

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

WEST VIRGINIA RADIO CORPORATION,

Plaintiff,

vs.

Case 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 BREY CARY, JR., RALPH  
BALLARD, RICHARD BALLARD, OLIVER LUCK,  
JAMES P. CLEMENTS, and IMG COLLEGE, IIC,  
DEFENDANTS.

**ORDER**

*(RE: Motion to Compel Joinder of West Virginia Newspaper Publishing Company  
D/B/A the Dominion Post as a Party Plaintiff)*

The referenced motion of the W. Va. University Board of Governors and response of Plaintiff W. Va. Radio Corporation opposing the motion, along with exhibits and memoranda of authorities, has been carefully considered by the court. Upon agreement of the parties, the motion was thereafter submitted for decision.

**Findings of Fact and Conclusions of Law**

1. West Virginia Radio Corporation ("WVRC"), is a West Virginia corporation with its principal place of business in Morgantown, West Virginia. It is described on the website of Greer Industries, Inc. as one of "a diverse network of businesses . . . managed from headquarters located in Morgantown, West Virginia." Its shareholders are John R. Raese and David Raese. Both Raeses are also directors of WVRC.

2. West Virginia Newspaper Publishing Company d/b/a the Dominion Post is a West Virginia corporation with its principal place of business in Morgantown, West Virginia. It publishes the Dominion Post and has also been described on the website of Greer Industries, Inc. as one of “a diverse network of businesses . . . managed from headquarters located in Morgantown, West Virginia.” Its shareholders are John R. Raese and David Raese. Both Raeses are also directors.

3. In its Verified Supplemental and Amended Complaint, WVRC alleges that the Defendant West Virginia University Board of Governors (“WVU BOG” or “BOG”) failed to comply with FOIA in regard to six (6) separate requests, dated March 15, 2013, March 29, 2013, March 29, 2013, May 20, 2013, May 24, 2013, and June 6, 2013.

4. WVRC made requests seeking various documents and information related to the allegations in the Complaint, in particular WVU’s multimedia rights and the Scoreboard Transaction, including: documents transmitted between the WVU BOG and the WVU Procurement Office related to the First RFP, pre-qualification statements for the First RFP, documents related to a March 27, 2013, meeting of the BOG, documents related to payments from the WVU Athletics Department to the WVU Foundation related to the Scoreboard Transaction, and a broad range of documents related to the scoreboards, Rockbridge Sports Group, the First and Second RFPs, the evaluation committee for the First RFP, and contracts with IMG.

5. FOIA requests made by the Dominion Post and its reporters, most often sports reporters Drew Rubenstein and Ed Owens, make up a large portion of the more than eighty-nine (89) requests received by the WVU BOG from Greer Industries entities from January to July 2013.

6. The Dominion Post, by letter dated December 5, 2013, from its counsel, alleged that the WVU BOG failed to properly and adequately respond to seven (7) of those FOIA requests and threatened to bring an action to compel the production of the documents it seeks, if it is not provided with what it deems to be a sufficient response by January 6, 2013.

7. The requests at issue are dated February 19, 2013, March 8, 2013, April 22, 2013, April 22, 2013, July 11, 2013, July 11, 2013, and July 28, 2013 the requests seek information or documents related to revenue generated by WVU's multimedia rights, communications between WVU and Rockbridge Sports Group related to WVU's multimedia rights, and communications between and among the six (6) members of the evaluation committee for the First RFP.

8. In 2013, Plaintiff WVRC, the Dominion Post and/or Raese submitted at least eighty-nine (89) FOIA requests to the WVU BOG. Many of those FOIA requests overlap in that they seek information concerning the athletic sponsorship and media rights of the WVU BOG, the process for requesting and evaluating proposals for an award of such rights as well as other matters involving the athletic department of the WVU BOG.

Accordingly, WVU BOG maintains that given the threat by the Dominion Post to take legal action with respect to the FOIA requests, the WVU BOG is at risk of incurring multiple or otherwise inconsistent obligations if the FOIA claims of the Dominion Post are not litigated in the context of the present civil action. Thus, WVU BOG argues that the FOIA requests emanate from the same source, and the issues surrounding those requests should be litigated together.

9. *WVRCivP Rule 19, Joinder of Persons Needed for Just Adjudication*, provides in pertinent part:

**(a) Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded

among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

#### OPINION ORDER

The WVU BOG maintains that the joinder of the Dominion Post as a party plaintiff in this action should be compelled, because the Dominion Post claims an interest related to the subject matter of the action and is so situated that the disposition of this matter in its absence may subject the WVU BOG to double, multiple, or otherwise inconsistent obligations by reason of its claimed interest. The Court disagrees.

It is true that the FOIA claims were served on WVU BOG at separate times by separate individuals, and even though it appears they touch on the same subject matter, that alone is not sufficient to compel joinder. Also, there has not been a sufficient showing that WVU BOG would face a substantial risk of multiple liabilities or inconsistent obligations if the Dominion Post is not joined. The fact is that the Plaintiff would not suffer multiple liabilities or prejudicially inconsistent obligations were inconsistent results found on the various FOIA claims made by the Plaintiff and nonparties.

