

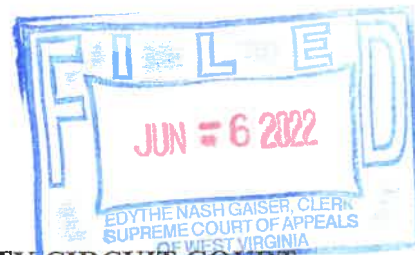
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KAPITUS SERVICING, INC. formerly
known as COLONIAL FUNDING NETWORK, INC.,
as authorized servicing agent for First US
Funding,

Plaintiff and Petitioner,

v.

TUCKER COUNTY CIRCUIT COURT
CIVIL ACTION NO. 22-C-4
The Honorable Judge Nelson



TIMBERLINE FOUR SEASONS UTILITIES
INC. AND CANAAN VALLEY PUBLIC
SERVICE DISTRICT, individually, and in its
capacity as RECEIVER OF TIMBERLINE
FOUR SEASONS UTILITIES INC.,

Defendants and Respondents.

TO: THE HONORABLE CHIEF JUSTICE

MOTION TO REFER CASE TO BUSINESS COURT DIVISION

Plaintiff, Kapitus Servicing, Inc., formerly known as Colonial Funding Network, Inc. ("Kapitus" or "Plaintiff"), in its capacity as Authorized Servicing Agent for First US Funding ("Funding"), by counsel and pursuant to Rule 29 of the *West Virginia Trial Court Rules*, respectfully requests that the above-styled action be referred to the Business Court Division for all further proceedings.

Rule 29.04 of the *West Virginia Trial Court Rules* contemplates that claims regarding significant transactions and operations between business entities are eligible for referral to the Business Court Division if beneficial. This case presents such a circumstance. For the reasons set forth below, Plaintiff respectfully requests transfer to the Business Court Division.

I. Factual Background

a. Defendants' Breach of the Agreement

Kapitus sued Defendants based on contractual obligations under that *Revenue Based Factoring (RBF/ACH) Agreement* and that certain *Security Agreement and Personal Guaranty* ("Agreement") between Kapitus, Defendant Timberline Four Seasons Utilities, Inc. ("Timberline Utilities"), and Timberline Four Seasons Resort Management Company, Inc. ("Timberline Resort").¹ Timberline Utilities, among others, voluntarily entered the Agreement with Kapitus on April 28, 2017, to induce Kapitus to advance One Hundred Thirty Thousand and 0/100 Dollars (\$130,000.00) to Timberline Utilities and its affiliates. Under the Agreement, Kapitus purchased Timberline Utilities' "future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies" the ("Purchased Receivables") from Timberline Utilities' "customers' and/or third-party payors."²

Kapitus' standard purchase agreement, like the Agreement here, contains numerous representations upon which Kapitus relies when determining whether to execute an agreement. Kapitus requires, as a threshold step in its consideration of whether to purchase a potential merchant's future receivables, that each merchant sign the agreement and provide certain written representations about its financial situation, operational plans, and intentions. Because Kapitus' funding process is truncated from that of a standard financing institution as is typical for the alternative financing industry, Kapitus relies heavily upon a merchant's representations and warranties made in each agreement and confirmed in a recorded call. In fact, Kapitus' counter signature to the agreement and funding are the last steps in the process.

1 See Pl.'s V. Compl. Ex. E, attached here as Exhibit A.

2 *Id.* at 1.

Here, to entice Kapitus to enter the Agreement, Timberline Utilities, through its owners/officers, Frederick Herz and Frederick Reichle, made the following express representations to Kapitus:

- (a) Timberline Utilities and Timberline Resort were in good financial condition and that they were not insolvent;
- (b) Timberline Utilities and Timberline Resort obtained all necessary governmental approvals to enter the Agreement;
- (c) Timberline Utilities and Timberline Resort were authorized to enter the Agreement;
- (d) Timberline Utilities and Timberline Resort would not enter any other purchase or security agreement related to the Purchased Receivables; and
- (e) Timberline Utilities and Timberline Resort had good and marketable title to all Purchased Receivables, free and clear of all liabilities and liens.³

³ See Pl.'s V. Compl. Ex. E, §§ 2.1-2.3, §§ 2.9-2.11. Kapitus relied on the representations and warranties set forth in the Agreement to finance the purchase of the Purchased Receivables, including but not limited to, the following:

II. REPRESENTATIONS, WARRANTIES AND COVENANTS. Merchant represents, warrants and covenants that as of this date and during the term of the Agreement:

2.1 Financial Condition and Financial Information. Its bank and financial statements, copies of which have been furnished to FUNDER, and future statements which will be furnished hereafter at the discretion of FUNDER, fairly represent the financial condition of Merchant at such dates, and since those dates there has been no material changes, financial or otherwise, in such condition, operation or ownership of Merchant. Merchant has a continuing, affirmative obligation to advise FUNDER of any material change in its financial condition, operation or ownership. FUNDER may request statements at any time during the performance of this Agreement and the Merchant shall provide them to FUNDER within 5 business days. Merchant's failure to do so is a material breach of this Agreement.

