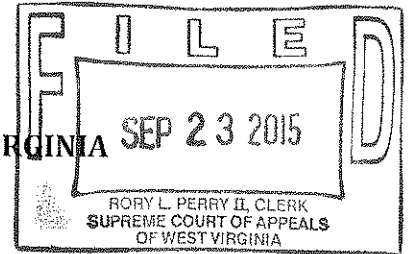


15-BCD-20



IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ALAN ENTERPRIZES, LLC  
Plaintiff,

Civil Action No.: 14-C-503-2  
Judge Bedell

v.

MAC'S CONVENIENCE STORES LLC,  
d/b/a Circle K, JOYCE SALMON, and  
LOUIS DIAB,

Defendants.

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

Plaintiff Alan Enterprizes LLC and Defendants Mac's Convenience Stores LLC d/b/a Circle K, Joyce Sammon<sup>1</sup>, and Louis Diab, by their undersigned counsel, hereby submit this Joint Motion to refer Civil Action No. 14-C-503-2, currently pending before the Circuit Court of Harrison County, West Virginia, to the Business Court Division pursuant to Rule 29.01 of the West Virginia Trial Court Rules. In support of their motion, the parties states as follows:

**I. Nature of the Action**

The nature of the above-referenced action is a claim under the West Virginia Unfair Trade Practices Act ("WVUTPA"), W. Va. Code § 47-11A-1 *et seq.*, arising out of the alleged sale of gasoline below cost by Defendant Mac's Convenience Stores LLC, d/b/a Circle K ("Mac's"). The WVUTPA provides that "[i]t is unlawful for any person, partnership, firm, corporation, joint-stock company, or other association engaged in business as a retailer or wholesaler within this State, to sell, offer for sale, or advertise for sale any article, product

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<sup>1</sup> Ms. Sammon was incorrectly named as a defendant as "Joyce Salmon" although her last name is actually "Sammon."

or item of merchandise at less than the cost thereof to the vendor . . . for purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition." W. Va. Code § 47-11A-2.

In its Amended Complaint, Plaintiff claims that since October 2011, Mac's has been illegally selling gasoline below cost at its Bridgeport station in contravention of the WVUTPA. Plaintiff claims that Defendants Joyce Sammon and Louis Diab, as agents of Mac's, assisted or aided, directly or indirectly, in the violations of the WVUTPA, and are responsible under W.Va. Code § 1A-4. Plaintiff alleges that Sammon, the former manager of the Mac's retail gasoline station located at 328 E. Main Street in Bridgeport, West Virginia, conducted daily surveys of the local retail gasoline prices charged by competitors, conveyed this information to the upper management of Mac's for purposes of setting the price of gasoline at the Bridgeport station, and caused such prices to be posted at the Bridgeport station. Plaintiff further alleges that Diab, Fuel Director for the Great Lakes Division of Mac's in Akron, Ohio, is responsible for setting and approving the retail fuel prices at the Bridgeport station, and that he directly or indirectly instructed Ms. Sammon to post the prices at the Bridgeport station. Plaintiff claims that these illegal practices have caused Plaintiff to lose gasoline sales revenue and are threatening its survival in the marketplace. Therefore, Plaintiff seeks a preliminary injunction and permanent injunction enjoining Defendants from offering to sell or selling gasoline below cost, treble damages for the losses suffered by Plaintiff, and reasonable attorneys' fees and costs of suit pursuant to W.Va. Code § 47-11A-9.

In their Answer to the Amended Complaint, Defendants deny that they violated the WVUTPA. Additionally, Mac's asserts in its Counterclaim that Plaintiff itself has illegally

sold gasoline below cost to the detriment of Mac's business, and seeks injunctive relief and treble damages against Plaintiff under the WVUTPA.

## **II. Basis for Plaintiff's Request**

The basis for the parties' joint request to refer the action to the Business Court Division is that the action meets all of the criteria of "Business Litigation" as that term is defined in Rule 29.04(a) of the West Virginia Trial Court Rules. As a preliminary matter, the action is currently pending in Circuit Court as required by the Rule. On November 10, 2014, Plaintiff filed a Complaint against Mac's and Ms. Sammon. Defendants filed their Answer and Counterclaim on January 5, 2015. Plaintiff filed its Reply to Defendants' Counterclaim on January 22. The Circuit Court entered a Pre-Trial and Scheduling Order on February 5. The parties convened for mediation on June 2 but did not reach a settlement. On August 4, Plaintiff filed an Amended Complaint, adding Mr. Diab as a party. Defendants filed their Answer to the Amended Complaint and Counterclaim on August 20.<sup>2</sup>

With respect to the first substantive requirement of the rule, it is clear that this action is wholly business-oriented. The parties themselves are businesses or are employees of Defendant Mac's. Furthermore, the question to be adjudicated in this case is directly related to the way in which the parties operate their businesses—specifically, the way in which the parties set their prices for their retail sale of gasoline to the public and compete with one another (and other gasoline retailers) in West Virginia. The claims asserted in this action therefore "involve matters of significance to the transactions, operations, or governance between business entities." *See* W. Va. Tr. Ct. R. 29.04(a)(1).

