actual or constructive.

**3. As a matter of law, Trans Energy did not make any of the representations that Abcouwer alleges support his constructive fraud claim.**

Abcouwer asserts that Woodburn and Bagley's alleged representation that they would sell Trans Energy resulted in him executing the Alleged Oral Agreement, became a term thereof, and is the bases for his constructive fraud claim. Complaint ¶¶ 12, 19, 23–26. As explained above, however, Abcouwer admits that Trans Energy is not a party to the Alleged Oral Agreement, *i.e.*, that Trans Energy did not make that representation. Ex. A 10:14–10:20, 16:17–16:21, 22:12–22:20, 155:17–156:15, 157:7–157:11. Thus, Abcouwer admits that Trans Energy did not make the sole representation upon which he bases his constructive fraud claim. *Id.*

Notwithstanding Abcouwer's admission, his constructive fraud claim against Trans Energy further fails because Woodburn and Bagley did not have the authority to act as Trans Energy's agent to the extent they made any representation that Trans Energy would sell the

company. *Bluefield Supply Co. v. Frankel's Appliances*, 142 S.E.2d 898, 908 (W. Va. 1965); *Magruder v. Hagen-Ratcliff & Co.*, 50 S.E.2d 488, 494 (W. Va. 1948); *Varney v. Hutchinson Lumber & Meg. Co.*, 73 S.E. 321, 323 (W. Va. 1911).

**4. Any representations made in conjunction with the Alleged Oral Agreement were superseded by the Employment Agreement.**

After Defendants purportedly entered into the Alleged Oral Agreement, it is undisputed that Abcouwer drafted and executed the Employment Agreement that does not contain or reference the alleged agreement to sell the company. *See* Exs. A 10:21–10:23, 24:10–24:12, 36:8–36:21, B-1. Thus, as explained above, even if Woodburn and Bagley made oral representations regarding selling Trans Energy, they were superseded by and merged into the Employment Agreement. *Marshall v. Elmo Greer & Sons, Inc.*, 456 S.E.2d 554, 557 (W. Va. 1995) (citations omitted).

**C. Abcouwer's Claim for Punitive Damages Fails as a Matter of Law.**

To support his claim for punitive damages, Abcouwer asserts claims for breach of contract and constructive fraud. Complaint ¶¶ 23–26. However, it is well established that punitive damages are unavailable when a party breaches a contract. *See C.W. Dev., Inc. v. Structures, Inc.*, 408 S.E.2d at 45; *Prestige Magazine Co.*, 2010 WL 425398, at *6. Thus, Abcouwer's only other claim that could possibly support an award of punitive damages is constructive fraud. *Id.*; *see* Complaint ¶¶ 23–26. As explained above, however, that claim is indistinguishable from his breach of contract claim — he alleges that he is entitled to punitive damages because "Defendants intentionally and maliciously ***refused to perform***" the Alleged Oral Agreement. Complaint ¶ 27 (emphasis added). Therefore, Abcouwer has not pled that Defendants intended to deceive or defraud him or acted with conscious disregard to his rights when they made the alleged representations relating to the Alleged Oral Agreement. *See*

*generally* Complaint. Without the requisite intent or conscious disregard, Abcouwer's punitive damage claim must be dismissed. *See Mayer v. Frobe*, 22 S.E. 58, 59 (W. Va. 1985).

In any event, Abcouwer's claims for breach of contract and constructive fraud fail as a matter of law for the reasons discussed above. Thus, Abcouwer's punitive damages claim must likewise be dismissed as a matter of law. *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 899 (W. Va. 1991); *Rohrbaugh v. Wal-Mart Stores*, 572 S.E.2d 881, 886 (W. Va. 2002).

Because Defendants are entitled to summary judgment on all of Abcouwer's causes of action, they respectfully move this Court for summary judgment dismissing the same.

## V. PRAYER

For these reasons, Defendants respectfully requests that the Court grant Defendant's Motion, dismiss with prejudice all causes of action in the Complaint, render judgment that Abcouwer take nothing for his claims against Defendants, and award Defendants such other and further relief general or specific, whether at law or equity, to which it may be justly entitled.

Dated: September 30, 2014

Respectfully submitted,

BAILEY & GLASSER L.L.P.

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**JAMES K ABCOUWER,**

**Plaintiff,**

**v.**

**Civil Action No. 13-C-56**
**Judge Carrie L. Webster**

**TRANS ENERGY, INC., a foreign corporation, WILLIAM F. WOODBURN, and LOREN E. BAGLEY,**

**Defendants.**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that DEFENDANTS TRANS ENERGY, INC., WILLIAM F. WOODBURN, AND LOREN E. BAGLEY'S MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was served upon the following counsel via hand delivery and United States First Class Mail, postage prepaid and properly addressed this 30th day of September, 2014:

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2018 MAR 27 PM 1:10

CATHY S. GARCIA, CLERK
KANAWHA COUNTY CIRCUIT COURT

James K. Abcouwer
Plaintiff(s),

v.

Civil Action No. 13-C-56
Judge Webster

Trans Energy, Inc. et al.
Defendant(s).

## SCHEDULING ORDER: CIVIL

The parties may not amend, modify, or adjust any provision of this Order except by leave of the Court. Any proposed order submitted for entry must be inspected by or otherwise reflect written agreement of all counsel of record and all unrepresented parties.

1. Third-Party Complaints to be filed and served by N/A.
2. Plaintiff(s) to identify fact witnesses by May 1, 2018 and Defendant(s) by May 15, 2018
3. Plaintiff(s) to identify expert witnesses by Sept. 1, 2018 and Defendant(s) by Oct. 1, 2018
4. All independent medical examinations, physical or scientific tests or similar examinations, tests or studies shall be conducted by N/A.
5. Discovery Commissioner Agreed by May 1, 2018.
6. Discovery completed by December 31, 2018
7. Mandatory mediation pursuant to T.C.R. 25 to be completed by February 19, 2019
8. Dispositive motions to be filed by (30 days prior to pretrial): January 13, 2019 with responses filed within 14 days February 1, 2019 and replies filed within 7 days February 8, 2019
9. All pretrial motions, including motions in limine, filed by (30 days prior to pretrial): January 18, 2019 with responses filed within 14 days February 1, 2019 and replies filed within 7 days February 8, 2019
10. Pretrial Memoranda to be filed by (ten days prior to Pretrial Conf.): February 11, 2019

PLAINTIFF'S EXHIBIT

11. Pretrial Conference: February 19, 2019 Time: 9:00 a.m.

12. All parties shall exchange a copy of proposed jury instructions by (5 days prior to trial): March 4, 19. All instructions agreed to by the parties and any other proposed instructions shall be submitted to the court and also transmitted in electronic format (WordPerfect or Microsoft Word) to the court at Guyla.Black@courtswv.gov by (at least three days prior to trial): March 6, 19.

13. Jury Selection: March 8, 2019 Time: 1:30 p.m.

14. Trial Date: March 11, 2019 Time: 9:00 a.m. Days needed for trial: 5 6

The Court directs the Clerk to send a certified copy of this Order to all counsel of record and all unrepresented parties.

Entered this 22nd day of March, 2018

Carrie L. Webster

CARRIE L. WEBSTER, JUDGE

[signature] #9093
Counsel for Plaintiff(s) with WVSB#
Masters Law Firm lc

[signature] #12804
Counsel for Defendant(s) with WVSB#
Spilman Thomas & Battle, PLLC

Counsel with WVSB#

Counsel with WVSB#

Counsel with WVSB#

Counsel with WVSB#

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 26th DAY OF March, 2018
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA