

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**F.K. EVEREST, INC. and**  
**J. MIKE MARTIN,**

**Plaintiffs,**

**v.**

**RYAN L. EDDY, DAVID BRYTE,**  
**INFINITY ELECTRIC, INC.,**  
**And ORANGE CONSTRUCTION,**  
**CORPORATION**

**Defendants.**

**CIVIL ACTION NO. 15-C-134**

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO**  
**REFER CASE TO BUSINESS COURT DIVISION**

COMES NOW the Plaintiffs F.K. Everest, Inc. ("FKE") and J. Mike Martin ("Martin") (collectively "Plaintiffs"), by and through their undersigned counsel, opposing the motion by Defendants Ryan L. Eddy ("Eddy"), David Bryte ("Bryte"), Infinity Electric, Inc. ("Infinity"), and Orange Construction Corporation ("Orange") (collectively "Defendants") to refer this case to the Business Court Division.

**I. INTRODUCTION**

The facts in this case are not complicated. Nor does this case involve any complex or novel questions of law. In October 2014, Eddy and Martin executed an agreement providing that (i) Martin would pay Eddy approximately \$300,000 for his ownership interest in FKE no later than January 15, 2015; and (ii) Eddy would refrain from soliciting or recruiting FKE's employees for a period of one year. It is undisputed that Martin lived up to his end of the bargain: he timely paid Eddy in full. However, almost immediately after Eddy received payment, six of FKE's employees resigned their employment to work for Eddy and Bryte and their new competing business, Infinity.

Judge Tucker conducted a one-hour preliminary injunction hearing on March 12, 2015. At the hearing, Eddy claimed that he did not engage in "solicitation" in violation of his agreement with Martin, explaining that the six employees had initiated contact with him (and not the other way around). Therefore, what lies at the heart of this case are two simple questions: whether Eddy's testimony should be credited, and whether Eddy nevertheless violated the agreement's non-recruitment provision even if he is found credible.

Given the straightforward nature of this case, and the fact that Judge Tucker has already held an injunction hearing but has not yet issued a ruling, Plaintiffs respectfully submit that it would be inappropriate to transfer this case to the Business Court Division, particularly at this point in time.

## **II. PROCEDURAL AND FACTUAL BACKGROUND**

On February 20, 2015, Plaintiffs commenced this action by filing a complaint in the Circuit Court for Monongalia County. The complaint alleges three counts: breach of contract (against Eddy), tortious interference with contract (against Bryte, Infinity, and Orange), and breach of fiduciary duty (against Eddy).<sup>1</sup> On February 23, 2015, Plaintiffs filed their motion for preliminary injunction. Defendants sought to transfer the case to the Business Court Division and stay this action by motion on February 24, 2015. Since then, various other papers have been filed, but *Defendants have yet to answer the complaint*. Judge Tucker conducted a hearing and heard argument on Plaintiffs' motion for preliminary injunction on Thursday March 12, 2015. She requested supplemental papers from Plaintiffs on or before Friday March 20, 2015, and reply papers from Defendants on or before Wednesday March 25, 2015.

---

<sup>1</sup> An amended complaint has been filed contemporaneously with this opposition. It names two additional defendants: Jarod Graffius and Jason Tomaro, who were project managers for FKE and who were successfully recruited/solicited by Defendants and includes them in the tortious interference count.

This allegations in this case are straightforward and not of a complex nature that merits transfer to the Business Court Division. Plaintiffs seek to enforce a non-recruitment/non-solicitation provision included in the "Stock Transfer Agreement" by which Eddy sold his minority interest in FKE in exchange for \$281,130.28, paid out over three payments.<sup>2</sup> Upon leaving FKE, Eddy opened his own competitive business, Infinity, partnering with Bryte. Bryte also operates his own business, Orange. Infinity and Orange are registered at the same address and share office resources.

Plaintiffs satisfied their payment obligations, and Eddy received the final payment on January 15, 2015. As part of the agreement, Eddy agreed to the following non-recruitment/non-solicitation provision:

Non-Solicitation of Employees. Assignor shall not, during the one-year period immediately following execution of this Assignment, directly or indirectly, by himself or on behalf of any other person, partnership, corporation or business entity, solicit or recruit any employees of the Companies.

