

33-118
IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY WEST VIRGINIA

ROBERT E. MAYHEW,

Plaintiff,

v.

**CIVIL ACTION NO.: 15-C-109
HONORABLE**

**DAVID WEIMER, Individually, and
WEIMER CHEVROLET, INC., a West
Virginia Corporation,**

Defendants.

MOTION TO DISMISS, ANSWER, AND COUNTERCLAIM

NOW COME Defendants, David Weimer, Individually ("Weimer"), and Weimer Chevrolet, Inc., a West Virginia corporation ("WCI"), by and through counsel, Colleen C. McCulloch and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and move to dismiss Counts II and III of the Complaint for failure to state claims upon which relief may be granted and answer the specific allegations in the Complaint as follows:

1. Defendants admit the allegations contained in Paragraph 1 of the Complaint.
2. Defendants admit the allegations contained in Paragraph 2 of the Complaint.
3. Defendants deny the allegations contained in Paragraph 3 of the Complaint and demand strict proof thereof.
4. Defendants deny the allegations contained in Paragraph 4 of the Complaint and demand strict proof thereof.
5. Defendants admit the allegations contained in Paragraph 5 of the Complaint.
6. Defendants admit that an Invoice for Sale of Stock of Mayhew Chevrolet, Inc., dated June 18, 2013 was signed by Plaintiff and Weimer but deny the remaining allegations contained in Paragraph 6 of the Complaint and demand strict proof thereof.

7. Defendants admit the allegations contained in Paragraph 7 of the Complaint.
8. Defendants admit the allegations contained in Paragraph 8 of the Complaint.
9. Defendants admit the allegations contained in Paragraph 9 of the Complaint.
10. Defendants admit the allegations contained in Paragraph 10 of the Complaint.
11. Defendants deny the allegations contained in Paragraph 11 of the Complaint and demand strict proof thereof.
12. Defendants deny the allegations contained in Paragraph 12 of the Complaint and demand strict proof thereof.
13. Defendants admit the allegations contained in the first sentence of Paragraph 13 of the Complaint. Defendants deny the allegations contained in the second sentence of Paragraph 13 of the Complaint and demand strict proof thereof.
14. Defendants admit the allegations contained in Paragraph 14 of the Complaint.
15. Defendants deny the allegations contained in Paragraph 15 of the Complaint and demand strict proof thereof.
16. Defendants deny the allegations contained in Paragraph 16 of the Complaint and demand strict proof thereof.
17. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint and, accordingly, deny the same and demand strict proof thereof.
18. Defendants deny the allegations contained in Paragraph 18 of the Complaint and demand strict proof thereof.

COUNT I

19. Defendants incorporate by reference their answers to Paragraphs 1 through 18 as if the

same were set forth herein verbatim.

20. Defendants admit the allegations contained in Paragraph 20 of the Complaint.

21. Defendants admit the allegations contained in Paragraph 21 of the Complaint.

22. Defendants admit the allegations contained in Paragraph 22 of the Complaint.

23. Defendants deny the allegations contained in Paragraph 23 of the Complaint and demand strict proof thereof.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint and demand strict proof thereof.

25. Defendants deny the allegations contained in Paragraph 25 of the Complaint and demand strict proof thereof.

26. Defendants deny the allegations contained in Paragraph 26 of the Complaint and demand strict proof thereof.

COUNT II

27. Defendants incorporate by reference their answers to Paragraphs 1 through 26 as if the same were set forth herein verbatim.

28. Defendants deny the allegations contained in Paragraph 28 of the Complaint and demand strict proof thereof.

29. Defendants deny the allegations contained in Paragraph 29 of the Complaint and demand strict proof thereof.

30. Defendants deny the allegations contained in Paragraph 30 of the Complaint and demand strict proof thereof.

31. Defendants deny the allegations contained in Paragraph 31 of the Complaint and demand strict proof thereof.

32. Defendants deny the allegations contained in Paragraph 32 of the Complaint and demand strict proof thereof.

33. Defendants deny the allegations contained in Paragraph 33 of the Complaint and demand strict proof thereof.

34. Defendants deny the allegations contained in Paragraph 34 of the Complaint and demand strict proof thereof.

COUNT III

35. Defendants incorporate by reference their answers to Paragraphs 1 through 34 as if the same were set forth herein verbatim.