2.2 Governmental Approvals. Merchant is in compliance and shall comply with all laws and has valid permits, authorizations and licenses to own, operate and lease its properties and to conduct the business in which it is presently engaged.

2.3 Authorization. Merchant, and the person(s) signing this Agreement on behalf of Merchant, have full power and authority to incur and perform the obligations under this Agreement, all of which have been duly authorized.

2.9 No Bankruptcy or Insolvency. As of the date of this Agreement, Merchant represents that it is not insolvent and does not contemplate and has not filed any petition for bankruptcy protection under Title 11 of the United States Code and there has been no involuntary petition brought or pending against Merchant. Merchant further warrants that it does not anticipate filing any such bankruptcy petition and it does not anticipate that an involuntary petition will be filed against it. In the event that the Merchant files for bankruptcy protection or is placed under an involuntary filing Protections 2 and 3 are immediately invoked.

(continued...)

Kapitus reasonably relied on the representations outlined in the preceding paragraph, but later learned that these representations were materially false and suffered damages as a result. Specifically, Timberline Utilities:

- (a) Was not in good financial condition and was quickly approaching bankruptcy;
- (b) Did not obtain PSC approval to enter the Agreement to the extent it allegedly was required;⁴ and
- (c) Allegedly dedicated all of Timberline Utilities' assets to Defendant CVPSD in 1985.

On or about May 1, 2017, Kapitus fulfilled its obligations under the Agreement by advancing the purchase price to Timberline Utilities, less any fees. Initially, Timberline Utilities made payments under the Agreement. From on or about May 2, 2017, through June 28, 2017, Timberline Utilities made total payments of Forty-Two Thousand Seven Hundred Ninety-Four and 0/100 Dollars (\$42,794.00) to Kapitus.

However, Timberline Utilities ceased making payments at the end of June 2017, in breach of the Agreement. From June 29, 2017, through October 13, 2017, twelve (12) ACH payments were authorized and attempted but did not clear (i.e., were rejected). Upon information and belief, the referenced transactions did not clear because Timberline Utilities diverted the purchased receivables to a different bank account, thereby breaching the terms of the Agreement.

2.10 Additional Financing. Merchant shall not enter into any arrangement, agreement or commitment, for any additional financing, whether in the form of a purchase of receivables or a loan to the business with any party other than FUNDER without their written permission.

2.11 Unencumbered Receipts. Merchant has good, complete and marketable title to all Receipts, free and clear of any and all liabilities, liens, claims, charges, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges and encumbrances of any kind or nature whatsoever or any other rights or interests that may be inconsistent with the transactions contemplated with, or adverse to the interests of FUNDER.

⁴ Kapitus does not concede that governmental approval was required for Timberline Utilities to execute the Agreement. However, any failure to do so is solely the fault of Timberline Utilities.

Kapitus later learned that Defendant Timberline Utilities, through Herz and Reichle, fraudulently induced Kapitus to enter the Agreement by, *inter alia*:

- (a) Misrepresenting the financial condition of, and debt incurred by, Timberline Utilities and Timberline Resort during the due diligence process;
- (b) Misrepresenting that Timberline Utilities and Timberline Resort were in good financial condition and that they were not insolvent;
- (c) Misrepresenting that Timberline Utilities and Timberline Resort obtained all necessary governmental approvals to enter the Agreement to the extent it allegedly was required;
- (d) Misrepresenting that Timberline Utilities and Timberline Resort were authorized to enter the Agreement to the extent PSC approval allegedly was required;
- (e) Misrepresenting that Timberline Utilities and Timberline Resort had good and marketable title to all Purchased Receivables, free and clear of all liabilities and liens to the extent Timberline Utilities Assets allegedly were dedicated to CVPSD;
- (f) Failing to disclose the alleged dedication of its assets to Defendant CVPSD;
- (g) Misrepresenting Timberline Utilities' and Timberline Resort's intent to not deposit their receivables into the authorized depository account for repayment of the funding in accordance with the terms of the Agreement; and
- (h) Misrepresenting Timberline Utilities' and Timberline Resort's intent to perform under the Agreement.

