

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

JOHN J. MENTUS,

Petitioner,

v.

Petition No. 15-P-63

Judge Michael John Aloï

FRANK WASHENITZ, and
R&W CABLE CO., INC.,
a West Virginia corporation,

Respondents,

and

FRANK WASHENITZ,

Respondent/Third-Party Plaintiff,

v.

J&J MINE SERVICE LLC,

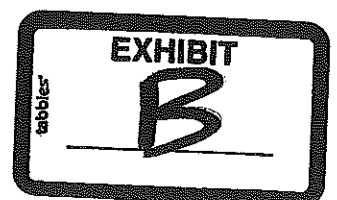
Third-Party Defendant.

**FRANK WASHENITZ'S RESPONSE TO PETITION, COUNTERCLAIM, AND
THIRD-PARTY COMPLAINT AGAINST J&J MINE SERVICE LLC**

Response to Petition

Frank Washenitz ("Washenitz"), by counsel Andrew G. Fusco, Michael C. Cardi and the law firm of Bowles Rice LLP, respectfully submits this *Response to Petition*.

1. Paragraph 1 of the Petition states a conclusion of law to which no response is required.
2. Washenitz admits the allegations contained in paragraph 2 of the Petition.
3. Washenitz admits the allegations contained in paragraph 3 of the Petition.



4. Washenitz admits the allegations contained in paragraph 4 of the Petition.
5. Washenitz admits the allegations contained in paragraph 5 of the Petition.
6. Washenitz admits the allegations contained in paragraph 6 of the Petition.
7. Washenitz admits the allegations contained in paragraph 7 of the Petition, but asserts affirmatively that such loss of business was the direct, proximate result of the conduct and misconduct of the Petitioner as alleged more fully in the Defendant Washenitz's Counterclaim below.
8. Washenitz admits the allegations contained in paragraph 8 of the Petition.
9. Washenitz is without sufficient facts and information upon which to form a belief regarding the allegations in paragraph 9 of the Petition.
10. Washenitz admits the allegations contained in paragraph 10 of the Petition.
11. Washenitz admits the allegations contained in the first two sentences of paragraph 11 of the Petition, but denies the remaining allegations in said paragraph.
12. Washenitz denies each and every allegation contained in the Petition and not specifically admitted herein.

FIRST AFFIRMATIVE DEFENSE

Petitioner breached his fiduciary duties to R&W Cable and, consequently, to Frank Washenitz. Therefore, his action is barred.

SECOND AFFIRMATIVE DEFENSE

Petitioner is estopped from bringing this action by Petitioner's own misconduct.

THIRD AFFIRMATIVE DEFENSE

Petitioner is estopped from bringing this action based on the equitable doctrines of waiver, laches, and unclean hands.

FOURTH AFFIRMATIVE DEFENSE

Washenitz gives notice that he intends to rely on other defenses, including, without limitation, those defenses available under Rules 8(c) and 12(b) of the West Virginia Rules of Civil Procedure, as may become available or apparent during the course of discovery, and reserves the right to amend this response to assert any such defense.

WHEREFORE, Respondent Frank Washenitz respectfully requests the following relief from this Court:

a. that the Court set a hearing forthwith to determine whether a receiver or custodian should be appointed to seize the assets and to operate the business until further order of the Court;

b. that the Court appoint a receiver or custodian to (1) take over the day-to-day operations of the company *pendente lite*; and (2) enter negotiations with potential private-party buyers, including Pillar Innovations, LLC, a company which, as explained below, has expressed interest in purchasing the assets of R&W Cable for a considerable sum;

c. that the Court direct the receiver or custodian to—upon the receiver or custodian’s determination that sale to a private buyer is futile—reduce costs and expenses of the corporation, including hiring and firing or adjusting pay and benefits to any employee, officer or director of the company, and taking all other action required to preserve the corporate assets wherever located and carrying on the business of the corporation until a full hearing can be had on Respondent’s *Counterclaim, and Third-Party Complaint Against J&J Mine Service LLC*;

c. that the Court—should private-party sale be abandoned and only after a full hearing on Petitioners claims and on Respondent’s *Counterclaim, and Third-Party Complaint Against J&J Mine Service LLC*—order a liquidation of the company.

