

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2016 SEP -8 PM 4:47

DAVANTIC, LLC,

Plaintiff,

v.

Civil Action No. 16-C-304

Judge King

MICHAEL P. THOMPSON, REALCORP,  
LLC, VAL YOUNG, MPT REALTY, LLC, and  
TOP PROPERTIES, LLC,

Defendants.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS FILED BY  
MPT REALTY, LLC AND TOP PROPERTIES, LLC**

Now into Court through undersigned counsel comes the Plaintiff, Davantic, LLC (hereinafter referred to as "Davantic") to file this Memorandum in Opposition to the Motion to Dismiss certain claims of the Plaintiff filed by MPT Realty, LLC (hereinafter referred to as "MPT") and Top Properties, LLC (hereinafter referred to as "Top").

Briefly, the Motion to Dismiss should be denied because the Plaintiff has proper legal standing as a limited liability company under the laws of West Virginia. The West Virginia Secretary of State issued the Plaintiff a full Certificate of Reinstatement prior to this litigation being filed. See Exhibit A, which reinstated Davantic to full proper status on February 3, 2016. Additionally, the West Virginia Secretary of State also issued a Certificate of Existence on November 3, 2015 after the faulty termination was properly corrected. See Exhibit B as well as exhibits, C, D, E and F attached showing the Plaintiff is a proper entity currently in good standing under West Virginia law and was also in good standing at the time of the filing of this lawsuit. The record is clear that the Plaintiff has proper standing to assert this Civil Action.

For the reasons set forth in this Memorandum, the Plaintiff requests this Court to deny the Motion to Dismiss filed by Top and MPT.

19-20

### **Brief Summary of Plaintiff's Case**

The Plaintiff retained Realcorp, LLC, Michael P. Thompson and Val Young as real estate agents to sell Commercial Real Estate located at Southridge, North Corridor G. These Defendants immediately recognized the Commercial Real Estate qualified to be the new Veterans' Administration Clinic. However, the Defendants did not, at any time, disclose this to the Plaintiff, in direct violation of their fiduciary duties as well as their duties of trust and loyalty. Instead, the Defendants concealed the real value of the property. While serving as real estate agents for the Plaintiff, the Defendants met with representatives of the Veterans' Administration, showed the Commercial Real Estate to representatives of the Veterans' Administration, and convinced the Veterans' Administration to lease the Commercial Real Estate from the Defendants and not the Plaintiff. The Defendants concealed their business plan from both the Plaintiff and Veterans' Administration in order to secure the lease for themselves. In execution of this fraudulent plan, the Defendants concealed the value of the property from the Plaintiff, formed an investment group, marketed the Commercial Real Estate as their own and actually executed a lease on the property resulting in a windfall of approximately 10 million dollars directly to the Defendants. See paragraphs 16 and 17 of the Amended Complaint

At no time did Michael P. Thompson, Realcorp, LLC, and/or Val Young disclose to the Plaintiff (their client) that (1) they were working on a Multimillion dollar deal to lease the Commercial Real Estate to the Veterans' Administration for the personal financial benefit of the Defendants (2) that said lease had a value in excess of \$10,000,000.00 dollars (3) that the Veterans Administration was interested in leasing commercial property in order to relocate their clinic; (4) the Veterans Administration was interested in leasing the Commercial Real Estate; (5) the Commercial Real Estate met the criteria and specifications for the new clinic and (6) that efforts were being made to lease the Commercial Real Estate to the Veterans Administration. See paragraph 16 of the Amended Complaint.

At all pertinent times, Michael P. Thompson was acting on behalf of Realcorp, LLC as well as MPT Realty, LLC and Top Properties, LLC, thus creating an incurable conflict of interest. The West Virginia Secretary of State's records show that Michael P. Thompson is a member of Top Properties, LLC and MPT Realty, LLC. Michael P. Thompson used his position as a fiduciary of the Plaintiff in order to convince the Plaintiff to sell the Commercial Real Estate to MPT Realty, LLC and Top Properties, LLC. Michael P. Thompson further breached his fiduciary duty by failing to disclose the ongoing multi-million dollar negotiations with the Veterans' Administration and the true value of the Commercial Real Estate. Instead of full disclosure, the Defendants bought the property themselves (through MPT and TOP which is managed and owned by Michael P. Thompson) leased the property to the Veterans Administration and kept the millions in lease revenue. See paragraph 26 of the Amended Complaint.

Further, Michael P. Thompson, Realcorp, LLC, and Val Young did breach their fiduciary duties and duties of loyalty, honesty and trust to the Plaintiff by (1) failing to disclose to the Plaintiff that the Defendants were in active lease negotiations with the Veterans' Administration for a multi-million dollar long-term lease covering the Plaintiff's Commercial Real Estate; (2) failing to disclose to the Plaintiff that the Defendants were showing the Commercial Real Estate to representatives of the Veterans' Administration for a long-term multi-million dollar lease, and that the Veterans' Administration desired the Plaintiff's Commercial Real Estate; (3) failing to disclose to the Plaintiff that the Plaintiff's Commercial Real Estate met the qualifications for the new Veterans' Clinic; (4) failing to disclose to the Plaintiff the Defendants' secretive business plan whereby the Defendants were going to purchase the Commercial Real Estate from the Plaintiff (through a TOP and Michael P. Thompson, and immediately flip it to the Veterans' Administration for a long-term multi-million dollar commercial lease valued at over 15 million dollars; (5) failing to disclose that the Defendants' true intentions regarding the Commercial Real Estate was for their own personal financial interests securing a long-term multi-million dollar commercial lease, (6) utilizing confidential and proprietary information obtained during the course of their agency relationship with the Plaintiff for the self-benefit of the Defendants; (7) failing to allow the Plaintiff the opportunity to make informed decisions regarding the sale of the