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<sup>2</sup> Copies of the Docket Sheet, Amended Complaint, Answer to Amended Complaint and Counterclaim, and Reply to Defendant Mac's Convenience Stores LLC's Counterclaim are attached hereto as Exhibits A through D, as required by Rule 29.06(a)(1).

Additionally, Plaintiff submits that this case is also deeply entrenched in the complexities of the retail gasoline business, as contemplated by the second substantive requirement of the rule. Adjudication of the legal questions in this case will require delving into various aspects of the business as well as the statutes and regulations that govern them, including the proper determination of cost under W. Va. Code § 47-11A-6 and the appropriate accounting methodology to determine the cost of doing business. Thus, "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 . . . ." W. Va. Tr. Ct. R. 29.04(a)(2).

Finally, the claims in this action do not involve any of the types of claims set forth in Rule 29.04(a)(3) of the West Virginia Trial Court Rules. Therefore, this action satisfies the third and final substantive requirement of the rule. Having satisfied all of the requirements of Rule 29.04(a) of the West Virginia Trial Court Rules, the parties respectfully submit that this action constitutes "Business Litigation" and provides an adequate basis for referral to the Business Court Division.

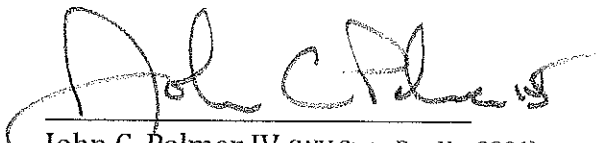
### **III. Related Actions**

The parties submit that there are no additional related actions that are pending or that may be filed in the future.

#### IV. Conclusion

WHEREFORE, for the reasons set forth above, the parties respectfully request that the Court grant its motion to refer the above-referenced Civil Action No. 14-C-503-2 to the Business Court Division.

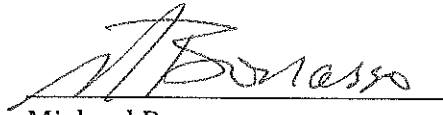
Plaintiff Alan Enterprizes, LLC  
By Counsel



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Defendants Mac's Convenience  
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Joyce Sammon and Louis Diab  
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Civil Action No. 14-C-503-2

MAC'S CONVENIENCE STORES LLC,  
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and LOUIS DIAB,

Defendants.

**CERTIFICATE OF SERVICE**

I, John C. Palmer IV, counsel for the Plaintiff, hereby certify that on August 23, 2015, I served the attached **JOINT MOTION TO REFER ACTION TO BUSINESS COURT DIVISION** upon the following by depositing true copies thereof U.S. Mail, postage fully paid, in envelopes addressed as follows:

Michael Bonasso, Esquire  
Flaherty Sensabaugh Bonasso, PLLC  
200 Capitol Street  
Charleston, West Virginia 25301  
*Counsel for Defendants*

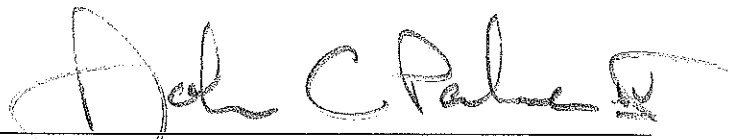
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Zach Chaffee-McClure, Esquire  
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2555 Grand Boulevard  
Kansas City, Missouri 64108  
(Admitted Pro Hac Vice)  
*Counsel for Defendants*

Honorable Thomas A. Bedell, Chief Judge  
Fifteenth Judicial Circuit  
Harrison County Courthouse  
301 W. Main Street  
Clarksburg, West Virginia 26301-2967

Donald L. Kopp II, Clerk  
Harrison County Circuit Court  
301 W. Main Street  
Clarksburg, West Virginia 26301

Berkeley County Judicial Center  
Business Court Division  
380 W. South Street  
Suite 2100  
Martinsburg, West Virginia 25401

A handwritten signature in cursive script, reading "John C. Palmer IV". The signature is written in dark ink and is positioned above a horizontal line.

John C. Palmer IV (WV State Bar ID No. 2801)