

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON AREA MEDICAL CENTER, INC.,

PLAINTIFF,

v.

**WEST VIRGINIA UNITED HEALTH SYSTEM,
INC., d/b/a WEST VIRGINIA UNIVERSITY
HEALTH SYSTEM, and WVU HEALTH SYSTEM;
THOMAS HEALTH SYSTEM, INC., d/b/a
THOMAS HEALTH; HERBERT J. THOMAS
MEMORIAL HOSPITAL ASSOCIATION, d/b/a
THOMAS MEMORIAL HOSPITAL;
CHARLESTON HOSPITAL, INC., d/b/a SAINT
FRANCIS HOSPITAL; THS PHYSICIAN
PARTNERS, INC.; PULMONARY ASSOCIATES
OF CHARLESTON PLLC, d/b/a CRITICAL
CARE, PLLC; TRAKE, LLC; PHILLIP COX, D.O.,
an individual; KEVIN EGGLESTON, M.D., *an
individual*; ROBBY KEITH, M.D., *an individual*;
JAMES D. PERRY, III, D.O., *an individual*;
TAMEJIRO “TOM” TAKUBO, D.O., *an individual*;
RYAN WADDELL, D.O., *an individual*; and W.
ALEX WADE, M.D., *an individual*,**

DEFENDANTS.

TO: THE HONORABLE CHIEF JUSTICE

**JOINT MOTION TO REFER ACTION
TO THE BUSINESS COURT DIVISION**

Pursuant to Rules 29.04 and 29.06 of the West Virginia Trial Court Rules, the parties jointly move for an order referring this civil action to the Business Court Division for all further proceedings and trial. This motion should be granted because this civil action (a) concerns a significant commercial dispute involving large sums of money in controversy, (b) involves several parties that are sophisticated commercial entities, and (c) requires the Business Court Division's

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**Circuit Court of Kanawha County
Civil Action No. 22-C-359
Judge Tera L. Salango**

specialized knowledge and expertise in contract law, healthcare regulation, complex commercial negotiations and transactions, and the legal principles that concern tortious interference with contractual and business relationships.

PAC and Trake conferred with counsel for Plaintiff Charleston Area Medical Center (“CAMC”) and all Co-Defendants before filing this motion. All parties agree that the case belongs in the Business Court Division, and CAMC and all Co-Defendants join this motion as co-movants. Copies of the Complaint, docket sheet, and other documents supporting referral of this action to the Division are attached hereto as Exhibit 1.

BACKGROUND

CAMC brought this action in the Circuit Court of Kanawha County, West Virginia, on or about May 3, 2022, against the following Defendants: West Virginia United Health System *d/b/a* West Virginia University Health System and WVU Health System (“WVUHS”); Thomas Health System, Inc. *d/b/a* Thomas Health (“Thomas Health”); Herbert J. Thomas Memorial Hospital Association *d/b/a* Thomas Memorial Hospital (“Thomas Memorial”); Charleston Hospital, Inc. *d/b/a* Saint Francis Hospital (“St. Francis”); THS Physician Partners, Inc. (“THSPP”) (THSPP, together with Thomas Health, Thomas Memorial and St. Francis, collectively referred to by the Plaintiff as “the Thomas Parties”); Pulmonary Associates of Charleston PLLC *d/b/a* Critical Care, PLLC (“PAC”); Trake, LLC (“Trake”); and individual members of PAC and Trake Phillip Cox, D.O., Kevin Eggleston, M.D., Robby Keith, M.D., James D. Perry, III, D.O., Tamejiro “Tom” Takubo, D.O., Ryan Waddell, D.O., and W. Alex Wade, M.D. (collectively, “the PAC Physicians”).

In this action, CAMC alleges that, “[i]n or about late 2020, representative(s) of CAMC entered into negotiations with representative(s) of PAC and Trake for the purpose of acquiring

substantially all of the assets of PAC and leasing, with an option to purchase, the [b]uilding owned by Trake in which PAC operated its business,” Complaint ¶ 18, and that, “on or about February 16, 2021, representative(s) of CAMC and representative(s) of PAC executed a Letter of Intent setting forth an agreement pursuant to which PAC was to convey to CAMC substantially all of its assets and lease to CAMC the building in which PAC then conducted its business, and CAMC was to employ the workforce of PAC and the PAC Physicians (“the Proposed Transaction”),” Complaint ¶ 20. CAMC alleges the Letter of Intent contained a confidentiality clause preventing the parties from disclosing the terms and subject matter of the agreement without prior consent from the other parties. Complaint ¶¶ 21-22. The Letter of Intent also allegedly contained provisions that precluded PAC from entertaining or soliciting offers to acquire its assets and requiring PAC to notify CAMC of the rejection of any such offer during the term of the agreement. Complaint ¶¶ 23-24.