Commercial Real Estate and execution of the Written Agreements; (8) affirmatively concealing the lease negotiations with the Veterans' Administration; (9) concealing the conflict of interest the Defendants had regarding the purchase and leasing of the Plaintiffs' Commercial Real Estate; (10) concealing that the Defendants were in active lease negotiations with the Veterans' Administration while at the same time purportedly serving as the agent for the Plaintiff; (11) failing to disclose all the facts and circumstances surrounding the use and value of the Commercial Real Estate in order to allow the Plaintiff to make an informed decision regarding his selection of real estate agents, the sale/leasing of the Commercial Real Estate, and the price and terms upon which the property was sold and/or leased; (12) taking advantage of the Plaintiff's financial condition by purchasing the Commercial Real Estate from the Plaintiff at a shockingly low price and without full disclosure; and (13) concealing the fair market value of the Commercial Real Estate and purchasing the Commercial Real Estate from the Plaintiff (through MPT and Top both of which are companies owned and/or controlled by Michael Thompson) at an unreasonably low price i.e. less than 15 percent of the real value of the property. See paragraph 36 of the Amended Complaint.

### **Legal Standard**

It is well settled that the purpose of a motion to dismiss for failure to state a claim is to test the sufficiency of the complaint. Cantley v. Lincoln County, 655 S.E.2d 490, 221 W.Va. 468 (2007). The trial court in appraising the sufficiency of the complaint on a motion to dismiss for failure to state a claim should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (emphasis added) R.K. v. St. Mary's Medical Center, Inc., 735 S.E.2d 715, 229 W.Va. (2012) emphasis added. The trial court is required to accept the allegations in the complaint as true with regard to utilizing a proper standard for deciding motions to dismiss for failure to state a claim. Mey v. Pep Boys - Manny, 717 S.E.2d. 235, 228 W.Va. 48 (2011). In considering a Rule 12(b)6 Motion, the Court is required to take well-pleaded allegations as true, in the light most favorable to the Plaintiff. See Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380 (1987). The Amended Complaint in this case has extremely

detailed allegations setting forth proper facts and legal claims, which are sufficient under West Virginia law, and therefore should not be dismissed.

### **Discussion**

#### **Legal Standing**

The Plaintiff's Amended Complaint should not be dismissed because the Plaintiff had a full Certificate of Reinstatement and also had a Certificate of Existence long before this litigation was filed. Going one step further, the attached exhibits also show the Plaintiff to be in good standing with the West Virginia Secretary of State and State Tax Department.

The Plaintiff corrected the filed termination record pursuant to West Virginia Code §31B-2-207, and the correction was effective retroactively pursuant to subsection c. See the Articles of Correction filed by the company member attached as exhibit F. Further, the West Virginia Secretary of State also issued the Plaintiff a full Certificate of Reinstatement. See Exhibit A reinstating Davantic, LLC to full proper status. The West Virginia Secretary of State also issued a Certificate of Existence after the faulty termination was properly corrected. See Exhibit B showing that the Plaintiff is a proper entity in good status under West Virginia law. All of this occurred long before the Plaintiff filed this civil action. West Virginia Code §31B-2-207 provides:

**§31B-2-207. Correcting filed record.**

**(a) A limited liability company or foreign limited liability company may correct a record filed by the secretary of state if the record contains a false or erroneous statement or was defectively signed.**

**(b) A record is corrected:**

**(1) By preparing articles of correction that:**

**(i) Describe the record, including its filing date, or attach a copy of it to the articles of correction;**

**(ii) Specify the incorrect statement and the reason it is incorrect or the manner in which the signing was defective; and**

**(iii) Correct the incorrect statement or defective signing; and**

**(2) By delivering the corrected record to the secretary of state for filing.**

**(c) Articles of correction are effective retroactively on the effective date of the record they correct except as to persons relying on the uncorrected record and adversely affected by the correction. As to**

**those persons, articles of correction are effective when filed. (*emphasis added*)**

Further, the West Virginia Code defines a "Record" as "information that is inscribed on a tangible medium or that is stored in an electric or other medium and is retrievable in perceivable form". See WV Code 31B-1-101(19). Thus, the definition of "Record" is extremely broad.

Pursuant to West Virginia Code §31B-2-207, the faulty termination was corrected by the West Virginia Secretary of State and a Certificate of Existence was issued by the West Virginia Secretary of State on both November 13, 2015, and on February 3, 2016, showing the company in proper legal standing and not defunct as alleged by the Defendants. Thus, showing that the Plaintiffs limited liability company status had not been revoked or administratively dissolved. See Exhibits B and C. Further, the West Virginia State Tax Department issued a Statement of Good Standing for the Plaintiff effective January 29, 2016, and June 30, 2016. See Exhibits D and E. The Plaintiff further asserts that it submitted Articles of Correction for Limited Liability Company to the West Virginia Secretary of State in accordance with West Virginia Code §31B-2-207, resulting in correction of the faulty termination and its return to full and proper status. See the Articles of Correction attached as Exhibit F. See also the attached exhibits B, C and D showing good standing and full reinstatement, which existed both prior to and after the filing of this civil action.