36. Defendants admit the allegations contained in Paragraph 36 of the Complaint.

37. Defendants admit the allegations contained in the first sentence of Paragraph 37 of the Complaint. Defendants deny the allegations contained in the second sentence of Paragraph 37 of the Complaint and demand strict proof thereof.

38. Defendants deny the allegations contained in Paragraph 38 of the Complaint and demand strict proof thereof.

39. Defendants deny the allegations contained in Paragraph 39 of the Complaint and demand strict proof thereof.

40. Defendants deny the allegations contained in Paragraph 40 of the Complaint and demand strict proof thereof.

41. Defendants deny the allegations contained in Paragraph 41 of the Complaint and demand strict proof thereof.

42. Defendants deny the allegations contained in Paragraph 42 of the Complaint and demand strict proof thereof.

Defendants deny that the Plaintiff is entitled to the damages claim in the *ad damnum* clause following Paragraph 42 of the Complaint and demand strict proof of each and every element of damages claimed.

AFFIRMATIVE DEFENSES

To the extent that any of the following affirmative defenses are applicable, based upon the evidence adduced in this matter, the Defendants state as follows:

GENERAL DENIAL

Defendants deny any and all allegations contained in the Complaint not specifically admitted and demand strict proof thereof.

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim in Counts II and III of the Complaint upon which relief may be granted.

SECOND DEFENSE

Plaintiff's acts or omissions caused or contributed to the incidents complaint of, and Plaintiff's acts in breach of the contracts pre-dated the acts of the Defendants as alleged in the Complaint. Accordingly, Plaintiff's claims are barred. Further, to the extent Plaintiff claims damages as a result of negligence, Plaintiff's comparative and/or contributory negligence equals or exceeds any negligence of the Defendants. Therefore, Plaintiff's claims are barred.

THIRD DEFENSE

To the extent that any of the following are or may be applicable, Defendants assert the affirmative defenses of contributory negligence, comparative negligence, assumption of risk, learned intermediary, waiver, estoppel, license, payment, release, laches, statutes of limitation, statutes of repose, statute of frauds, lack of privity, superseding intervening cause, act of God,

failure to mitigate damages, failure to exhaust administrative remedies, unclean hands, and any other avoidance or affirmative defense under Rules 8, 9, or 12 of the West Virginia Rules of Civil Procedure.

FOURTH DEFENSE

Defendants reserve the right to assert any other affirmative defenses, counterclaims, cross-claims and/or any other claims which may arise in discovery, and any evidence adduced therefrom.

FIFTH DEFENSE

Defendants further raise and preserve each and every defense or matter constituting an avoidance of contractual liability as contained or described in Rules 8, 9 and 12 of the West Virginia Rules of Civil Procedure, to the fullest extent as the same may be revealed as applicable following investigation and discovery.

SIXTH DEFENSE

Plaintiff's Complaint is barred or the damages alleged, if any, should be reduced or eliminated due to the after-acquired evidence doctrine. Further, Plaintiff's Complaint is barred by the doctrine of unclean hands.

SEVENTH DEFENSE

The Plaintiff's damages, if any, were caused in whole or in part by the Plaintiff's own conduct or the conduct of third parties not named as defendants in this cause of action.

EIGHTH DEFENSE

Defendants hereby raise and reserve each and every affirmative defense available to them and further reserve the right to raise such additional defenses as may appear appropriate following further discovery and factual development in this case.

NINTH DEFENSE

Plaintiff has suffered no damages as a result of any conduct by the Defendants.

TENTH DEFENSE

Defendants owed no duty of care to the Plaintiff and did not breach any duty at law owed to the Plaintiff.

ELEVENTH DEFENSE

Defendants, at all times material to Plaintiff's Complaint, acted in conformity with all standards expected of parties to a contract and in compliance with the law. Further Defendants, at all times, acted in conformity with all standards expected of a reasonable person and are, therefore, not liable to the Plaintiff for damages claimed.

TWELFTH DEFENSE

At all times relevant to the Complaint, Defendants performed their duties in conformity with applicable law and acted in good faith.

THRITEENTH DEFENSE

Plaintiff's claims are barred under the doctrines of unjust enrichment, the economic loss rule and failure to mitigate, minimize, or avoid costs associated with his claims.

