

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREER INDUSTRIES, INC.

Plaintiff,

v.

Monongalia County Circuit Court

CIVIL ACTION NO. 15-C-74

The Hon. Russell M. Clawges, Jr., Judge

WEST VIRGINIA UNIVERSITY  
FOUNDATION, INC.,

Defendant.

And

WEST VIRGINIA RADIO CORPORATION,

Plaintiff,

v.

Monongalia County Circuit Court

Civil Action No. 13-C-468

Business Division

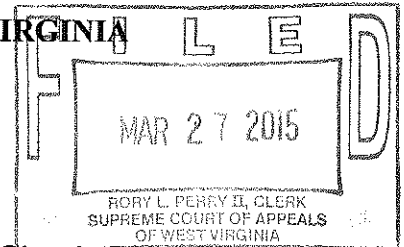
Judge Thomas C. Evans III

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,  
WEST VIRGINIA UNIVERSITY FOUNDATION, INC.,  
WEST VIRGINIA MEDIA HOLDINGS, LLC,  
ANDREW A. PAYNE, III, DAVID B. ALVAREZ,  
ALBERT BRAY CARY, JR., RALPH BALLARD,  
RICHARD BALLARD, OLIVER LUCK, JAMES P. CLEMENTS,  
AND IMG COLLEGE, LLC,

Defendants.

TO: The Honorable Chief Justice Margaret L. Workman

MOTION OF WEST VIRGINIA UNIVERSITY FOUNDATION, INC., TO REFER CASE  
TO BUSINESS COURT DIVISION AND REQUEST FOR EXPEDITED RELIEF



Pursuant to Trial Court Rule 29.06 of the West Virginia Trial Court Rules, the Defendant, West Virginia University Foundation, Inc., ("WVUF") by counsel, respectfully requests that this Court refer the above-styled Civil Action No. 15-C-74 pending in the Circuit Court of Monongalia County to the Business Court Division. In support of this Motion, WVUF states the following:

**1. Nature of the Cause of Action.**

This matter involves a dispute between a private, closely held corporation, Greer Industries, Inc., (Greer) and a private, non-profit charitable corporation, the West Virginia University Foundation, Inc. (WVUF). It involves allegations of breach of fiduciary duty and violations of the West Virginia Solicitations of Charitable Funds Acts arising out of an investment made by WVUF in 2002 and 2003 in West Virginia Media Holdings LLC and WVUF's acquisition of video scoreboards and other Panasonic electronic equipment for the benefit of West Virginia University between 2008 and 2012. As such, this action involves claims and disputes of significance to the transactions, operations, or governance of business entities, including, but not limited to, the internal affairs of a corporation, and claims involving the actions of directors and/or officers of the corporation. As required by required Trial Court Rule 29.06, the Complaint, Answer and Docket Sheet in this matter, Monongalia County Circuit Court Civil Action No. 15-C-74, are attached and marked respectively as **Exhibits 1, 2, and 3** to this motion.

**2. Related Actions and Consolidation.**

In regard to the above action, there is a related action already pending in the Business Court Division, *West Virginia Radio Corporation v. West Virginia University Board of Governors, et al.* Civil Action No. 13-C-468, that should be the subject of consolidation. This matter is pending

before the Honorable Thomas C. Evans, III. The Amended and Verified Complaint of West Virginia Radio Corporation, the Answer of WVUF and the Docket Sheet in Civil Action No. 13-C-468 are also attached and are marked respectively as **Exhibits 4, 5, and 6**. Civil Action No. 13-C-468 involves nearly identical factual and legal allegations against WVUF by West Virginia Radio Corporation (WVRC), which is a sister corporation of Greer and also a company for which Greer provides management, human resources, payroll, accounting, legal, and other services. Greer and WVRC also share common officers, directors, and owners. *See*, Depo. of WVRC President Dale Miller, Vol. II, March 4, 2015, Pgs. 421--426 attached **Exhibit 7**; *see also* chart comparing WVRC's Amended Complaint to Greer's Complaint, attached as **Exhibit 8**.