The Plaintiff was clearly reinstated pursuant to West Virginia Code §31B-8-811, entitled Reinstatement following administrative dissolution, which provides as follows:

**§31B-8-811 Reinstatement following administrative dissolution.**

(a) A limited liability company administratively dissolved may apply to the secretary of state for reinstatement within two years after the effective date of dissolution. The application must:

- (1) Recite the name of the company and the effective date of its administrative dissolution;
- (2) State that the ground for dissolution either did not exist or have been eliminated;
- (3) State that the company's name satisfies the requirements of section 1-105; and
- (4) Contain a certificate from the tax commissioner reciting that all taxes owed by the company have been paid.

(b) If the secretary of state determines that the application contains the information required by subsection (a) of this section and that the information is correct, the secretary of state shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites this determination and the effective date of reinstatement, file the original of the certificate, and serve the company with a copy of the certificate.  
(c) When reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the company may resume its business as if the administrative dissolution had never occurred.  
(emphasis added)

The Plaintiff complied with the process of administrative reinstatement, which provided a retroactive effect, and the Plaintiff was returned to good standing with the West Virginia Secretary of State and the West Virginia State Tax Department, both prior to and after the filing of this lawsuit. See Certificate of Reinstatement issued by the West Virginia Secretary of State attached as Exhibit A. Moreover, the Plaintiff is currently in good standing with the West Virginia Secretary of State and the West Virginia State Tax Department. See Exhibits A-E attached hereto.

The Plaintiff asserts that the Motion to Dismiss filed by the Defendants should be denied because the Plaintiff properly filled out Articles of Correction pursuant to West Virginia Code §31B-2-207. See Exhibit F. The Articles of Correction were submitted by the proper member of the limited liability company. See Exhibit G showing Karlene McCowan as the company member of the Plaintiff, Davantic LLC. Therefore, the Plaintiff was returned to good standing and thereafter reinstated by the West Virginia Secretary of State pursuant to §31B-8-811 prior to the filing of this civil action. The Plaintiff complied with any and all provisions of the Uniform Limited Liability Act as promulgated by the West Virginia Legislature. Therefore, as a matter of law, the Plaintiff is not a defunct company, and is a viable entity as set forth in the Certificates of Reinstatement and Certificates of Good Standing attached hereto as Exhibits A, B, C, D, and E.

#### **Plaintiff's Breach of Fiduciary Duty Claims Count I**

The Defendants MPT and Top have requested this Court to dismiss the Plaintiff's breach of fiduciary duty claims asserted in Count I of the Plaintiff's Amended Complaint

against these Defendants. However, the Plaintiff did not assert any breach of fiduciary duty claims against MPT or Top. Therefore, there are no breach of fiduciary duty claims in Count I pending against MPT and Top. See Count I of the Plaintiff's Amended Complaint, which states, "At pertinent times, Michael P. Thompson, Realcorp, LLC, and Val Young were acting as exclusive real estate agents in their fiduciary capacity for the Plaintiff." See paragraph 35 of the Amended Complaint. Further, paragraph 36 goes on to state, "Michael P. Thompson, Realcorp, LLC and Val Young did breach their fiduciary duties, and duties of loyalty, honesty, and trust to the Plaintiff..." As shown by Count I in the Plaintiff's Amended Complaint, there are no breach of fiduciary duty claims pending against TOP and Michael P. Thompson. Therefore, there are no claims against these Defendants for this Court to dismiss. As a result, the Plaintiff respectfully states that the request of MPT and Top to dismiss breach of fiduciary duty claims against MPT and Top be denied, because no such claims exist against them in Count I.

#### **Breach of Agency Agreement Count IV**

The Defendants MPT and Top seek to have the Plaintiff's claims for breach of agency agreement dismissed against them. The Plaintiff's claims for breach of agency agreement are contained in Count IV of the Plaintiff's Amended Complaint. Count IV of the Plaintiff's Amended Complaint does not allege that Top and/or MPT breached an agency agreement. Count IV alleges that, "The Defendants Michael P. Thompson and Realcorp, LLC breached their agency relationship and agreement with the Plaintiff." See paragraph 47 of the Plaintiff's Amended Complaint.

There are no pending claims for breach of agency agreement against MPT and Top, and therefore such claims cannot be dismissed against these Defendants, because they are not pending against these Defendants. Accordingly, this request of MPT and Top should be denied, because no breach of agency agreement claims exist against MPT or Top, and are only asserted against the other Defendants.