Since Eddy received the final payment on January 15, 2015, six employees have left FKE for Infinity: two project managers, two foremen, and two electricians. The first employee to leave, Jarod Graffius ("Graffius"), was a project manager and left on January 26, 2015, less than two weeks after Plaintiffs satisfied their obligations to Eddy under the Stock Transfer Agreement. Another project manager, Jason Tomaro ("Tomaro") followed Graffius, giving his two-week notice on February 2, 2015.

FKE sent a cease and desist letter to Eddy on February 4, 2015, which was ignored by Defendants. The two foremen and two electricians followed Tomaro, after receiving repeated phone calls from Tomaro who was using his new Infinity-provided cell phone.

---

<sup>2</sup> A true and correct copy of the Stock Transfer Agreement is attached hereto as "Exhibit A." Eddy also sold a minority interest in a related company "VIP Ventures," which is immaterial to the present dispute.

FKE has been irreparably harmed by Infinity's successful solicitation and recruitment of its key employees. Graffius and Tomaro, as project managers, were repository of FKE's goodwill with vendors, suppliers, and subcontractors. Graffius and Tomaro also knew FKE's profit margins and bidding strategies, giving Infinity a decided advantage in responding to RFQ's and bidding on work that FKE is also seeking. Such high turnover in a short period is damaging to FKE's business reputation and standing with contractors who select it to perform work for them, their vendors, suppliers, and subcontractors, and the community at large.

### III. ARGUMENT

This case should not be transferred to the Business Court Division for two reasons: first, there is not good cause for consideration of the motion prior to Defendants answering the complaint, and second, the case does not meet the criteria for transfer. First, Defendants' motion was made without good cause. West Virginia Trial Court R. 29.06(a)(2) requires that a motion be filed only after time to answer the complaint has expired, except "[f]or good cause shown." The time for Defendants to answer Plaintiffs' complaint has not expired. Thus, Defendants must show good cause for transfer.

Defendants cannot show good cause for transfer. Their principal "good cause" alleged in their motion was a desire for the Business Court Division to hear the preliminary injunction motion<sup>3</sup> (Def. Mot. ¶ 9.) Correspondingly, Defendants requested that Judge Tucker stay the matter pending transfer. Instead, Judge Tucker implicitly rejected Defendants' request for a stay and heard testimony and argument on Plaintiffs' motion for preliminary injunction on Thursday March 12, 2015.

---

<sup>3</sup> Defendants also allege that the Business Court Division should hear a potential motion to dismiss, even though they have not, as of the filing of this response, brought such a motion.

Both of Defendants' "good causes" have been mooted. Judge Tucker has mooted the first purported "good cause" by electing to hear Plaintiffs' preliminary injunction motion, mooting transfer to the Business Court Division for that purpose. Defendants' failure to file a motion to dismiss moots their other "good cause." Lacking any good cause, there is no basis to transfer this matter to the Business Court Division at this time and until Defendants' time to answer Plaintiffs' complaint has expired.

Second, Defendants have failed to meet their burden of persuasion. It is Defendants' burden, as movants, to support their motion by satisfying the burden of persuasion. Yet, Defendants did not identify any specific "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." W.Va. Tr. Ct. R. 29.04(a)(2). There are no technological issues raised by Plaintiffs' complaint. Thus, that basis for transfer is instantly removed.

Additionally, Defendants' motion does not articulate a single, specific, commercial issue that requires "specialized treatment." Defendants' motion does not articulate how such "specialized treatment" will "improve the expectation of a fair and reasonable resolution of the controversy." Defendants identify no "subject matter" raised in Plaintiffs' complaint in which "specialized knowledge [of] or expertise in...specific law or legal principles" will be required. Defendants only basis for transfer, apparently, is that this is a dispute between competing businesses and Plaintiffs' former minority owner. That, alone, is insufficient under Trial Court Rule 29.

Finally, there are no issues raised by Plaintiffs' complaint that require the specialized treatment or expertise of the Business Court Division. Plaintiffs' principal allegations are breach of the Stock Transfer Agreement's non-recruitment/non-solicitation clause – and tortious interference with that clause. No specialized knowledge or expertise is required to construct the provision, quoted above. Similarly, no specialized knowledge or expertise is required to determine if Plaintiffs can satisfy the elements of a breach of contract or tortious interference claim, claims which West Virginia's trial courts routinely decide.