In addition to the West Virginia University Board of Governors (WVU), WVUF is a party defendant in the WVRC case along with former WVU President James Clements, former WVU Athletic Director Oliver Luck, current WVU Board of Governors member Andrew Payne, IMG College, West Virginia Media Holdings LLC., ("WVMH") and three individuals: WVMH President Albert Bray Cary and alleged WVMH investors Richard Ballard III and Ralph Ballard.

As practical matter, the matters at issue in this Complaint have already been determined by the West Virginia Supreme Court of Appeals to be appropriate for Business Court jurisdiction when Chief Justice Benjamin ordered the transfer of the WVRC case to the Business Division. *See* Or. Sept. 12, 2013 and Sept. 26, 2014 Administrative Or., attached collectively as **Exhibit 9**. The issues raised in the instant action are inextricably entwined with the issues raised in Civil Action No. 13-C-468, and Greer Industries, Inc., and WVRC are sister corporations with common officers and common owners. *See* Ex. 7. As can be seen by comparing the Complaints, the actions involved

common allegations and arise from the same transaction or occurrence or same series of transactions or occurrences. *See* Ex. 8. Requiring WVUF to try two cases against sister corporations with common management and ownership where the cases involve common witnesses, common factual allegations, and common legal theories with a high level of complexity requiring specialized treatment would result in a waste of resources for both WVUF and the Court. Additionally, it could expose the parties to the risk of conflicting rulings and potentially inconsistent results. Moreover, the parties in Civil Action No. 13-C-468 have already produced tens of thousands of documents (both in paper and electronic format), spent weeks in depositions, and have expended millions of dollars in legal fees preparing that case. Individuals identified as part of the factual allegations in both actions include former WVUF Vice President of Investments Dorothy Dotson, former WVUF President Wayne King, WVU Vice President of Administration and Finance Narvel Weese, WVMH Chairman W. Marston Becker, WVMH President Bray Cary, Richard Ballard, Ralph Ballard, WVU board member Andrew Payne, Greer and WVRC General Counsel Robert Gwynne, and Greer President and owner (and WVRC owner), John Raese. Time is of the essence in that a trial is presently scheduled to begin in Civil Action No. 13-C-468 on June 22, 2015. Furthermore, Court ordered mediation involving two Business Division judges, Division Chair Judge Wilkes and Judge Young, is scheduled in Civil Action No. 13-C-468 for April 8, 2015. The chances of a successful, fair, and reasonable resolution are increased if this matter is referred and consolidated so that it can be mediated together with its companion case.

WVUF respectfully submits that after referral to the Business Court Division, the instant case should be consolidated with Civil Action No. 13-C-468 and transferred to Judge Evans. If these two

cases were both pending in Circuit Court, transfer of the Greer case would be mandatory under W.Va. Rule Civ. P. 42(b). Then, whether the matters should be consolidated for trial would be within the discretion of the court to which the matter was transferred. *See Syl., State ex rel. Bank of Ripley v. Thompson*, 139 S.E.2d 267, 268 (W.Va. 1964); *Syl. Hanlon v. Joy Mfg. Co.*, 518 S.E.2d 594, 595 (W.Va. 1992).

In deciding consolidation issues, the court should consider several factors in the exercise of its discretion. These are: 1) whether the risks of prejudice and confusion outweigh judicial economy; 2) the burden on parties, witnesses, and resources posed by multiple lawsuits; 3) the time required to conclude multiple suits compared to a single suit; and 4) the relative expense to all concerned of single, versus multiple trial alternatives. *See Syl. Pt. 2, State ex. rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 607, 610 (W.Va. 1993).

Given the fact that Civil Action No. 13-C-468 was previously referred to the Business Court Division and assigned to Judge Evans by then Chief Justice Benjamin, if referral to the Business Court Division is granted, it would be the most efficient use of the Court's resources to assign this case to Judge Evans who already has a broad knowledge regarding the matters at issue and to consolidate the matter with Civil Action No. 13-C-468.