b. Timberline Utilities' Bankruptcy

Due, at least in part, to fraudulent conduct and mismanagement, Timberline Utilities filed for bankruptcy. Kapitus filed a Proof of Claim and an Amended Proof of Claim (collectively the "Proof of Claim") in Timberline Utilities' bankruptcy case on June 11, 2021, and August 2, 2021. Defendant Timberline Utilities objected to Kapitus' Proof of Claim and the parties engaged in significant substantive briefing on the merits of Kapitus' Proof of Claim. The Bankruptcy Court ultimately ruled in Kapitus' favor on the Proof of Claim holding that the Proof of Claim was valid

and secured.⁵ The Bankruptcy Court further Ordered that the Agreement is enforceable and that

Kapitus has a security interest in Timberline Utilities' accounts receivable:

Accordingly, the [A]greement is voidable at Kapitus's discretion and may be enforced if it so chooses. Kapitus does wish to enforce the [A]greement, evidenced by its security agreement and contesting of the [Timberline Utilities] current proposed plan which treats Kapitus's claims as invalid. Pursuant to the [A]greement and valid UCC-3 Continuation Statement dated June 10, 2021, Kapitus has a valid security interest in [Timberline Utilities] accounts receivable.⁶

The Bankruptcy Court soundly reasoned that it would be unjust for Timberline Utilities to benefit from Timberline Utilities' fraudulent conduct:

Where both the [Timberline Utilities] and Kapitus were victimized by the actions of the [Timberline Utilities'] former owner-officers [Herz and Reichle], it is not equitable [for Timberline Utilities to come] away unvictimized. Kapitus carried out its end of the [A]greement—paying \$130,000 to [Timberline Utilities]—while [Timberline Utilities] defaulted on its obligations less than two months later. A party may not gain a benefit from a contract while simultaneously avoiding the obligations under that same contract. *United States use of Humble Oil & Ref. Co. v. Fid. & Cas. Co.*, 402 F.2d 893 (4th Cir. 1968); *see Home Base Litter Control, LLC v. Claiborne Cnty.*, 183 So. 3d 94, 101 (Miss. App. 2015). Despite this well-settled concept of contract law, [Timberline Utilities'] arguments to avoid the agreement due to fraud of its own former officers attempts to do just that. Kapitus carried out its end of the [A]greement after entering it in reliance upon the misrepresentations of the [Timberline Utilities], ultimately instilling a benefit upon the [Timberline Utilities] in the amount of \$130,000. The [A]greement, however, provided that Kapitus would receive future accounts receivable. These payments to which Kapitus has an interest under the [A]greement are the very same which the Debtor seeks to transfer to CVPSD for no return value in its Chapter 11 plan. Beyond the unconscionability of this result, it would allow [Timberline Utilities] to leave unscathed from the resulting aftermath of its negligent officers. This result would leave Kapitus to bear the cost of entering into a contract in reliance upon the intentional misrepresentations of those same officers [Herz and Reichle] and grant an inequitable financial windfall to [Timberline Utilities] and its former officers [Herz and Reichle].⁷

⁵ See Mem. Op.: Def.'s Mot. for Recons. is granted, ECF No. 114; Order Overruling Def.'s Obj., ECF No. 115; Kapitus' V. Compl. Ex. C.

⁶ *Id.*

⁷ *Id.*

c. PSC Investigation

While Timberline Utilities' bankruptcy case was pending, the PSC moved the Bankruptcy Court to lift the stay so that the PSC could investigate the Agreement. The Bankruptcy Court granted the PSC's motion. However, in doing so, the Bankruptcy Court left no doubt that regardless of the outcome of the PSC's investigation into the Agreement, Kapitus' claim against Kapitus is valid and secured. The Bankruptcy Court specifically ordered during the December 15, 2021, hearing on the PSC's motion, that regardless of the PSC's investigation into the validity of the Agreement, Kapitus' claim against Timberline Utilities is valid and secured and the Bankruptcy Court's Orders were final and enforceable:

[R]egardless of the PSC's outcome in that case—the [PSC's] decision would not impact this Court's Final Order as for the reasons cited by Kapitus' in its response primarily to the PSC, but in essence, under Rule 9024 none of the bases cited by the debtor this Court would consider bases for reconsideration. Even if the PSC makes a decision post outcome, or post opinion, in this case, it's not really construed as perhaps new evidence, but the record was closed at the time this Court made a decision. This Court has cited or stated—had made that decision based on the record before it and believes that under the applicable bankruptcy rules the Court does not have the ability to reconsider at this point, so the Court will deny the motion to reconsider for those reasons.⁸