#### **Breach of Implied Covenant of Good Faith and Fair Dealing Count V**



The Defendants Top and MPT request that the breach of implied covenant of good faith and fair dealing claims against them contained in Count V of the Plaintiff's Amended Complaint be dismissed. However, no such claims currently exist in the Amended Complaint for claims of breach of implied covenant of good faith and fair dealing against MPT or Top. In fact, Count V states that, "The Defendants Michael P. Thompson and Realcorp, LLC breached their written agency relationship agreement with the Plaintiff, and also thereby breached their implied covenants of good faith and fair dealing contained in such agency agreement by...." See paragraph 52 of the Plaintiff's Amended Complaint, wherein the breach implied covenant of good faith and fair dealing claims are asserted only against Michael P. Thompson and Realcorp, LLC. These Defendants also point out that under Highmark Virginia, Inc. v. Jaime, 221, W.Va. 487, 492, 655 S.E.2d 509, 514 (2007), the West Virginia Supreme Court ruled that a Plaintiff may not assert an implied covenant of good faith and fair dealing claim apart from the breach of contract claim. However, in the Plaintiff's Amended Complaint at Count V, the breach of implied covenant of good faith and fair dealing claim is part of the breach of contract claim, as set forth in paragraphs 52 and 53. In fact, the Plaintiff clearly states that Michael P. Thompson and Realcorp, LLC, "breached their written agency relationship agreement with the Plaintiff..." Therefore, under Highmark v. Jaime, a cause of action has been asserted, because the breach of implied covenant of good faith and fair dealing is part of the breach of written agreement. However, this is mooted by the fact that the Plaintiff did not assert these claims directly against Top and MPT.

#### **Plaintiff's Tortious Interference Claims Count XI**

TOP and MPT assert in their Motion to Dismiss that the Plaintiff has not properly asserted a claim for tortious interference. The Plaintiff has set forth 76 paragraphs of detailed facts, which set forth the contracts and agreements between the parties, and specifically how these Defendants tortuously interfered with the Plaintiff's contractual rights. Under West Virginia law, in order for a Plaintiff to prevail on a claim for tortious interference, the Plaintiff must prove (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or

expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. Tiernan v. Charleston Area Medical Center, 203 W.Va. 135, 148-49, 506 S.E.2d 578, 591-92 (1998) (citing Torbett v. Wheeling Dollar Saving Sav & Trust Co., 173 W.Va. 210, 314 S.E.2d 166 (1983)). In our present case, at paragraph 74 of the Amended Complaint, the Plaintiff specifically states that, "At all pertinent times MPT Realty, LLC and Top Properties, LLC knew that the Plaintiff had an agency relationship, business relationship, fiduciary relationship and/or business expectancy with Michael P. Thompson, Realcorp, LLC, and Val Young."

Therefore, the Plaintiff has shown the business relationship and business expectancy. Further, the Plaintiff went on to discuss in detail the plan to interfere by stating:

The conduct of MPT Realty, LLC and Top Properties, LLC in devising and executing the secretive plan to fraudulently and improperly obtain the Commercial Real Estate from the Plaintiff and flip it to the Veterans' Administration for self-financial benefit and without disclosure to the Plaintiff constitutes an intentional act of interference which proximately caused sustained harm and damages to the Plaintiff. See paragraph 75 of Plaintiff's Amended Complaint.

As to damages, the Plaintiff clearly stated at paragraph 76 of the Amended Complaint, "The conduct of MPT Realty, LLC and Top Properties, LLC proximately caused the Plaintiff to lose lease revenues in excess of 10 million dollars and to lose the sale value, market value and revenues of the Commercial Real Estate as well as other consequential damages."

As shown herein above, the Plaintiff has shown the existence of the agency relationship and the contracts detailed thoroughly in paragraphs 74 and 75, as well as in great detail at paragraphs 12, 13, 19, and 24 of the Amended Complaint. Specifically, at paragraph 12 of the Amended Complaint, the Plaintiff states:

On or about April 22, 2014, the Plaintiff entered into an Exclusive Authorization and Right to Sell Agreement, providing Realcorp, LLC an exclusive authorization and right to sell said Commercial Real Estate. This exclusive authorization and right to sell was signed by Val Young as the

agent, and designated Realcorp, LLC as the exclusive broker for the Commercial Real Estate for a period of 6 month. Thereafter, Michael P. Thompson and Val Young on behalf of Real Corp, LLC provided an Agency Relationship Agreement to the Plaintiff, representing that Michael P. Thompson would be the individual real estate agent for the Plaintiff, on behalf of Realcorp, LLC. The Agency Relationship Agreement specifically represented to the Plaintiff that Michael P. Thompson and Realcorp, LLC would exercise, "diligent exercise of reasonable skill and care in performance of the agent's duties," "a duty of honest and fair dealing and good faith," and "the duty of utmost care, integrity, honesty, and loyalty." This written Agency Relationship Agreement was dated February 12, 2015, was signed by Michael P. Thompson on February 11, 2015, and by the Plaintiff's representatives on February 12, 2015 (hereinafter referred to as the "Agency Relationship Agreement") and this instrument was delivered to the Plaintiff. These representations were material, false and detrimentally relied upon by the Plaintiff in a justifiable manner.

