

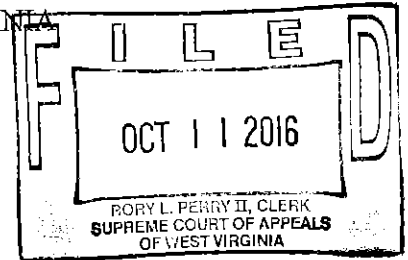
## IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,  
a statutory corporation, for and on behalf of West Virginia  
University,

Plaintiff,

v.

Monongalia County Circuit Court  
Civil Action No.: 16-C-383



JACOBS FACILITIES, INC., a Missouri  
business corporation, f/k/a Sverdrup Facilities, Inc.;  
MOODY/NOLAN LTD., INC., an Ohio business corporation,  
OVERLY MANUFACTURING COMPANY,  
a Pennsylvania business corporation, and  
DONALD M. MILLER COMPANY, a Pennsylvania  
business corporation,

Defendants.

**TO: THE HONORABLE CHIEF JUSTICE MENIS E. KETCHUM, II**

**MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, Plaintiff, the West Virginia University Board of Governors, for and on behalf of West Virginia University (hereinafter collectively referred to as "the University"), by counsel, Marc A. Monteleone, Kenneth E. Webb, Jr. and the law firm of Bowles Rice LLP, respectfully requests that the above-styled case be referred to the Business Court Division. For the reasons set forth below, this case presents issues significant to several business entities and presents complex commercial issues that require specialized treatment. In support, the University states as follows:

**FACTS**

1. This case involves various causes of action against several business entities for recovery of damages related to a metal roof installed at the West Virginia University

Student Recreation Center. The contract plans and specifications used for the WVU Student Recreation Center contained specific requirements for the manufacture and installation of the metal roof, including a thirty (30) year warranty against leakage. After significant damage to the metal roof was discovered, the Defendants refused to honor their obligations to replace the metal roofing system.

2. On April 22, 1998, the University contracted with Sverdrup Facilities, Inc. ("Sverdrup") to act as the Construction Manager and as a Constructor of a New Student Recreation Center to be located on the West Virginia University Evansdale Campus in Morgantown, West Virginia ("the Project").

3. The University contracted with Moody/Nolan Ltd., Inc. ("Moody/Nolan") to act as the Project architect.

4. The scope of work, schematic designs and specifications for the Project included the design, manufacture and installation of a thirty (30) year metal roofing system at the Project.

5. The thirty (30) year metal roofing system was manufactured by Overly Manufacturing Company ("Overly").

6. Sverdrup subcontracted with Donald M. Miller, Inc. ("Miller") to install the thirty (30) year metal roofing system.

7. Project specifications required that the metal roofing system include a thirty (30) year warranty against leakage and a twenty (20) year warranty against structural defect.

8. In April 2015, representatives of the University noticed that the metal roof was leaking. Roof inspections in June and December 2015 revealed failures and compromises in the entire roofing system. As a result of these failures and compromises, the entire metal roofing system needs removed and reinstalled.

9. After discovery of the problems with the metal roofing system, representatives of the University requested the named Defendants replace the defective metal roofing system pursuant to the thirty (30) year anti-leak warranty.

10. The University filed this case after the named Defendants refused to honor their obligations to replace the metal roofing system.

### **STANDARD**

11. Rule 29 of the West Virginia Trial Court Rules ("TCR") provides that civil actions which constitute "Business Litigation" are eligible for transfer to the West Virginia Business Court Division.

12. "Business Litigation" is defined by TCR 29 as a civil action in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

(2) 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; and

(3) the principal claim or claims do not involve consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

TCR 29.04(a).

13. Under TCR 29, any party or judge may seek a referral of "Business Litigation" to the Business Court Division by filing a Motion to Refer with the Clerk of this Court, after the time to answer the complaint has expired. *See* TCR 29.06(a)(1). Such a motion must include a copy of the "complaint, answer, docket sheet and any other documents that support referral..." *Id.*

14. Accordingly, a true and accurate copy of Plaintiff's Complaint is attached hereto as Exhibit A. Defendants Moody/Nolan, Miller and Overly filed motions to dismiss, which are collectively attached as Exhibit B. Defendant Sverdrup filed its Answer and Cross-Claims against Defendants Moody/Nolan, Miller and Overly, which is attached as Exhibit C. A true and accurate copy of the docket sheet is attached hereto as Exhibit D.

