

**THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA**  
**WEST VIRGINIA RADIO CORPORATION,**

**Plaintiff,**

**v.**

**Civil Action No. 13-C-468**  
**(Judge Thomas C. Evans III)**

**WEST VIRGINIA UNIVERSITY BOARD OF  
GOVERNORS, WEST VIRGINIA UNIVERSITY  
FOUNDATION, INC., WEST VIRGINIA MEDIA  
HOLDINGS, LLC, ANDREW A. PAYNE, III,  
DAVID B. ALVAREZ, ALBERT BRAY CARY, JR.,  
RALPH BALLARD, RICHARD BALLARD,  
OLIVER LUCK, JAMES P. CLEMENTS, and  
IMG COLLEGE, LLC,**

**Defendants.**

**DEFENDANTS IMG COLLEGE, LLC, WEST VIRGINIA MEDIA HOLDINGS, LLC,  
BRAY CARY, AND WEST VIRGINIA UNIVERSITY  
FOUNDATION, INC.'S JOINT MOTION TO REFER TO  
THE WEST VIRGINIA BUSINESS COURT DIVISION**

COME NOW Defendants IMG College, LLC, West Virginia Media Holdings, LLC, Bray Cary, and West Virginia University Foundation ("Defendants"), through their counsel and pursuant to Rule 29.06 of the West Virginia Trial Court Rules, and respectfully move this Court to refer this case to the West Virginia Business Court Division. In support thereof, Defendants state as follows:

**I. FACTS AND PROCEDURAL HISTORY**

1. On June 19, 2013, plaintiff West Virginia Radio Corporation, ("WV Radio") filed a Verified Complaint against all defendants in the above-referenced style of this case with the exception of IMG College, LLC ("IMG"). On August 7, 2013, plaintiff filed "Plaintiff's Verified Supplemental and Amended Complaint" naming IMG as an additional defendant.

2. Plaintiff alleges the following counts in the Verified Supplemental and Amended Complaint: Count I - Action in Mandamus (against defendant West Virginia University Board of

Governors); Count II – Breach of Fiduciary Duty (against defendants Andrew Payne, David Alvarez, Oliver Luck, and James Clements); Count III – Violation of the Solicitation of Charitable Funds Act (against defendant West Virginia University Foundation, Inc.; Count IV – Constructive Fraud (against defendants West Virginia Media Holdings, LLC, Andrew Payne, David Alvarez, Albert Bray Cary, Ralph Ballard, Oliver Luck and James Clements); Count V – Civil Conspiracy (against defendants West Virginia Media Holdings, LLC, IMG College, LLC, Andrew Payne, David Alvarez, Albert Bray Cary, Ralph Ballard, Richard Ballard, Oliver Luck, and James Clements); and Count VI – Action for Injunctive Relief Freedom of Information Act Violations (against defendant West Virginia University Board of Governors).

3. On August 6, 2013, Chief Justice Brent D. Benjamin entered an Administrative Order of the Supreme Court of Appeals of West Virginia assigning the Honorable Thomas C. Evans, III, to preside over the instant case. In the Oder, Justice Benjamin stated “[u]pon review of said matter, it is also observed that the business litigation issues raised in this matter may be appropriate for consideration by the Business Court Division; and the parties and judge are encouraged to consider a referral of this matter to said Division.”

4. Defendants are in the process of answering or have answered the Verified Supplemental and Amended Complaint.

5. On August 26, 2013, the Court held a hearing on all motions pending at that time, including certain defendants’ motions to dismiss and plaintiff’s Motion for Preliminary Injunction and Injunctive Relief.

6. At the hearing on August 26, 2013, the Honorable Thomas Evans, III, inquired as to each party’s position on a referral of this matter to the Business Court Division.

7. Certain parties indicated their position at the hearing, while others sent letters to the Judge subsequent to the hearing stating their positions.