DEFENDANTS' COUNTER-CLAIMS AGAINST PLAINTIFF

COUNT I – PETITION FOR DECLARATORY JUDGMENT

Defendants seek a judgment of this Court declaring that the Consulting Agreement between the parties is void or, alternatively, that Plaintiff breached the Consulting Agreement and is not owed any further payment thereunder. In support thereof, Defendants would respectfully show the following:

1. At the time the parties entered into the Consulting Agreement, Defendant David

Weimer had not been approved as a Dealer Principal and Plaintiff accordingly agreed to continue as Dealer Principal and to perform other duties as a consultant for Defendants.

2. Plaintiff breached the Consulting Agreement by engaging in, among other things,

a. Sexual harassment of employees of Defendant:

a.1. Specifically, on at least one occasion an employee complained of Plaintiff's sexual harassment and Plaintiff was barred from the premises for a period of time. Later, after the employee told Defendant David Weimer that Plaintiff could return to the premises, Defendant David Weimer learned that Plaintiff loaned said employee money to obtain a divorce; this fact became known to Defendant David Weimer when said employee requested that funds be withheld from her pay to reimburse the Plaintiff.

a.2. Female employees and customers have complained that Plaintiff appears at the dealership poorly dressed, often in sweatpants, and frequently wearing no underwear at all. During these visits to the dealership, Plaintiff had a practice of leaning over dealership employees, embracing customers, and rubbing up against employees and customers alike. Accordingly, Defendant David Weimer has had to direct Plaintiff to refrain from coming to the dealership unless he is appropriately dressed and wearing underwear.

a.3 Due to Plaintiff's inappropriate behavior, Defendants advised Plaintiff that the Consulting Agreement was breached but agreed to continue payments if Plaintiff stayed away from the premises. Defendants did pay Plaintiff until he returned to the premises and refused to stay away during

business hours.

- b. As part of his consulting duties, Plaintiff was asked to accompany the Dealership general manager on visits to local establishments in an effort to be introduced and to encourage local businesses to consider doing business with Defendants. Plaintiff refused to do so and specifically told the General Manager that he was retired and didn't feel like doing such visits. Plaintiff's community contacts were deemed essential to the continued success of the Dealership, and thus his consulting agreement required cooperation in transitioning business from him to the Defendants, yet his failure and refusal to work cooperatively with the Defendants in doing so has resulted in lost business opportunities.
- c. General Motors runs an "on-line lead" program, which matches potential purchasers with area dealers. Defendants pay nearly \$20,000 each year for participation in the "on-line lead" program. As part of his consulting duties, Plaintiff was the "on-line lead" coordinator. Defendants recently learned that Plaintiff has never followed up on a lead or advised Defendants of the existence of leads. Further, Plaintiff failed to disclose and consequently lost an opportunity for Defendants to capitalize on a significant potential sale as a result of the Plaintiff's dereliction in this respect
- d. In October 2015, Plaintiff refused to sign as Dealer Principal, contacted General Motors and made disparaging and threatening remarks to a General Motors representative, and otherwise disparaged the Defendants in communications with General Motors, upon whom Defendants rely for

inventory and business success.

- e. On several occasions Plaintiff has, without cause or provocation, talked negatively about Weimer to members of the community and to General Motors. When confronted by Defendant David Weimer regarding this conduct, Plaintiff has admitted to doing so.

Given Plaintiff's failure to engage in any effort to promote or provide beneficial services to the Defendants, Defendants seek a declaration from this Court that the Consulting Agreement is void. Alternatively, as a result of Plaintiff's inappropriate behavior, disparaging comments about Defendant David Weimer, and refusal to act in the best interest of the dealership, Plaintiff has breached the Consulting Agreement and is not owed any further payment thereunder.

COUNT II -TORTIOUS INTERFERENCE WITH BUSINESS

Defendants incorporate by reference the statements and representations made in Count I of the Counter-Claims as if fully set forth at length herein.