After PAC consented to the terms of the Letter of Intent, CAMC publicly filed, on March 8, 2021, a “Request for Determination of Reviewability (‘the Request’) with the West Virginia Health Care Authority (‘the Authority’), asking the Authority to determine that its contemplated acquisition of PAC was not subject to Certificate of Need (‘CON’) review.” Complaint ¶ 28. On March 11, 2021, Thomas Memorial and THSPP requested the Authority grant them “affected person status” to allow them to oppose CAMC’s request. Throughout March of 2020, CAMC, Thomas Hospital and THSPP litigated “whether a CON was required for CAMC’s contemplated acquisition of PAC.” Complaint ¶ 34. On May 7, 2021, the Authority found “CAMC need not obtain a CON to proceed with its contemplated acquisition of PAC.” Complaint ¶ 35. Thomas Memorial and THSPP requested the Authority stay its decision, which was denied on June 28, 2021. Complaint ¶ 37. An appeal of the Authority’s decision filed by Thomas Memorial and

THSPP was denied by the Office of Judges on September 21, 2021. Complaint ¶ 38. Thomas Memorial and THSPP appealed the decisions of the Authority and the Office of Judges to the Circuit Court of Kanawha County, West Virginia, on November 9, 2021, and requested the Court stay the Authority’s decision. Complaint ¶ 39.

CAMC alleges it entered into a series of additional contracts in furtherance of carrying out the terms of the Letter of Intent, which include:

- An Asset Purchase Agreement on October 11, 2021, which, if closed, would allow CAMC to purchase substantially all of the assets of PAC, Complaint ¶ 44, and which contained an exclusive negotiation period provision (Complaint ¶ 46), a confidentiality provision (Complaint ¶ 48, 49), a non-compete clause (Complaint ¶ 47), and an indemnification clause (Complaint ¶ 50).
- Employment contracts with each of the PAC Physicians from June 24, 2021, through December 1, 2021, each of which CAMC alleges contained a non-compete clause (“the Contracts of Employment”). Complaint ¶ 41-42.
- A ten year Lease Agreement with Trake, LLC, the owner of the building in which PAC Physicians conducted their business, on October 1, 2021. Complaint ¶ 43.
- An Employee Leasing Agreement, which would allow the transition of the employees of PAC to CAMC on November 15, 2021 (Complaint ¶ 53).
- A Records Asset Agreement on December 16, 2021 (Complaint ¶ 54).

The Asset Purchase Agreement contained a series of conditions precedent to all of PAC’s and the PAC Physicians’ legal obligations. It also specified that it could be terminated by either party after December 31, 2021, if the transaction had not closed by that date. Complaint ¶ 51. All other agreements were contingent on the closing of the Asset Purchase Agreement, meaning they failed if the contemplated transaction—as embodied in the Asset Purchase Agreement—did not timely close.

On December 16, 2021, the Circuit Court (via Judge Joanna Tabit) granted Thomas Memorial’s and THSPP’s request to stay the Authority’s decision regarding whether a CON was needed for CAMC to acquire substantially all of the assets of PAC. The existence of this order—

and the existence of that litigation itself—means that several express conditions precedent were not met. CAMC claims that it and PAC were set to close the Asset Purchase Agreement that same day, but the closing was suspended due to the stay order. Complaint ¶ 62. December 31, 2021, then passed without the parties closing the Asset Purchase Agreement, which permitted either party to terminate the agreement at any time. PAC terminated the Asset Purchase Agreement on February 22, 2021. Complaint ¶ 72. Then PAC also terminated the remaining agreements (the contracts of Employment between the PAC Physicians and CAMC, the Employee Leasing Agreement and the Records Access Agreement). Complaint ¶¶ 72-74. Although not mentioned in the complaint, CAMC expressly accepted PAC’s notice of termination.

On April 20, 2022, WVU Health System and Thomas Health, which operates Thomas Memorial Hospital and St. Francis Hospital, announced the two entities had entered into a management and clinical affiliation agreement, under which they will partner in managing Thomas Health and providing clinical services. Complaint at ¶¶ 82–84.

CAMC’s Complaint asserts ten claims against the Defendants. Count I alleges PAC and the PAC Physicians breached the confidentiality clauses in the Letter of Intent and Asset Purchase Agreement by disclosing the content of those agreements to WVU Health and/or the Thomas Parties. Complaint ¶¶ 85-93. In Count II, CAMC alleges PAC and the PAC Physicians violated the exclusivity provisions of the Letter of Intent and Asset Purchase Agreement by engaging in discussions to enter into a transaction with WVU Health and/or the Thomas Parties, “on or subsequent to February 16, 2021, but before February 22, 2022.” Complaint ¶¶ 94-102. Count III asserts another breach-of-contract claim against PAC and the PAC Physicians for “bad faith termination” of the Asset Purchase Agreement. Complaint ¶¶ 103-114. Count IV asserts a

breach of contract claim against PAC and the PAC Physician for breach of the non-competition provisions in the Asset Purchase Agreement and the Contracts of Employment. Complaint ¶¶ 115-123. Count V seeks indemnification from PAC and the PAC Physicians pursuant to the Asset Purchase Agreement. Complaint ¶¶ 124-131. Count VI alleges that WVU Health and one or more of the Thomas Parties tortiously interfered with the Contracts of Employment, Asset Purchase Agreement, Employee Leasing Agreement, Leasing Agreement and the Record Access Agreement by offering to acquire PAC and/or offering to employ the PAC Physicians. Complaint ¶¶ 132-144. Count VII alleges WVU Health and one or more of the Thomas Parties tortiously interfered with an “ongoing, valid, and existing business relationship” between CAMC, PAC, the PAC Physicians, and Trake. Complaint ¶¶ 145-154. Count VIII asserts a claim of aiding and abetting tortious conduct against all the Defendants (Complaint ¶¶ 155-161) and Count IX asserts a claim of civil conspiracy against all the Defendants (Complaint ¶¶ 162-171). Count X demands judgment against Trake enforcing the provisions of the Lease Agreement. Complaint ¶¶ 172-213. CAMC’s Complaint seeks compensatory, consequential, incidental, expectation, and punitive damages and injunctive relief.