At paragraph 13 of the Amended Complaint, Plaintiff specifically states that:

On or about February 11, 2015, Michael P. Thompson, as the selling agent and as the actual purchaser representative, signed a Purchase Contract to purchase the Commercial Real Estate. This Purchase Contract was presented to the Plaintiff for signature, and provided the terms and conditions of the purchase of the Commercial Real Estate. This Purchase Contract designated Davantic, LLC as the selling company, Realcorp, LLC as the listing company, and "MPT Realty, LLC" or its assigns as the purchaser (hereinafter referred to as the "Real Estate Purchase Contract"). Thereafter, Michael P. Thompson, on behalf of MPT Realty, LLC presented an Addendum to Purchase Contract to the Plaintiff, which was executed by the Plaintiff, and Michael P. Thompson on February 12, 2015, covering the Commercial Real Estate (hereinafter referred to as the "Purchase Addendum"). The Addendum to Purchase Contract provided that the purchaser would have an extra 35 days of due diligence, could cancel the agreement at any time and receive a full refund of the earnest money deposit, and requiring the seller to provide the purchaser with all materials, reports, appraisals, and any other information pertinent to the Commercial Real Estate.

Further, at paragraph 19 of the Amended Complaint, Plaintiff states that:

At all pertinent times, Michael P. Thompson, Realcorp, LLC, and Val Young owed a fiduciary duty, duty of loyalty, honesty and trust to the Plaintiff, and were required to put the Plaintiff's interests ahead of their own personal interests. Furthermore, under the Agency Relationship Agreement, Michael P. Thompson, Realcorp, LLC, and Val Young specifically agreed to provide a "diligent exercise of reasonable skill and care" in performance of their duties

and to provide a "duty of honest and fair dealing and good faith," and "the duty of utmost care, integrity, honesty, and loyalty." Michael P. Thompson, Realcorp, LLC, and Val Young breached their fiduciary duties and their duties as real estate agents, fiduciaries, and brokers, by failing to disclose to the Plaintiff the ongoing lease negotiations and true value of the Commercial Real Estate, as well as their own lucrative business deal to enter into a long-term multimillion dollar lease with the Veterans' Administration by using the Plaintiffs Commercial Real Estate for their own personal benefit.

These were the agreements that were interfered with wrongfully by these Defendants, and at paragraph 75, the Plaintiff specifically shows the nature of the intentional act of the interference, and paragraph 76 shows the specific damages. Therefore, the Plaintiff has stated a claim for tortious interference, and this claim should not be dismissed on a mere Rule 12(b)6 Motion.

#### **Plaintiff's Claims for Joint Venture and Partnership**

Defendants Top and MPT request that the Plaintiff's allegations of "Joint Venture and Partnership" should be dismissed. However, the Plaintiff is not asserting joint venture and partnership as a separate legal count. It is not styled as a separate legal count or even numbered as a count. In fact, this was recognized in the Defendant's Answer of the Defendants at paragraph 94, wherein the Defendants state that the matters relating to joint venture and partnership asserted, "constitute legal conclusions rather than allegations of fact, and therefore do not require response by way of admission or denial..." The Plaintiff has not set joint venture and partnership as a count, it is not numbered as a count, and is only set forth as a factual allegation against all Defendants, and states at paragraph 93 of the Amended Complaint:

At all pertinent times, the Defendants were engaged in a joint venture, wherein the Defendants carried out a single business enterprise for profit, for which these Defendants combined and shared their property, offices, employees, equipment, management, debt, money, effects, skills, and knowledge. This joint venture arose out of the implied, written, and business relationship between the Defendants, which provided for the marketing, brokerage, purchase, sale, and leasing of the Commercial Real Estate.

As can be seen, the Plaintiff is setting forth proper factual allegations of joint venture and partnership. Specifically, under West Virginia law, a joint venture is defined as, "an

association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge." Armor v. Lance, 207 W.Va. 672, 677, 535 SE.2d 737, 742 (2000); Lilly v. Munsey, 135 W.Va. at 254, 63 SE.2d at 523 ("to constitute a joint venture, there must be an agreement to combine property or efforts and to share in profits"). A joint venture "arises out of a contractual relationship between the parties," which may be "oral or written, expressed or implied." Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380 (1987). In our present case, the Plaintiff has alleged all the necessary elements of the claim. Specifically, at paragraphs 93, 94, and 95, the Plaintiff alleges that the Defendants carried out a single business enterprise for profit, and combined their property, offices, employees, equipment, management, debt, money, effects, and skill. See paragraph 93 of the Amended Complaint. And further, that the Defendants were "all engaged in the real estate business in connection with the "promotion, sale, management, and purchase of real estate, and share principal offices at 3818 MacCorkle Ave SE, Kanawha City, WV, share administrative offices, share rent, share furniture, share telephones and computer equipment, share leased space, and share the same management members of their limited liability companies." See paragraph 95 of the Plaintiff's Amended Complaint. The Plaintiff has clearly set forth sufficient factual allegations to establish a joint venture and partnership. Moreover, the Defendants MPT and Top are asking that joint venture facts and allegations be removed from the Plaintiff's Amended Complaint. Because the joint venture and partnership assertions of the Plaintiff are not set forth as a separate legal count but as factual assertions the request of these Defendants should be denied. As a result, the request of Top and MPT to remove factual allegations from the Plaintiff's Amended Complaint on a 12(b) Motion should be denied.