## ANALYSIS

15. This case involves five (5) business entities<sup>1</sup> and claims for breach of contract, breach of express warranty, breach of implied warranty, negligence and negligent misrepresentation. The claims in this case fall within the subject matter of the Business Court Division. Specifically, this case meets the criteria provided in TCR 29.04(a).

16. First, pursuant to TCR 29.04(a)(1), the principal claims in this case involve matters of significance to the transactions and operations between five (5) business entities. While the West Virginia Trial Court Rules do not define “transaction,” Black’s Law Dictionary defines transaction as “[t]he act or an instance of conducting business or other dealings; esp. the formation, performance, or discharge of a contract. Something performed or carried out; a business agreement or exchange.” BLACK’S LAW DICTIONARY, Transaction (9th ed. 2009).

17. At the heart of the University’s Complaint are breach of contract and breach of warranty claims against the Defendants, wherein the University asserts that the Defendants wrongly refused to honor the thirty (30) year anti-leak warranty. The issues involved in this case affect the parties’ rights and obligations related to the Project and pursuant to contract plans and specifications used for the Project.

18. Second, pursuant to TCR 29.04(a)(2), specialized treatment of the parties’ claims is likely to improve the expectation of a fair and reasonable resolution of the controversy. In order to resolve this case, the court must delve into contract terms, understand detailed

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<sup>1</sup> The West Virginia University Board of Governors is a statutory corporation pursuant to West Virginia Code § 18B-2A-1 *et seq.*

specifications, analyze relationships in a construction project and rule upon disputed issues involving contract and warranty claims. This case further implicates indemnity obligations and contribution claims between the Defendants as asserted in Sverdrup's cross-claims. A judge that possesses familiarity with construction law and the underlying legal principles -- (1) contract interpretation, (2) application of warranties, (3) limitations periods and (4) indemnity or contribution -- will undoubtedly improve the expectation of a fair and reasonable resolution of the parties' claims.

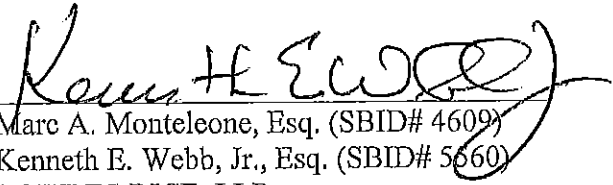
19. Finally, the principal claims in this case do not involve any of the categories of claims excluded from the definition of Business Litigation listed in TCR 29.04(a)(3).

20. Therefore, in light of the commercial nature of this dispute and the need for specialized treatment due to the complex legal issues, the principal claims in this case fall within the jurisdiction of the Business Court Division. Accordingly, this case should be referred to the Business Court Division.

WHEREFORE, Plaintiff, the West Virginia University Board of Governors, respectfully moves, pursuant to West Virginia Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

WEST VIRGINIA UNIVERSITY BOARD  
OF GOVERNORS, a statutory corporation,  
for and on behalf of West Virginia University,

By Counsel,



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a Pennsylvania business corporation, and  
DONALD M. MILLER COMPANY, a Pennsylvania  
business corporation,

Defendants.

**CERTIFICATE OF SERVICE**

I, Kenneth E. Webb, Jr., counsel for Plaintiff, do hereby certify that on this the  
11th day of October, 2016, I served the attached *Motion to Refer Case to Business Court  
Division* upon the following by U.S. mail as follows:

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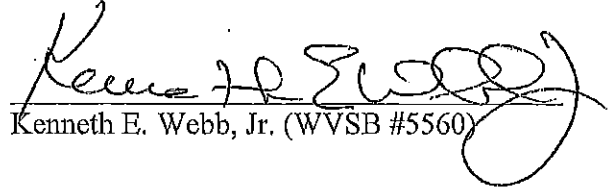


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Judge Russell M. Clawges, Jr.  
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Morgantown, WV 26505  
*Circuit Court Judge for Monongalia  
County Civil Action No. 16-C-383*

  
Kenneth E. Webb, Jr. (WVSB #5560)