BASIS FOR REQUEST

This action meets the definition of “Business Litigation” as set forth in Rule 29.04, which states the three requirements supporting referral of an action to the Business Court.

First, the claims in this litigation involve “matters of significance to the transactions, operations, or governance between business entities.” W. VA. TRIAL CT. R. 29.04(a)(1). As shown above, several of Defendants in this action are business entities and all the claims involve multiple contractual agreements or business negotiations between the largest medical system in the state, the largest healthcare facilities in Charleston, and a physicians’ group that provides pulmonary

health services to a large part of the Charleston community and surrounding area. Moreover, CAMC alleges economic losses and declaratory relief, as well as punitive damages.

Second, “the dispute presents commercial . . . issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy.” W. VA. TRIAL CT. R. 29.04(a)(2). The adjudication of this litigation will require specialized knowledge and expertise on commercial, healthcare, employment, and real estate contract law and interpretation, healthcare regulation, complex commercial negotiations and transactions, and tortious interference with contractual and business relationships. In short, this action has all the hallmarks of business litigation and necessitates the Business Court’s specific expertise in the areas listed above as well as the complex nature of damages in this business dispute. *See, e.g., W. Virginia Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, 766 S.E.2d 416, 432 (W. Va. 2014) (“Given the admitted complexity of the issues presented in this case and the prior request of the petitioners to transfer this matter to the Business Court Division, we are granting that request and accordingly direct the circuit court to promptly transfer this case to the Business Court Division for further proceedings consistent with this opinion.”).¹

¹ A wide variety of complex business cases have been referred to and decided by the Business Court Division. *See, e.g., Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, No. 14-0446, 2015 WL 2261649 (W. Va. May 13, 2015) (breach of lease agreement); *Mangus Coal Co. v. Jennings*, No. 16-0199, 2016 WL 6820762 (W. Va. Nov. 18, 2016) (Derivative claims for breach of fiduciary duties, conversion, and civil conspiracy); *Alan Enterprizes LLC v. Mac’s Convenience Stores LLC*, 810 S.E.2d 61 (W. Va. 2018) (addressing dispute between two gas stations over whether one violated the Unfair Practices Act by selling gasoline below cost); *Matkovich v. Univ. Healthcare Found., Inc.*, 795 S.E.2d 67 (W. Va. 2016) (dispute over whether ad valorem tax exemption applied to charitable organization); *Antero Res. Corp. v. Irby*, No. 20-0530, 2022 WL 1055446, at *1 (W. Va. Apr. 8, 2022) (addressing West Virginia State Tax Commissioner’s methodology for valuing oil and gas wells).

Third, the claims at issue do not implicate subjects that are ineligible for Business Court Division treatment, such as products liability, personal injury, wrongful death, consumer class actions, insurance bad faith, or landlord-tenant disputes. W. VA. TRIAL CT. R. 29.04(a)(3) (providing a full list of subjects Business Court Division may not adjudicate). Rather, as shown in the Background Section, this is a business dispute concerning complex commercial negotiations and transactions. The Business Court Division's knowledge and expertise on commercial law and liability will be invaluable in adjudicating this business litigation fairly and efficiently.

As a final point, all parties agree that the case belongs in the Business Court Division. Indeed, all parties join this motion as co-movants and wish for this case to be transferred to the Business Court Division.

RELATED ACTIONS

PAC and Trake are not aware of any pending or related actions that could be the subject of consolidation with the instant matter. *See* W. VA. TRIAL CT. R. 29.06(a) (1).

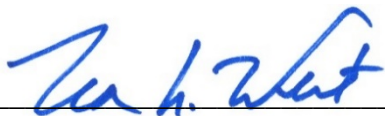
CONCLUSION

For these reasons, the parties respectfully request entry of an order referring this civil action to the Business Court Division for all further proceedings and trial and for such other relief as the Court deems appropriate and just.

Dated: July 15, 2022

Respectfully submitted,
BAILEY & GLASSER, LLP

By: _____


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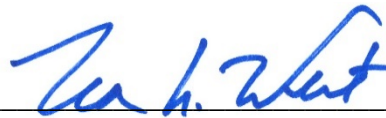
CERTIFICATE OF SERVICE

I, Marc R. Weintraub, the undersigned counsel for Defendants, hereby certify that on this 15th day of July, 2022, I served a true copy of the foregoing *Joint Motion to Refer Action to the Business Court Division* via electronic email to the following counsel:

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