The WVU BOG asserts that in light of the unity of both ownership and interest in obtaining documents related to the subject matter of the Complaint, the Dominion Post's claimed interest is so closely intertwined with the interests of WVRC that its joinder should be compelled. However, it is a misapplication of *Rule 19(a)* to add parties who have a separate cause of action entirely. ***Glover v. Narick***, 184 W.Va. 381, 386 (1990) (overruled on other grounds). It has not been sufficiently demonstrated here that the Dominion Post has a direct stake in the outcome of the pending litigation. The Dominion Post holds its own claims that it may or may not choose to assert against WVU BOG for that entity's conduct with respect to the Dominion Post's FOIA requests.

Although the FOIA requests made by the Dominion Post relate to WVRC's allegations in its Complaint and appear to overlap with the requests of WVRC, this is not enough to show that the Dominion Post has a direct stake in the pending litigation. The WVU BOG in its reply acknowledges that there have been many other news entities that have submitted FOIA requests for documents relating to the allegations in the Complaint and it is not seeking to join any of them in this litigation. (Reply to Plaintiff's Response to Motion to Compel Joinder, pg. 13). Therefore, the fact that WVRC and the Dominion Post have submitted similar, even overlapping, FOIA request is not, alone, enough to establish that the Dominion Post has an interest in this litigation sufficient to require joinder under Rule 19(a)(2)(ii).

The West Virginia Supreme Court of Appeals has interpreted the language of Rule 19(a) as giving rise to the following test:

Rule 19(a) of the West Virginia Rules of Civil Procedure requires two general inquiries for joinder of a person who is subject to service of process. First, is his presence necessary to give complete relief to those already parties? Second, does he have a claim that, if he is not joined, will be impaired or will his nonjoinder result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations? If the absent person meets the foregoing test, his joinder is required.

Syl. Pt. 1, ***State ex rel. One-Gateway Associates, LLC v. Johnson***, 208 W.Va. 731, 542 S.E.2d 894(2000).

“Rule 19(a)(2)(ii) of the West Virginia Rules of Civil Procedure is designed to require joinder of a nonparty where the failure to join would expose the defendant to the possibility of double or multiple recovery on the same claim. On the other hand, where nonjoinder of an absentee might result in multiple litigation on separate claims, but not multiple recovery on the same claim, Rule 19(a)(2)(ii) does not require joinder.” Syl. Pt. 9, ***Glover v. Narick***, 184 W.Va. 381 (1990) (overruled on other grounds).

Simply because WVU BOG may be subject to further litigation if the Dominion Post were to file its own suit in regards to the institution’s alleged failure to comply with FOIA, there is not a sufficient showing that the outcome of such a suit would result in inconsistent obligations. “[T]he mere fact that nonjoinder of one not a party to a pending lawsuit will expose a party to the risk of further litigation, which may result in inconsistent verdicts, will not necessarily require joinder of the nonparty under Rule 19(a)(2)(ii). There must

be some showing that the party subject to additional litigation is faced with inconsistent obligations.” *Id.* at 391.

WVU BOG argues that should WVRC and the Dominion Post separately proceed to judgment on their FOIA claims, there is a substantial likelihood that different courts could reach inconsistent results, requiring the WVU BOG to produce certain documents over a claim of exemption in one case and requiring the WVU BOG to withhold those same documents pursuant to the same exemption in the other case. In response, the Plaintiff WVRC asserts that if WVU BOG were required to provide certain documents to WVRC in one suit, and not required to produce those same documents to the Dominion Post in another suit as a result of different legal interpretations or factual circumstances, this would constitute different (and not necessarily inconsistent) results, not different (and inconsistent) obligations.

Even if inconsistent decisions were ultimately issued in this suit and a hypothetical suit by the Dominion Post, the law is clear: adjudications that are not consistent merely as a matter of logic do not trigger the application of Rule 19(a)(2)(ii). *Glover*, 184 W.Va. at 390. The claims of WVRC and the potential claims of the Dominion Post arrive from separate, not joint, FOIA requests and WVU BOG owes separate FOIA obligations to each entity. Simply because the requests deal with the same documents or subject matter is not enough to require joinder. WVU BOG has stated that it has received many FOIA requests for documents related to the allegations in the complaint from other news entities but has failed to state why these requests or possible claims relating to

these requests would differ from those of WVRC and the Dominion Post as to require joinder of one but not of all. The potential FOIA claims of the Dominion Post arise out of separate requests to obtain documentation in WVU's possession, the nature of and entitlement to the Dominion Post's FOIA relief would be framed by the specific content of each of the newspaper's independent FOIA requests and WVU BOG's responses thereto, and these claims are separate from the ones at issue in this litigation.

Accordingly, the Motion to Compel Joinder of West Virginia Newspaper Publishing Company D/B/A the Dominion Post as a Party Plaintiff, is hereby **DENIED** and **OVERRULED**.

The Clerk is directed to forward attested copies of this Order to all counsel of record and the Business Court Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia.

All of which is **ORDERED**, accordingly.

ENTERED: May 22, 2014



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Thomas C. Evans, III, Circuit Judge  
Presiding Judge  
Business Court Division