1. Plaintiff maliciously, untruthfully, and without cause, misrepresented to third-parties in the community in which the automobile dealership does business that Defendants were closing the business.
2. As a result of Plaintiff's tortious behavior, potential customers chose not to do business with Defendants.
3. Defendants were required to take affirmative steps to assure people in the community that Defendants intended to continue to operate the business and create additional good will.
4. Despite Defendants' assurances to the community of their ongoing commitment, in or about late 2013 and early 2014 Plaintiff started pressuring Defendant David Weimer

to exercise the option to purchase the real property contained in the Lease. In a further effort to pressure Defendant David Weimer into exercising the option to purchase early, Plaintiff told him that he would forgo any further payment under the Consulting Agreement. When Defendant David Weimer declined to exercise the option earlier, Plaintiff began marketing the real property to other potential purchasers and maliciously, untruthfully, and without cause, began telling third parties that another party was purchasing the real property and that the dealership was imminently closing.

5. As a result of Plaintiff's tortious behavior, Defendants have again lost potential customers and have been forced to employ damage control measures at additional cost and effort in order to avoid a complete loss of future business opportunities.
6. Further, Plaintiff now suggests that Defendant David Weimer's demand that he not come to the premises during business hours is a breach of the Lease Agreement and the option to purchase. The Lease Agreement, which is between K.B. Mayhew Holdings, LLC and BTA, Inc., neither of which is a party to this litigation, provides in pertinent part: "6. Lessee shall permit Lessor and the agents of Lessor to enter into and on the demised premises at all **reasonable times upon reasonable notice** for the purpose of inspecting the demised premises as same would relate to the terms and provisions of this Lease Agreement." (Emphasis added.)
7. Accordingly, although Plaintiff is prohibited from entering the premises and interfering with the day to day business of Defendants, the Lessor and its agent are not prohibited from entering at **reasonable times and upon reasonable notice**. Plaintiff has not provided notice of his intent, as agent of the lessor, to inspect the

premises in order to determine whether Defendants are in compliance with the terms of the Lease.

8. In any event, despite being importuned by Defendant David Weimer and other of Defendants' employees (both verbally and in writing) not to appear on the premises of the Dealership, Plaintiff has continued to ignore such requests and appears regularly on the premises, all to the Defendants' detriment and for no reasonable purpose that is consistent with the terms of the Lease.

As a result of Plaintiff's tortious interference with the Defendants' automobile business, Defendants have been damaged in an amount to be determined at trial.

**COUNT III – FRAUD, MISREPRESENTATION OR, IN THE
ALTERNATIVE, BREACH OF CONTRACT**

Defendants incorporate by reference the statements and representations made in Counts I and II of the Counter-Claims as if fully set forth at length.

1. As part of the Agreement to Sale (sic) Business (the "Agreement"), Plaintiff represented to Defendants that substantially all of the parts inventory was subject to General Motors "Buy Back" Policy and the value of such inventory was approximately \$150,000.00.
2. Accordingly, the Plaintiff and Defendants agreed that the purchase price described in the Agreement would be adjusted when the parts inventory were "bought back" by General Motors.
3. Further, Plaintiff represented to Defendants that in the event General Motors declined to buy back any of the parts inventory, Plaintiff would reimburse Defendants in the amount of \$150,000.00.
4. When Defendants approached General Motors to buy back the parts inventory,

General Motors advised Defendants that the parts were not subject to the "Buy Back" Policy and that Plaintiff had been previously advised of same.

5. Despite demand for reimbursement of the agreed upon amount of \$150,000.00, Plaintiff has refused to comply with the agreement.
6. Plaintiff deliberately misrepresented that General Motors would "buy back" parts inventory in an effort to fraudulently induce Defendants into purchasing the automobile dealership.
7. Defendants relied to their detriment on Plaintiff's representations and, in fact, entered into the Agreement in full reliance upon Plaintiff's representations.

As a result of Plaintiff's fraudulent misrepresentations that parts inventory was subject to the "Buy Back" Policy of General Motors, Defendants have been damaged in an amount not less than \$150,000.00 and are further entitled to punitive damages in an amount to be determined at trial.

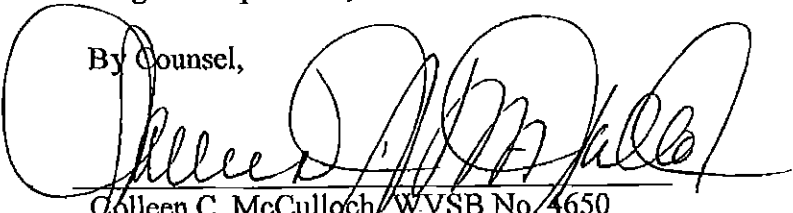
PRAYER FOR RELIEF

As a result of Plaintiff's tortious interference with the operation of Defendants' business and Plaintiff's fraudulent misrepresentations that parts inventory was subject to General Motor's "Buy Back" Policy, Defendants have been harmed in an amount to be determined at trial.