- a. Plaintiff indicated a preference not to be governed by the time constraints imposed by Trial Court Rule 29. (See August 29, 2013, letter from Frank E. Simmerman, Jr. to Judge Evans).
- b. West Virginia University Board of Governors deferred to the Court's discretion in deciding whether referral to the Business Court Division under Trial Court Rule 29.06 should occur. (See August 30, 2013, letter from Jeffrey M. Wakefield to Judge Evans).
- c. West Virginia University Foundation favors referral to the Business Court Division. (See August 30, 2013 letter from John R. Hoblitzell to Judge Evans).
- d. West Virginia Media and Bray Cary concurred with Chief Justice Benjamin's suggestion that this case be referred to the Business Court Division. (See August 30, 2013, letter from Benjamin L. Bailey to Judge Evans).
- e. IMG favors a referral to the Business Court Division. (See September 4, 2013, letter from Heather Heiskell Jones to Judge Evans).
- f. Andrew A. Payne III, consented to the transfer of this action to the Business Court Division. (See August 30, 2013 letter from Shawn P. George to Judge Evans).
- g. James P. Clements deferred to the Court's discretion as to whether this action should be referred to the Business Court Division. (See August 30, 2013, letter from William E. Galeota to Judge Evans).

- h. Ralph and Richard Ballard requested that the case be referred to the Business Court Division. (See September 11, 2013 letter from J. Michael Benninger to Judge Evans).

## **II. APPLICABLE LAW**

8. The West Virginia Business Court Division has jurisdiction to efficiently manage and resolve "litigation involving commercial issues" between parties engaged in business transactions. W.Va. T.C.R. 29.01. Specifically, the Business Court Division, upon proper referral and transfer by the Chief Justice of the West Virginia Supreme Court, may properly preside over and adjudicate "Business Litigation," which is defined as:

one or more pending actions in circuit court 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.

W. Va. T.C.R. 29.04(a)(1) – (3).

9. A party may file a Motion to Refer within “three (3) months after the filing date of the action; provided, however, that a judge may file the motion at any time.” W. Va. T.C.R. 29.06(a)(2).

### **III. ARGUMENT**

10. The matters that are the subject of the Verified Supplemental and Amended Complaint claims involve matters of significance to the transactions and operations among business entities within the meaning of Rule 29.04 of the West Virginia Trial Court Rules. The claims involved in this case are claims for mandamus, breach of fiduciary duty, violation of the Solicitation of Charitable Funds Act, constructive fraud, civil conspiracy, and for injunctive relief regarding alleged Freedom of Information Act violations.

11. The disputes present commercial 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.

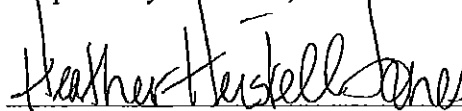
12. The claims in this case do not involve any of the types of claims excluded from the Business Court Division by Rule 29.04(a)(1) – (3). For these reasons, this action meets the definition of “Business Litigation” as defined in Rule 29.04 of the West Virginia Trial Court Rules.

13. This Motion is filed within three months of the filing date of the action, June 19, 2013.

**WHEREFORE**, because this lawsuit meets the definition of “Business Litigation” within the meaning of Rule 29.04(a) of the West Virginia Trial Court Rules, Defendants IMG College, LLC, West Virginia Media Holdings, LLC, Bray Cary, and West Virginia University

Foundation, Inc., move this Court to enter an order referring this case, in its entirety, to the West Virginia Business Court Division.

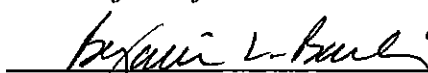
Respectfully submitted,



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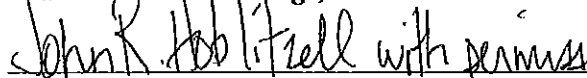
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IMG COLLEGE, LLC,**

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**CERTIFICATE OF SERVICE**

I, Heather Heiskell Jones, counsel for IMG College, LLC, hereby certify that I have served **Defendants IMG College, LLC, West Virginia Media Holdings, LLC, Bray Cary, and West Virginia University Foundation, Inc.'s Joint Motion to Refer to The West Virginia Business Court Division** upon all counsel of record on this 10<sup>th</sup> day of September, 2013, by causing a true and exact copy thereof to be sent via E-mail and First-Class U. S. Mail, postage prepaid, addressed to:

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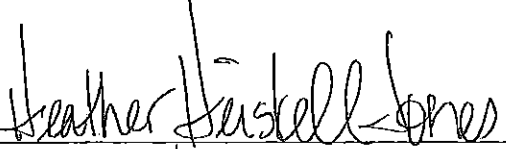
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