Counterclaim, and Third-Party Complaint Against J&J Mine Service LLC

Respondent/Third-Party Plaintiff Frank Washenitz ("Washenitz") hereby asserts the following *Counterclaim* against Petitioner John J. Mentus ("Mentus") and *Third-Party Complaint Against J&J Mine Service LLC*.

1. J&J Mine Service LLC ("J&J Mine Service") is a limited liability company that was organized by Mentus and Joyce Gandy under the laws of the State of West Virginia.

2. J&J Mine Service was terminated on March 25, 2015, and Washenitz was not informed of the same until after the termination date.

3. Frank Washenitz is a resident of Marion County, West Virginia.

4. In 1984, Mentus married Washenitz's daughter, Joni.

5. Immediately thereafter, Washenitz gifted 50% ownership of R&W Cable to Mentus.

6. At various times during Mentus's ownership of R&W Cable, Mentus operated other businesses while employed by R&W Cable.

7. Concerned with the nature and operation of such other businesses, Washenitz occasionally requested that Mentus terminate the same, and Mentus agreed to do so.

8. On August 19, 2013, Mentus registered J&J Mine Services as a trade name of R&W Cable.

9. Mentus did not consult with, or inform, Washenitz of the registration of this trade name.

10. On September 19, 2013, Mentus, along with Joyce Gandy ("Mrs. Gandy"), formed J&J Mine Service.

11. Mentus did not consult Washenitz about the formation of J&J Mine Service or inform Washenitz of its existence.

12. At the time Mentus and Mrs. Gandy formed J&J Mine Service, Mrs. Gandy's husband, Jim Gandy ("Mr. Gandy"), was an employee of Murray Energy Corporation ("Murray Energy") and Assistant Superintendent of Robinson Run Mine.

13. At the time Mentus and Mrs. Gandy formed J&J Mine Service, Murray Energy was R&W Cable's primary client and largest source of revenue.

14. At the time Mentus and Mrs. Gandy formed J&J Mine Service, Mentus knew, or by the exercise of reasonable diligence, should have known, that Murray Energy's policies prohibited Mrs. Gandy from being a part of any business dealings with Murray Energy for so long as her husband was employed by Murray Energy.

15. J&J Mine Service frequently performed rock-dusting services for Murray Energy.

16. Because J&J Mine Service did not possess the necessary licenses and insurance coverage required by the State of West Virginia and Murray Energy to perform work for Murray Energy, Mentus directed J&J Mine Service to bill its services through R&W Cable, thereby misleading Murray Energy as to the true ownership of the company with which it was doing business.

17. J&J Mine Service utilized R&W Cable's employees, materials and equipment to perform services for Murray Energy.

18. In or about March 2015, Murray Energy discovered the relationship among Mr. Gandy, Mrs. Gandy, J&J Mine Service and R&W Cable, and terminated the services of R&W Cable for conflict of interest.

19. At the time Murray Energy terminated its relationship with R&W Cable, it informed Washenitz that the business relationship could resume only if Mentus were dissociated from R&W Cable.

20. As a result of the loss of its primary source of business, R&W Cable's profits began to dwindle.

21. R&W Cable's profits will continue to dwindle, and its value to third-parties will decrease correspondingly with Murray Energy absent from R&W Cable's client base.

22. Thereafter, Washenitz and Mentus were unable to agree on a profitable path forward.

23. In April 2015, a representative of Pillar Innovations, LLC ("Pillar") contacted Washenitz and told him that Pillar was interested in purchasing R&W Cable.

24. Pillar expressed a willingness to purchase R&W Cable even though Washenitz suggested the value of the company was in the range of \$1.9 million because Pillar was confident that Murray Energy's business would return to R&W Cable with the change of ownership.

25. In order to proceed in negotiations, Pillar required that R&W Cable sign a Mutual Confidentiality Agreement ("Confidentiality Agreement").