Defendants moved the Bankruptcy Court multiple times to reconsider its decision. Kapitus spent significant amounts of time, money, and resources defending Defendants' multiple attempts to reconsider the bankruptcy court orders. When Defendants realized they could not prevail in Bankruptcy Court, they alerted the PSC, and orchestrated the PSC's investigation to collaterally attack the bankruptcy court orders. They also simultaneously dismissed the bankruptcy case. Now, in their Motion to Dismiss, Defendants seek to contravene the Bankruptcy Court's Order once again by claiming the PSC's Order is determinative. Defendants have relentlessly attempted to defraud Kapitus in hopes that Defendant CVPSD will receive Timberline Utilities' assets and

⁸ See Transcript of Hearing at 27, *In re Timberline Four Seasons Utils., Inc.*, No. 2:21-bk-00125, 2021 WL 4952613 (Bankr. N.D. W. Va. 2021), attached here as Exhibit E.

Kapitus' Purchased Receivables, free and clear of all liens. Regardless, the Bankruptcy Court's Order is final and determinative.

Timberline Utilities concedes that "the Order of October 25, 2021, undoubtedly became [a] final order [at the December 15, 2021, hearing]." ⁹ On December 16, 2021, the Bankruptcy Court entered a second final Order denying Timberline Utilities' Motion for Reconsideration and granting the PSC's Motion to Lift the Stay (the "PSC Motion") to investigate the Agreement. ¹⁰

d. CVPSD's Receivership

On March 13, 2019, the Circuit Court of Tucker County appointed Defendant CVPSD as Receiver of Timberline Utilities. Defendant CVPSD was ordered, among other things, to:

[r]eceive the monies, fees and assets of [Timberline Utilities] and to apply them to the debts, obligations and accounts of [Timberline Utilities] as are necessary in the discharge of its duties and responsibilities as receiver and to account, therefore, to the Court as the Court may later determine. ¹¹

As such, CVPSD had a duty to Kapitus to manage Timberline Utilities operations and pay Kapitus under the Agreement. CVPSD willfully and deliberately breached its duty to collect "monies, fees and assets" and "apply them to debts" of Timberline Utilities by failing to honor the Agreement. ¹² CVPSD also willfully and deliberately breached its fiduciary duty by:

- (a) Failing to make a single payment under the Agreement to Kapitus;
- (b) Failing to turn over the Purchased Receivables to Kapitus despite Kapitus' demands;

⁹ See Timberline Utilities' Mot. to Dismiss p. 5, ECF No. 139.

¹⁰ See Order Granting PSC's Mot. for Ruling that Regulatory Action is Exempt from Automatic Stay, ECF No. 136.

¹¹ See Pl.'s V. Compl. Ex. A, at 5.

¹² *Id.*

- (c) Treating Kapitus' Purchased Receivables and collateral as its own pursuant to the alleged 1985 Dedication;¹³
- (d) Retaining the benefit of the Purchased Receivables and the collateral without paying any consideration;
- (e) Abusing the bankruptcy process as a means to defraud Kapitus as a valid and secured creditor;
- (f) Instigating the PSC investigation into the Agreement despite the Bankruptcy Court's Order that the Agreement was valid and enforceable and any investigation of the Agreement would have no impact upon Kapitus' valid and secured claim against Timberline Utilities;
- (g) Issuing a subpoena to Kapitus as part of the PSC investigation despite the Bankruptcy Court's Order that the PSC investigation would have no impact upon Kapitus' valid and secured claim; and
- (h) Abusing its role as Receiver, and as the controlling entity of Timberline Utilities, to unjustly enrich CVPSD to the detriment of Timberline Utilities' creditors, including Kapitus, and possibly other creditors.

As a result of Defendants' actions and litigation tactics, on March 7, 2022, Kapitus was forced to file suit in the Circuit Court of Tucker County seeking damages of more than Three Hundred Twenty-Five Thousand Seven Hundred Eighty-Four and 16/100 Dollars (\$325,784.16). Additional attorneys' fees, costs and interest have accrued, and continue to accrue, since Plaintiff filed its Verified Complaint. A copy of the docket sheet is attached as **Exhibit B**.