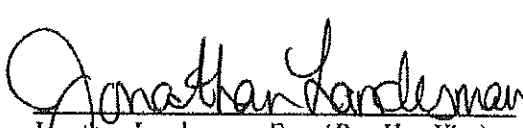

#### IV. CONCLUSION

In sum, this is a routine contract dispute. For the reasons described in the factual background above, Plaintiffs need urgent relief, as quickly as they can obtain it. Defendants' motion, in its total failure to meet its burden of persuasion, can be seen for the delaying tactic it is. At a minimum, Defendants' motion should be dismissed as untimely, because it was filed prior to the expiration of Defendants' time to answer, without good cause. Defendants' motion should be dismissed altogether because Defendants fail to meet their burden of identifying the commercial "subject matter(s)" that require "specialized knowledge or expertise." This matter should remain with the trial court.

Date: March 16, 2015

Respectfully submitted,

F.K. EVEREST, INC. and  
J. MIKE MARTIN,

 *by*  #9412

Jonathan Landesman, Esq. (*Pro Hac Vice*)  
COHEN SEGLIAS PALLAS GREENHALL &  
FURMAN, P.C.

525 William Penn Place, Suite 3005

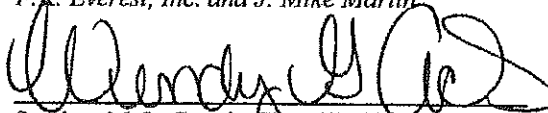
Pittsburgh, PA 15219

(412) 434-5534

[jlandesman@cohenseglias.com](mailto:jlandesman@cohenseglias.com)

*Appearing as Lead Counsel for Plaintiffs*

*F.K. Everest, Inc. and J. Mike Martin*



Stephen M. LaCagnin, Esq. (WV Bar No. 2118)

Wendy G. Adkins, Esq. (WV Bar No. 9412)

JACKSON KELLY PLLC

150 Clay Street, Suite 500

P.O. Box 619

Morgantown, WV 26507-0619

(304) 284-4136

[wgadkins@jacksonkelly.com](mailto:wgadkins@jacksonkelly.com)

[slacagnin@jacksonkelly.com](mailto:slacagnin@jacksonkelly.com)

*Appearing as Local Counsel for Plaintiffs*

# EXHIBIT A



## STOCK TRANSFER AND ASSIGNMENT OF MEMBERSHIP INTERESTS

This Stock Transfer and Assignment of Membership Interests Agreement (the "Assignment") is made this 22 day of October 2014, by and among RYAN L. EDDY, (the "Assignor"), J. MIKE MARTIN (the "Assignee") and F.K. EVEREST, INC., a West Virginia corporation ("Everest") and VIP VENTURES, LLC, a West Virginia limited liability company ("VIP Ventures"), collectively the "Parties."

### Recitals:

A. Everest, an electrical contractor, was incorporated in West Virginia on December 19, 1949;

B. Ryan L. Eddy is the owner of forty-nine (49) shares of common stock in Everest and executed a Key-Man Stock Repurchase Agreement dated May 16, 2008, 2000 (the "Repurchase Agreement");

C. VIP Ventures was formed on March 31, 2004 as a West Virginia limited liability company; VIP Ventures is the owner of the real estate and improvements located at 140 Business Park Drive, Fairmont, WV 26554 (the "Property");

D. Ryan L. Eddy is the owner of 33 $\frac{1}{3}$  % membership interest in VIP Ventures and executed an Operating Agreement, with a Buy-Out Agreement, dated September 6, 2005, as amended February 26, 2014 (collectively, the "Operating Agreement"); and

E. Ryan L. Eddy, as Assignor, desires to transfer all of his entire right, title and interest in and to Everest and VIP Ventures including his stock and membership interests to J. Mike Martin, or his nominee, as Assignee, under the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto, intending to be legally bound, mutually agree as follows:

### 1. Assignment.

(a) Assignor hereby assigns, transfers, sells and conveys unto Assignee all of his entire right, title and membership interest in and to VIP Ventures, including any rights, title or interest (i) in any profits, losses and capital of VIP Ventures; (ii) the Property; and (iii) under the Operating Agreement (collectively, the "LLC Interest");

(b) Assignor hereby assigns, transfers, sells and conveys unto Assignee all of his entire right, title and interest in and to forty-nine (49) shares of common stock in Everest, including any rights, title or interest in Everest and under the Repurchase Agreement (collectively, the "Stock Interest"); and

(c) The LLC Interest and Stock Interest may hereinafter be collectively referred to as "Interests." Everest and VIP Ventures may hereinafter be collectively referred to as the "Companies."