#### **Plaintiff's Claims of Unjust Enrichment Count XV**

The Defendants Top and MPT are requesting that the Plaintiff's unjust enrichment claim in Count XV be dismissed because the Defendants allege it arises from an express contract, the Real Estate Purchase Agreement. However, the Defendants fail to point out that MPT was not a party to the final purchase contract, which was assigned to Top Properties. Therefore, MPT was not a party to the final express sales contracts, but

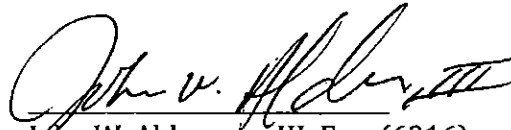
previously assigned its rights. Therefore, the Plaintiff's claims, which are asserted in the alternative, may prove to be viable in the event a jury concludes MPT was not a party to the final Real Estate Purchase Agreement. More importantly, the Plaintiff further asserts at paragraph 19 of the Amended Complaint that the unjust enrichment claim arises out of the improper sale and subsequent leasing of the Plaintiff's commercial real estate, to which the Plaintiff was not a party to these agreements with the Veterans' Administration. To the contrary, these Defendants entered into a final lease with the Veterans' Administration, wherein they are obtaining approximately 15 million dollars in lease revenues, and the Plaintiff is not a party to that agreement, despite the arguments of these Defendants.

### **Plaintiff's Claims for Punitive Damages**

The Defendants MPT and Top are requesting this Court to dismiss an alleged punitive damages count of the Plaintiff's Complaint on a Rule 12(b)6 Motion to Dismiss. However, in our present case, there is no pending Complaint, only an Amended Complaint. Further, these Defendants state that Plaintiff's request for punitive damages is a "stand alone cause of action." In our present case, the Plaintiff is not asserting a stand alone cause of action for punitive damages, but is setting forth the facts and allegations allowing it to recover punitive damages. In fact, in the Plaintiff's Amended Complaint, punitive damages is not a numbered count, it is not titled as a count, and is not set forth as a count. It is merely a factual subsection of the Amended Complaint at paragraph 99, wherein the Plaintiff is alleging that these "Defendants acted in a willful, wanton, malicious, and/or reckless manner..." See paragraph 99 of the Plaintiff's Amended Complaint. In effect, these Defendants are asking that the Plaintiff's request for punitive damages be dismissed on a 12(b)6 Motion without the development of discovery and facts. The Plaintiff has clearly stated in its Amended Complaint grounds for punitive damages. It has also further set forth in the Plaintiff's Amended Complaint that the request for punitive damages is a factual assertion and not a count as alleged by these Defendants. As a matter of fact, the Plaintiff's Amended Complaint ends with Count XV, entitled Unjust Enrichment, and the last two paragraphs of the Plaintiff's Amended Complaint merely request punitive damages as well

as a trial by jury. For these reasons, the Plaintiff states that the paragraph setting forth grounds for punitive damages not be dismissed, because they are factual allegations the Plaintiff is entitled to assert.

WHEREFORE, for the reasons set forth herein, the Plaintiff respectfully requests that the Rule 12(b)6 Motion to Dismiss filed by the Defendants MPT and Top be denied in its entirety and the Plaintiff be allowed to proceed with its Amended Complaint, together with any other relief this court deems just an equitable.



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DAVANTIC, LLC,

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Plaintiff,

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 16-C-304  
Judge King

MICHAEL P. THOMPSON, REALCORP,  
LLC, VAL YOUNG, MPT REALTY, LLC, and  
TOP PROPERTIES, LLC,

Defendants.

**CERTIFICATE OF SERVICE**

I, John W. Alderman, III, do hereby certify that on the 8th day of September, 2016 I served the (1) *Plaintiff's Memorandum in Opposition to the Motion to Dismiss Filed by MPT Realty, LLC and Top Properties*; (2) *Plaintiff's Memorandum in Opposition to the Motion to Dismiss Filed by Michael P. Thompson, Realcorp, LLC and Val Young* on all parties of record by U.S. Postal Service, first class, postage paid addressed as follows:

Isaac R. Forman  
Bailey & Glasser, LLP  
209 Capitol St.  
Charleston, WV 25301

Vivian Basdekis  
Jackson Kelly PLLC  
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# State of West Virginia



## Certificate

*I, Natalie E. Tennant, Secretary of State of the  
State of West Virginia, hereby certify that*

DAVANTIC, LLC

has met the requirements for reinstatement of their organization as required by the  
West Virginia Code.

Therefore, I hereby issue this

### CERTIFICATE OF REINSTATEMENT



*Given under my hand and the  
Great Seal of the State of  
West Virginia on this day of  
February 3, 2016*

*Natalie E. Tennant*



# State of West Virginia



## Certificate

*I, Natalie E. Tennant, Secretary of State of the  
State of West Virginia, hereby certify that*

DAVANTIC, LLC

made application to the West Virginia Secretary of State's Office to be a registered limited liability company in the State of West Virginia on March 20, 2007. The application was received and found to conform to law.

The company is filed as an at-will company, for an indefinite period.

I further certify that the company has not been revoked or administratively dissolved by the State of West Virginia nor has the West Virginia Secretary of State issued a Certificate of Cancellation or Termination to the company.