Defendants further seek judgment of this Court (a) declaring that the Consulting Agreement is (i) null and void; or (ii) has been breached by Plaintiff and no further payments are owed to Plaintiff; (b) declaring that Defendants have not breached the Lease Agreement; (c) granting Defendants fees and costs incurred in defending the allegations of Plaintiff and pursuing their Counter-Claims; and (d) such further relief as may be deemed equitable and just.

DAVID WEIMER, individually, and
WEIMER CHEVROLET, INC., a West
Virginia corporation,

By Counsel,



Colleen C. McCulloch, WVSB No. 4650

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IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY WEST VIRGINIA

ROBERT E. MAYHEW,

Plaintiff,

v.

CIVIL ACTION NO.: 15-C-109
HONORABLE

DAVID WEIMER, Individually, and
WEIMER CHEVROLET, INC., a West
Virginia Corporation,

Defendants.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendants, does hereby certify on this 23rd day of December, 2015, that a true copy of the foregoing "*MOTION TO DISMISS, ANSWER AND COUNTERCLAIM*" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

J. David Judy, III
Judy & Judy Attorneys at Law
PO Box 636
Moorefield, WV 26886



Colleen C. McCulloch, WVSB No. 4650

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CIVIL CASE INFORMATION STATEMENT
CIVIL CASES
(Other than Domestic Relations)

PLAINTIFF: Robert E. Mayhew	CASE NUMBER: 15-C-109
DEFENDANTS: David Weimer, Individually, and Welmer Chevrolet, Inc., West Virginia Corporation.	

II. TYPE OF CASE

- | | |
|---|--|
| <p><input checked="" type="checkbox"/> General Civil</p> <p><input type="checkbox"/> Mass Litigation
(As defined in T.C.R. Rule XIX (c))</p> <p><input type="checkbox"/> Asbestos</p> <p><input type="checkbox"/> Carpal Tunnel Syndrome</p> <p><input type="checkbox"/> Diet Drugs</p> <p><input type="checkbox"/> Environmental</p> <p><input type="checkbox"/> Industrial Hearing Loss</p> <p><input type="checkbox"/> Silicone Implants</p> <p><input type="checkbox"/> Other: _____</p> | <p><input type="checkbox"/> Adoption</p> <p><input type="checkbox"/> Administrative Agency Appeal</p> <p><input type="checkbox"/> Civil Appeal from Magistrate Court</p> <p><input type="checkbox"/> Miscellaneous Civil Petition</p> <p><input type="checkbox"/> Mental Hygiene</p> <p><input type="checkbox"/> Guardianship</p> <p><input type="checkbox"/> Medical Malpractice</p> |
|---|--|

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (Month / Year): 01 / 2017

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY? ☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other – Unknown at this time

Attorney Name: Colleen C. McCulloch

Representing:

Firm: Pullin, Fowler, Flanagan, Brown & Poe, PLLC

☐ Plaintiff

☒ Defendant:

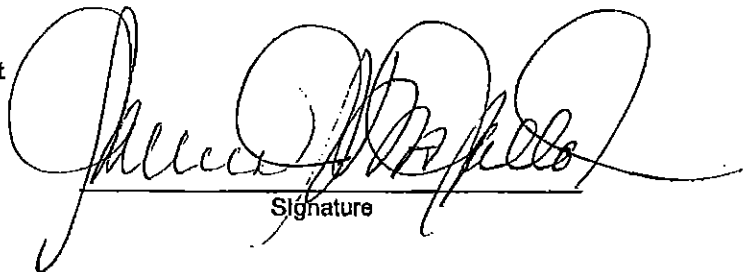
Address: 600 Neville St., Ste 201, Beckley, WV 25801

☐ Cross-Complainant ☐ Cross-Defendant

Telephone: 304-254-9300

Dated: December 23, 2015

☐ Proceeding Without an Attorney


Signature