26. Mentus refused to allow Washenitz to sign the Confidentiality Agreement.

27. Upon information and belief, Mentus refused to sign the Confidentiality Agreement because he wished to retain certain equipment titled to R&W Cable, namely, a bore hole truck, and did not want Pillar, a competitor of J&J Mine Service, to have the same. The same is admitted by Mentus's attorney, George B. Armistead, in a March 14, 2015, letter attached as Exhibit A:

"The issue with turning over all of R&W's information to any potential buyer [signing the Confidentiality Agreement] and letting

that buyer's representative speak to the employees of R&W is to protect the future viability of what remains of R&W or any business my client will be able to continue under a new name. My client still wants to make a living with the skills he has and the equipment [the bore hold truck] that he is willing to purchase from R&W or replace with one-half the funds, net of taxes and expenses, from a sale."

Exhibit A, at 1-2.

**COUNT I — BREACH OF DUTIES AS DIRECTOR
REGARDING J&J MINE SERVICE
(W. Va. Code §§ 31D-8-830 & 831)
(Against John J. Mentus)**

28. Washenitz hereby adopts and incorporates paragraphs 1 through 27 of its *Counterclaim and Third-Party Complaint* as if fully set forth herein.

29. As a director of R&W Cable, Mentus had a duty to act in good faith and in a manner that he reasonably believed was in the best interest of R&W Cable.

30. By forming J&J Mine Service with Mrs. Gandy, Mentus created a conflict of interest detrimental to R&W Cable.

31. Mentus created this conflict in bad faith and for his own personal gain.

32. Mentus did not reasonably believe that the formation of J&J Mine Service was in the best interest of R&W Cable.

33. As a result of Mentus's actions, Murray Energy terminated its business relationship with R&W Cable, rendering R&W Cable unprofitable and substantially depleting its value to its shareholders and to any third-party purchaser.

34. These actions constitute a breach of Mentus's duties as a director of R&W Cable.

**COUNT II — BREACH OF DUTIES AS DIRECTOR REGARDING PILLAR
(W. Va. Code §§ 31D-8-830 & 831)
(Against John J. Mentus)**

35. Washenitz hereby adopts and incorporates paragraphs 1 through 34 of its *Counterclaim and Third-Party Complaint* as if fully set forth herein.

36. Mentus's refusal to allow Washenitz to sign Pillar's Confidentiality Agreement effectively foreclosed the possibility of selling R&W Cable to Pillar.

37. Such refusal was done in bad faith and for Mentus's own personal gain.

38. Mentus did not reasonably believe that refusing to sign Pillar's Confidentiality Agreement was in the best interest of R&W Cable.

39. As a result of Mentus's actions, R&W Cable is in risk of dissolution and its assets will be sold absent the considerable value of its former client, Murray Energy, which value Pillar represented it could return to the R&W Cable asset base.

40. These actions constitute a breach of Mentus's duties as a director of R&W Cable.

**COUNT III — BREACH OF DUTIES AS OFFICER
REGARDING J&J MINE SERVICE
(W. Va. Code § 31D-8-842)
(Against John J. Mentus)**

41. Washenitz hereby adopts and incorporates paragraphs 1 through 40 of its *Counterclaim and Third-Party Complaint* as if fully set forth herein.

42. As an officer of R&W Cable, Mentus had a duty to act in good faith, a duty to act with the care that a person in a like position would reasonably exercise under similar circumstances, and a duty to act in a manner that he reasonably believed to be in the best interest of R&W Cable.

43. As an officer of R&W Cable, Mentus violated those duties set forth in W. Va. Code § 31D-8-842 by forming J&J Mine Service with Mrs. Gandy and creating a conflict of interest detrimental to R&W Cable.

44. In so doing, Mentus was not acting in good faith, not acting with the care that a person in a like position would reasonably exercise under similar circumstances, and not acting in a manner that he reasonably believed to be in the best interest of R&W Cable.

45. Mentus's actions proximately caused substantial damage to R&W Cable.

46. Mentus's intentional actions constituted a breach of his duties as an officer of R&W Cable.

**COUNT IV — BREACH OF DUTIES AS OFFICER REGARDING PILLAR
(W. Va. Code § 31D-8-842)
(Against John J. Mentus)**

47. Washenitz hereby adopts and incorporates paragraphs 1 through 46 of its *Counterclaim and Third-Party Complaint* as if fully set forth herein.