### **3. Request to Chief Justice for Expedited Consideration.**

Pursuant to Trial Court Rules 29.06(a)(2) and (4), WVUF requests expedited consideration of this Motion and requests that the Chief Justice grant this Motion to Refer without response. WVUF was served with the Complaint in this matter on Monday, March 16, 2015, by a process server at WVUF's principal place of business in Morgantown, West Virginia. The time to answer or

otherwise plead has not yet expired, but an Answer was filed on March 26, 2015. *See* Ex. 2. Pursuant to Rule 29.06(a)(2) of the West Virginia Trial Court Rules, a motion for referral of a case to the Business Court Division shall be filed after the time to answer the complaint has expired. However, for good cause shown to the Chief Justice, the motion may be filed sooner. Since an Answer has been filed, good cause exists in this matter for the Chief Justice to permit early filing of this motion and to immediately refer this matter to the Business Division rather than needlessly wait for the expiration of the remaining time to file an Answer to expire.

In addition, while Rule 29.06(a)(4) provides for any party or affected judge to have twenty (20) days after the motion is filed within which to file a reply memorandum stating its position and opposition, if any, to the motion, the Chief Justice shall have the authority to grant or deny the motion to refer without response for good cause shown. In this case, for the reasons set forth *infra*, good cause exists immediately to refer the matter without response.

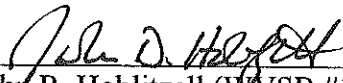
#### **4. Conclusion.**

**WHEREFORE**, the WVUF respectfully moves pursuant to Trial Court Rule 29.06, that the Honorable Chief Justice of the Supreme Court of Appeals of West Virginia consider this motion on an expedited basis, that this case be referred to the Business Court Division, and that, if appropriate at this stage, the case be consolidated with the case of *West Virginia Radio Corporation v. West Virginia University Board of Governors, et al.*, Civil Action No. 13-C-468, previously referred to the Business Court Division, for consideration and decision.

Respectfully submitted,

**WEST VIRGINIA UNIVERSITY  
FOUNDATION, INC.**

By Counsel

  
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March 24, 2015

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

**GREER INDUSTRIES, INC.**

**Plaintiff,**

**v.**

**Monongalia County Circuit Court  
CIVIL ACTION NO. 15-C-74  
The Hon. Russell M. Clawges, Jr., Judge**

**WEST VIRGINIA UNIVERSITY  
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**WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,  
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ALBERT BRAY CARY, JR., RALPH BALLARD,  
RICHARD BALLARD, OLIVER LUCK, JAMES P. CLEMENTS,  
AND IMG COLLEGE, LLC,**

**Defendants.**

**CERTIFICATE OF SERVICE**

I, John D. Hoblitzell, III as counsel for West Virginia University Foundation, Inc., hereby  
certify that on the 27<sup>th</sup> day of March, 2015, I served the foregoing **Motion of West Virginia**



**University Foundation, Inc., to Refer Case to Business Court Division and Request for Expedited Relief** upon the following judicial officers by hand delivery a true copy thereof to them as follows at their respective judicial offices:

Honorable Margaret L. Workman, Chief Justice  
C/O Hon. Rory Lee Perry, Clerk  
Supreme Court of Appeals of West Virginia  
1900 Kanawha Blvd. East, Rm. E-317  
Charleston, West Virginia 25305

Hon. Russell M. Clawges, Jr., Judge Circuit Court  
of Monongalia County  
Monongalia County Court House  
234 High Street  
Morgantown, West Virginia 26505  
*Presiding Judge in Civil Action No. 15-C-74*

Hon. Thomas C. Evans III, Chief Judge  
Jackson County Court House P.O. Box 800  
Ripley, West Virginia 25271 *Presiding Judge  
in Civil No. 13-C-468  
Circuit Ct. of Monongalia County- Business  
Division*

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

I, further certify that on the 27<sup>th</sup> day of March, 2015, I served the foregoing **Motion of West Virginia University Foundation, Inc., to Refer Case to Business Court Division and Request for Expedited Relief** upon the following persons by depositing a true copy thereof in the United States Mail addressed as follows at their last known address and by e-mailing a true copy thereof to their email address as indicated.

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Action No. 15-C-74*

I, further certify that on the 27<sup>th</sup> day of March, 2015, I served the foregoing **Motion of West Virginia University Foundation, Inc., to Refer Case to Business Court Division and Request for**

**Expedited Relief** upon counsel of records in Civil Action No. 13-C-468 via email as directed by the Case Management Order in that action as indicated:

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State of West Virginia

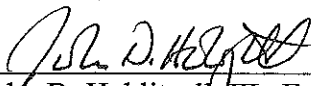
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