2. Payment.

(a) Assignee shall pay to Assignor the total amount of Three Hundred Forty Thousand One Hundred Two Dollars and Twenty Eight Cents (\$340,102.28) (the "Purchase Price"), as set forth on Exhibit A, pursuant to the following schedule and allocation:

| <u>Payment Date</u> | <u>FKE</u>   | <u>VIP</u>  | <u>Total</u> |
|---------------------|--------------|-------------|--------------|
| 10/30/2014          | \$70,000.00  | \$29,486.00 | \$99,486.00  |
| 11/17/2014          | \$40,000.00  | \$29,486.00 | \$69,486.00  |
| 1/15/2015           | \$171,130.28 |             | \$171,130.28 |
|                     | \$281,130.28 | \$58,972.00 | \$340,102.28 |

3. Limited Representations. Assignor hereby represents and warrants that he owns the Interests free and clear of any all liens, encumbrances and security interests and he has not assigned, transferred, sold and conveyed the Interests, or any part of them, prior to the execution of this Assignment.

4. Limited Indemnifications.

(a) Assignor agree to indemnify, defend and hold harmless the Assignee and Companies, and their agents, heirs, employees and assigns from and against any and all liabilities, claims, losses, damages, penalties, costs or expenses (including but not limited to court costs and reasonable attorney's fees) relating to or arising by reason of the Interests; provided that these (i) arose before the date of this Assignment; (ii) were caused by the acts and omissions of Assignor; and (iii) were not caused by the acts and omissions of Assignee or Companies; and

(b) Assignee and the Companies Everest agree to indemnify, defend and hold harmless the Assignor, and his agents, heirs, employees and assigns from and against any and all liabilities, claims, losses, damages, penalties, costs or expenses (including but not limited to court costs and reasonable attorney's fees), provided that these (i) relate to or arise by reason of the Interests after the date of this Assignment and Assignor's ownership of the Interests; and (ii) were not caused by the acts and omissions of Assignor.

5. Mutual Releases. The Parties hereby forever release and discharge each other, and their heirs, predecessors, successors, assigns, employees, directors, and officers, from all claims (whether at equity or law, realized or not) relating to and/or arising out of or related to the Interests, the Companies or the Assignor's acquisition, ownership and assignment of the Interests, except the Parties do not release or discharge any claims they may have relating to any breach of this Assignment.

6. Resignation. Assignor does hereby resign as director, officer and employee of Everest and as manager and officer of VIP Ventures.

7. Non-Solicitation of Employees. Assignor shall not, during the one-year period immediately following execution of this Assignment, directly or indirectly, by himself or on behalf of any other person, partnership, corporation or business entity, solicit or recruit any employees of the Companies.

8. Stock and Membership Certificates. Assignor hereby irrevocably constitutes and appoints Assignee to transfer the Interests on the books of the Companies, with full power of substitution. Assignor shall deliver to Assignee the certificates, if any, representing the Interests, duly endorsed in proper form for transfer. If the certificates representing his Interests are not currently in his possession, Assignor certifies that they were not indorsed and that, until execution of this Assignment, he remained the registered and beneficial owner of the Interests.

9. Miscellaneous.

(a) This Assignment shall be construed and enforced under the laws of the laws of the State of West Virginia and all disputes that arise or relate to this Assignment shall be litigated in the state or federal courts of West Virginia located in Morgantown, West Virginia, unless the parties agree otherwise.

(b) This Assignment supersedes all prior and contemporaneous oral or written communications between the parties related to the terms or subject matter of this Assignment, except such written communications as shall have been incorporated herein by reference. The written terms of this Assignment are intended by the parties to be a final written expression of their agreement with respect to such terms, and as a complete and exclusive statement of the terms of the agreement between them. Modifications or amendments may be made in writing and shall only be valid when signed by both parties.