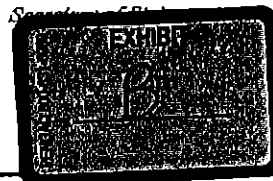
Accordingly, I hereby issue this

### CERTIFICATE OF EXISTENCE



*Given under my hand and the  
Great Seal of the State of  
West Virginia on this day of  
November 13, 2015*

*Natalie E. Tennant*



# State of West Virginia



## Certificate

*I, Natalie E. Tennant, Secretary of State of the  
State of West Virginia, hereby certify that*

DAVANTIC, LLC

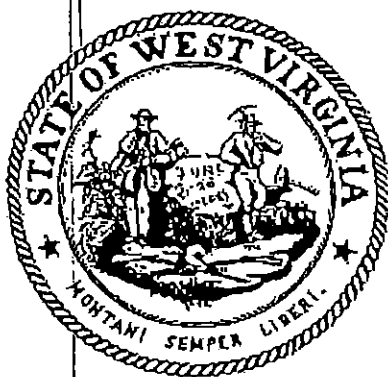
made application to the West Virginia Secretary of State's Office to be a registered limited liability company in the State of West Virginia on March 20, 2007. The application was received and found to conform to law.

The company is filed as an at-will company, for an indefinite period.

I further certify that the company has not been revoked or administratively dissolved by the State of West Virginia nor has the West Virginia Secretary of State issued a Certificate of Cancellation or Termination to the company.

Accordingly, I hereby issue this

### CERTIFICATE OF EXISTENCE



*Given under my hand and the  
Great Seal of the State of  
West Virginia on this day of  
February 3, 2016*

*Natalie E. Tennant*



402715 2/3/16



STATE OF WEST VIRGINIA  
State Tax Department, Excise and Support Unit  
P. O. Box 885  
Charleston, WV 25323-0885



Earl Ray Tomblin, Governor

Mark W. Matkovich, Tax Commissioner

RONALD MCCOWAN  
DAVANTIC, LLC  
11 CARRIAGE RD  
CHARLESTON WV 25314-2158

Letter Id: L1396677440  
Issued: 01/29/2016

West Virginia State Tax Department  
Statement of Good Standing

EFFECTIVE DATE: January 29, 2016

A review of tax accounts indicates that the above named taxpayer is in good standing as of the effective date of this document.

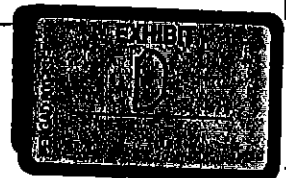
The issuance of this Statement of Good Standing shall not bar any audits, investigations, assessments, refund or credits with respect to the taxpayer named above and is based only on a review of the tax returns and not on a physical audit of records.

Sincerely,

Crystal O. Peal, Tax Unit Supervisor  
Excise and Support Unit  
Tax Account Administration Division

RL103 v.18

Excise and Support Unit ■ P. O. Box 885 ■ Charleston, WV 25323-0885  
Fax (304) 558-8643 ■ [www.tax.wv.gov](http://www.tax.wv.gov)





STATE OF WEST VIRGINIA  
State Tax Department, Excise and Support Unit  
P. O. Box 885  
Charleston, WV 25323-0885



Earl Ray Tomblin, Governor

Mark W. Matkovich, Tax Commissioner

RONALD MCCOWAN  
DAVANTIC, LLC  
11 CARRIAGE RD  
CHARLESTON WV 25314-2158

Letter Id: L0873975616  
Issued: 06/30/2016

**West Virginia State Tax Department  
Statement of Good Standing**

**EFFECTIVE DATE: June 30, 2016**

A review of tax accounts indicates that the above named taxpayer is in good standing as of the effective date of this document.

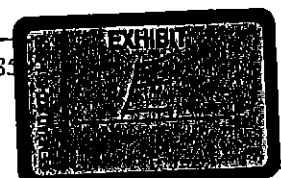
The issuance of this Statement of Good Standing shall not bar any audits, investigations, assessments, refund or credits with respect to the taxpayer named above and is based only on a review of the tax returns and not on a physical audit of records.

Sincerely,

Crystal G. Peal, Tax Unit Supervisor  
Excise and Support Unit  
Tax Account Administration Division

aLL103 v.13

Excise and Support Unit ■ P. O. Box 885 ■ Charleston, WV 25323-0885  
Fax (304) 558-8643 ■ [www.tax.wv.gov](http://www.tax.wv.gov)



FILED

Natalie E. Tennant  
Secretary of State  
1900 Kanawha Blvd E.  
Bldg 1, Suite 157  
Charleston, WV  
IN THE OFFICE OF  
SECRETARY OF STATE

NOV 09 2015



Penney Barker, Manager  
Corporations Division  
Tel: (304)558-8000  
Fax: (304)558-8381  
Website: [www.wvsos.com](http://www.wvsos.com)  
E-mail: [business@wvsos.com](mailto:business@wvsos.com)

FILE ONE ORIGINAL  
(Two if you want a filed  
stamped copy returned to you)  
FEE: \$25.00

WEST VIRGINIA  
ARTICLES OF CORRECTION  
FOR LIMITED LIABILITY COMPANY

Office Hrs: Monday - Friday  
8:30 a.m. - 5:00 p.m. ET

\*\*\* In accordance with WV Code §31B-2-207, the undersigned organization adopts the following \*\*\*  
Articles of Correction:

1. The name of the organization is: Davantic, LLC
2. Date of filing Articles of Organization  
or Certificate of Authority with the WV  
Secretary of State: 3/20/2007 Effective Date
3. Specify and describe the incorrect statement and reason it is incorrect:  
Improperly filed Articles of Termination on 9/8/2015 stating that the  
company was terminated on 7/21/2015. The company should not be terminated  
on 7/21/2015.