After Plaintiff filed the Verified Complaint, the PSC conducted its investigation of the Agreement without any input from Kapitus.¹⁴ On April 10, 2022, the PSC entered an Order purportedly voiding Kapitus' Agreement with Timberline Utilities. Despite the Bankruptcy

¹³ The 1985 Dedication is defined in Kapitus' Verified Complaint. Notably, Defendants claim that before the creation of the CVPSD, Timberline Utilities effectively dedicated its assets to CVPSD, without any consideration. Defendants make this argument now in hopes that CVPSD will receive Timberline Utilities' assets, including Kapitus' Purchased Receivables, free and clear of all liens.

¹⁴ Notably, Kapitus, on its own accord, did not participate in the PSC investigation because Kapitus repeatedly addressed the issue before the Bankruptcy Court and the Bankruptcy Court ruled in favor of Kapitus noting that the Agreement was enforceable regardless of the PSC's findings.

Court's clear and unequivocal Orders holding that Agreement was enforceable regardless of the PSC's investigation, Defendants filed their Motion to Dismiss Plaintiff's Verified Complaint arguing that the Agreement is not enforceable pursuant to the PSC's Order.¹⁵ As detailed in Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, pursuant to the Bankruptcy Court's Order, the Agreement is enforceable, and Defendants are liable to Plaintiff.¹⁶

II. This action meets the criteria for "Business Litigation" and would benefit from transfer to the Business Court Division.

As noted above and detailed extensively in Kapitus' Verified Complaint, Plaintiff's business relationship with Timberline Utilities was related to a complex Revenue Based Factoring Agreement along with a Security Agreement. It is undisputed that Timberline Utilities ultimately breached the Agreement and Kapitus suffered damages because of the breach.

In connection with these allegations, Plaintiff asserts claims for breach of contract, fraud, unjust enrichment, fraudulent transfer, breach of fiduciary duties, declaratory judgment, tortious interference, conversion, and civil conspiracy¹⁷:

Kapitus' Verified Complaint – Counts	
1	Breach of Contract (Timberline Utilities)
2	Fraud (Timberline Utilities)
3	Unjust Enrichment (Timberline Utilities and CVPSD)
4	Fraudulent Transfer (Timberline Utilities and CVPSD)
5	Breach of Fiduciary Duties (CVPSD)
6	Declaratory Judgment (Timberline Utilities and CVPSD)
7	Tortious Interference (CVPSD)
8	Conversion (Timberline Utilities and CVPSD)
9	Civil Conspiracy (Timberline Utilities and CVPSD)

¹⁵ See Def.'s Mot. to Dismiss, attached as Exhibit C.

¹⁶ See P.'s Resp. in Opp'n to Defs.' Mot. to Dismiss, attached as Exhibit D.

¹⁷ *Id.* at ¶¶ 62-137.

Rule 29.06(a)(1) of the *West Virginia Trial Court Rules* provides that “[a]ny party . . . may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia.” “Business Litigation” is defined as an action in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

(2) 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

(3) 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.¹⁸

This action is a model case for transfer to the Business Court Division. The claims—and potential future claims—are “of significance to the transactions, operations, or governance between” Kapitius and Defendants.¹⁹ The Complaint alleges that Defendants breached the Agreement and committed several business-related intentional torts arising out of the Agreement.²⁰

¹⁸ W. Va. Trial Ct. R. 29.04(a).

¹⁹ *See id.*

²⁰ *See* Compl. ¶¶ 62-137.

As a result of Defendants' conduct, Defendants have been unjustly enriched and Kapitus has suffered damages of Three Hundred Twenty-Five Thousand Seven Hundred Eighty-Four and 16/100 Dollars (\$325,784.16) plus additional attorneys' fees, costs and interest that continue to accrue.²¹

Put simply, Plaintiff is seeking recourse for Defendants' breach of the Agreement and other intentional torts related to the Agreement. These disputes involve commercial issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution. Resolution will benefit from the specialized knowledge of the Business Court Division, both legal and substantive, regarding interpretation of complex contracts and financial services.


Finally, this action does not fall within any of the disqualifying categories listed in Rule 29.04(a)(3).

WHEREFORE, pursuant to Rule 29 of the *West Virginia Trial Court Rules*, Kapitus Servicing, Inc. moves the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted,

KAPITUS SERVICING, INC.

By Counsel:


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²¹ *Id.*

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Defendants and Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, this day, the 6th day of June 2022, I served the foregoing **MOTION TO REFER CASE TO BUSINESS COURT DIVISION** with attachments by first class mail to the following:

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