(c) The recitals are incorporated by reference into this Assignment as though the same were fully set forth herein.

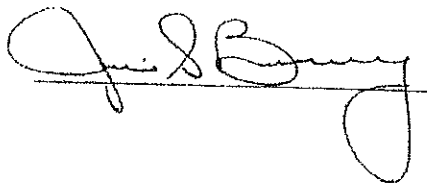
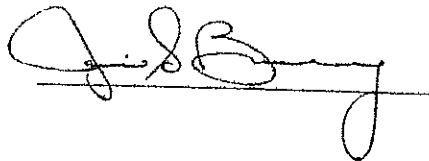
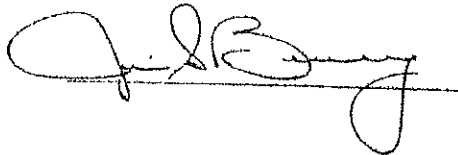
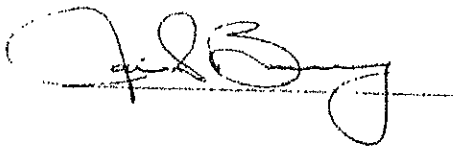
(d) This Assignment shall be executed in two counterparts, each of which shall constitute an original. A telefax signature shall be deemed an original for all

uses and purposes except this shall not be construed as relieving any party from an obligation of executing and forwarding the original signature pages.

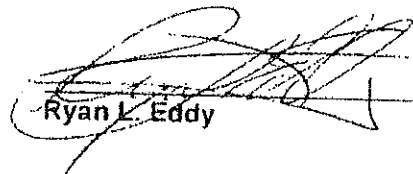
(e) This Assignment shall be deemed to have been drafted by each of the parties to the Assignment.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Assignment this 22 day of October 2014.


ATTEST/WITNESS:




ASSIGNOR:

  
Ryan L. Eddy (SEAL)

ASSIGNEE:

  
J. Mike Martin (SEAL)

VIP Ventures, LLC

By:  (SEAL)  
J. Mike Martin, Managing Member

F.K. Everest, Inc.

By:  (SEAL)  
J. Mike Martin, President

**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA**

**F.K. EVEREST, INC.,  
and J. MIKE MARTIN,**

**Plaintiffs,**

**v.**

**CIVIL ACTION NO.: 15-C-134  
Honorable Susan B. Tucker**

**RYAN L. EDDY, DAVID BRYTE,  
JAROD GRAFFIUS, JASON TOMARO,  
INFINITY ELECTRIC, INC., and  
ORANGE CONSTRUCTION CORPORATION,**

**Defendants.**

---

**CERTIFICATE OF SERVICE**

---

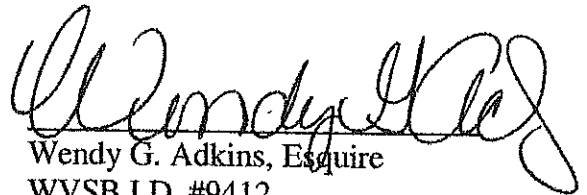
I, Wendy G. Adkins, do hereby certify that I served the foregoing, **“Plaintiffs’  
Opposition to Defendants’ Motion to Refer Case to Business Court,”** upon the  
following, *via* U.S. Mail, postage pre-paid, on the 16<sup>th</sup> day of March, 2015:

Honorable Susan B. Tucker  
Division No. 1  
Monongalia County Courthouse  
243 High Street  
Morgantown, WV 26505

Jean Friend, Circuit Clerk  
Circuit Court of Monongalia County  
Monongalia County Courthouse  
243 High Street, Room 110  
Morgantown, WV 26505

Andrew G. Fusco, Esquire  
Dylan Lewis, Esquire  
BOWLES RICE LLP  
7000 Hampton Center  
Morgantown, WV 26505  
*Counsel for Defendants*

Berkeley County Judicial Center  
Business Court Division Central Office  
380 W. South Street, Suite 2100  
Martinsburg, WV 25401



Wendy G. Adkins, Esquire  
WVSB I.D. #9412