Correct and specify how the statement should read:

That the company is not terminated and desires to be in good standing.  
Please reinstate the company.

4. Contact name and phone number to reach in case of a problem with filing: (Optional, however,  
listing one may help to avoid a return or rejection of filing if there is a problem with the document.)

Carol A. Talbert 304-925-2100  
Contact Name Phone Number

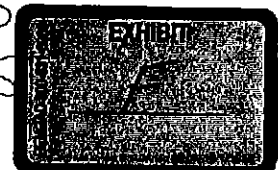
Business e-mail address, if any: caroltalbert@frontier.com

5. Signature of person executing document \*(See below *Important Legal Notice Regarding Signature*):

Signature: Garlene M. Coura Title: MEMBER

*\*Important Legal Notice Regarding Signature: Per West Virginia Code §31B-2-209, Liability for False statement in filed record. If a record authorized or required to be filed under this chapter contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from a person who signed the record or caused another to sign it on the person's behalf and knew the statement to be false at the time the record was signed.*

289385  
\$25



Betty Ireland  
Secretary of State  
State Capitol  
1900 Kanawha Blvd, East  
Charleston, WV 25305  
Hrs: 8:30 am - 5:00 pm



FILED

DEC 11 2007

Penney Barker, Manager  
Business & Licensing  
Tel: (304) 558-6000  
Toll Free: (866) 767-8683  
Fax: (304) 558-8381  
email: process@wvssos.com  
Web: www.wvssos.com

Fee: \$15 per application

IN THE OFFICE OF  
SECRETARY OF STATE  
FILE ONE ORIGINAL (Send two originals if you want a filed copy returned to you)

APPLICATION TO APPOINT OR CHANGE PROCESS,  
OFFICERS, MEMBERS, MANAGERS and/or OFFICE ADDRESSES

1. The company filing this change  
is registered as a:

- ☐ Corporation  
☒ Limited Liability Company  
☐ Limited Liability Partnership  
☐ Limited Partnership  
☐ Voluntary Association  
☐ Business Trust

2. The change is filed for:  
(Note: Enter information as previously  
filed. No change can be accepted  
without this information.)

Company name DAVANTIC, LLC

Access current company record  
at [www.wvssos.com](http://www.wvssos.com)

Principal Office 11 Carriage Rd  
Address Charleston, WV 25314  
As Listed

Home State: W.V. WV Formation Date March 30, 2007

3. Change of Address (use appropriate lines for the type of address to be changed):

Address Type

New Address

a. Principal Office

\_\_\_\_\_  
\_\_\_\_\_

b. Local Office (WV)

\_\_\_\_\_  
\_\_\_\_\_

c. Designated Office (LLC)  
(must be physical address)

\_\_\_\_\_  
\_\_\_\_\_

Form A-0

SECRETARY OF STATE, STATE CAPITOL, CHARLESTON WV 25305

Revised 1/05

782 k 115.89 12/11/2007 783932



4. Change of Agent for Service of Process:

New Agent Name and Address

The agent named here has given consent to appointment as agent to accept service of process on behalf of this company.

Karlene McLowan  
11 Carriage Rd  
Charleston, W.V. 25314

Karlene McLowan  
New Agent Signature

5. Complete the Change of Officers or Other Persons in Authority:

Officer Type  
(check one for each new officer)

New Officer Name

New Officer Address

☐ President (Corp. VA)

☐ Manager (LLC)

☐ General Partner (LP, LLP)

☐ Trustee (Bus. Trust)

☒ Other member

Karlene McLowan

11 Carriage Rd

Charleston, W.V. 25314

Remove Ronald McLowan  
(Previous officer name, if any.)

b. ☐ Vice-President (Corp. VA)

☐ Manager (LLC)

☐ General Partner (LP, LLP)

☐ Trustee (Bus. Trust)

☐ Other

Remove \_\_\_\_\_  
(Previous officer name, if any.)

c. ☐ Secretary (Corp. VA)

☒ Member (LLC)

☐ Limited Partner (LP)

☐ General Partner (LLP)

☐ Trustee (Bus. Trust)

☐ Other

Remove Ronald McLowan  
(Previous officer name, if any.)

d. ☐ Treasurer (Corp. VA)

☐ Member (LLC)

☐ Limited Partner (LP)

☐ General Partner (LLP)

☐ Trustee (Bus. Trust)

☐ Other

Remove \_\_\_\_\_  
(Previous officer name, if any.)

e. ☐ Director (Corp. VA)

☐ Member (LLC)

☐ Limited Partner (LP)

☐ General Partner (LLP)

☐ Trustee (Bus. Trust)

☐ Other

Remove \_\_\_\_\_  
(Previous officer name, if any.)

Ronald McLowan  
Name (please print)

member  
Title

Ronald McLowan  
Signature