48. As an officer of R&W Cable, Mentus violated the duties set forth in W. Va. Code § 31D-8-842 by refusing to allow Washenitz to sign Pillar's Confidentiality Agreement and effectively foreclosed the possibility of selling R&W Cable to Pillar.

49. In so doing, Mentus was not acting in good faith, not acting with the care that a person in a like position would reasonably exercise under similar circumstances, and not acting in a manner that he reasonably believed to be in the best interest of R&W Cable.

50. Mentus's actions proximately caused harm to R&W Cable.

51. Mentus's intentional actions constitute a breach of his duties as an officer of R&W Cable.

**COUNT V — ACCOUNTING
(Against J&J Mine Service)**

52. Washenitz hereby adopts and incorporates paragraphs 1 through 51 of its *Counterclaim and Third-Party Complaint* as if fully set forth herein.

53. J&J Mine Service utilized R&W Cable's materials, equipment, and employees to perform services for Murray Energy and, presumably, other clients.

54. J&J Mine Service fraudulently billed Murray Energy and, presumably, other clients, for its services through R&W Cable because J&J Mine Service lacked the requisite licenses and insurance coverage to perform its services legally and in accordance with Murray Energy's corporate policies.

55. As such, Washentiz, as 50% owner of R&W Cable, is entitled to an accounting of J&J Mine Services' profits.

56. Washentiz, as 50% owner of R&W Cable, is entitled to an accounting of the materials and equipment utilized by J&J Mine Service to perform services.

57. Washenitz, as 50% owner of R&W Cable, is entitled to an accounting of R&W Cable's labor utilized by J&J Mine Service to perform services.

**COUNT VI — MISAPPROPRIATION OF R&W CABLE'S MATERIALS, EQUIPMENT,
LABOR, AND GOODWILL
(Against John J. Mentus and J&J Mine Service)**

58. Washenitz hereby adopts and incorporates paragraphs 1 through 57 of its *Counterclaim and Third-Party Complaint* as if fully set forth herein.

59. Washenitz is 50% owner of R&W Cable and, as such, has an interest in protecting R&W Cable's assets, labor, and goodwill.

60. Mentus registered J&J Mine Services as a trade name of R&W Cable and formed J&J Mine Service with Joyce Gandy in order to fraudulently do business for Murray Energy.

61. Upon information and belief, on behalf of J&J Mine Service, Mrs. Gandy leveraged her husband's position at Murray Energy to gain Murray Energy's business.

62. Mentus and J&J Mine Service misappropriated materials, equipment, and labor from R&W Cable for their personal benefit and without fully compensating R&W Cable.

63. Mentus and J&J Mine Service misappropriated R&W Cable's goodwill, represented by its various licenses and insurance coverage, for their personal benefit and without fully compensating R&W Cable.

WHEREFORE, Respondent/Third-Party Plaintiff Frank Washenitz respectfully requests the following relief from this Court:

(a) that upon sale or dissolution, the Court reduce Mentus's share of profits and/or distribution to represent the decrease in value of R&W Cable and the monetary loss that R&W Cable suffered as a result of J&J Mine Service and Mentus's misappropriation of funds, and Mentus's breach of duties imposed by W. Va. Code §§ 31D-8-830, 831, & 842;

(b) an accounting of the work performed by J&J Mine Service and billed through R&W Cable;

(c) an accounting of the materials, equipment, and work force misappropriated by J&J Mine Service and Mentus in the performance of services for Murray Energy and other clients;

(d) punitive damages against Mentus and J&J Mine Service for its fraudulent misappropriation of R&W Cable's materials, equipment, work force, and goodwill; and

(e) all other relief that this Court deems appropriate.

FRANK WASHENTZ

By counsel

/s/ Andrew G. Fusco
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Michael C. Cardi [WVSB # 12228]
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing FRANK WASHENITZ'S RESPONSE TO PETITION, COUNTERCLAIM, AND THIRD-PARTY COMPLAINT AGAINST J&J MINE SERVICE LLC was this day electronically filed with the Clerk of the Court, which will send notification of such filing to counsel of record.

Dated this 15th day of May 2015.

/s/ Andrew G. Fusco
Andrew G. Fusco [WVSB # 1317]
Michael C. Cardi [WVSB # 12228]