

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

WEST VIRGINIA RADIO CORPORATION,  
a corporation,

Plaintiff,

vs.

//

CIVIL ACTION NO. 13-C-468  
(BCD 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.

**ORDER**

(Re: "Defendant Ralph Ballard's and Defendant Richard Ballard's  
Motions for Summary Judgment")

Pending before the Court for decision is the referenced Motions for Summary  
Judgment ("Motions"), filed by Defendants Ralph and Richard Ballard ("Ballards").

Plaintiff West Virginia Radio Corporation ("WV Radio") has filed a Response in  
Opposition to the Motions filed by the Ballards, and the Ballards have filed their Replies  
thereto.

In deciding this Motion, the Court has considered the pleadings, the Motions and  
brief in support, the response thereto, the replies, and exhibits to the foregoing, as  
submitted by the Ballards and WV Radio, together with argument thereon presented at  
a hearing.

For the reasons set forth herein, the Court is of the opinion that the motion for summary judgment must be denied.

### **PROCEDURAL STATEMENT**

1. On August 7, 2013, Plaintiff, WV Radio, filed its Verified Supplemental and Amended Complaint ("Verified Amended Complaint").

2. The Plaintiff, in its Verified Amended Complaint, alleges that "... individuals, which include Defendants Payne, Alvarez, Cary, Ralph Ballard, Richard Ballard, and Luck (collectively the "Insider Defendants"), have used their insider positions and connections at the University and Foundation to sidestep, circumvent, or simply ignore West Virginia's procurement rules and code to cause the University and its Foundation to enter into purchasing or revenue-generating contracts that will benefit them personally, at the expense of the University, the Foundation, and the citizens of West Virginia." *Verified Amended Complaint* ¶ 21.

3. The Plaintiff further alleges that "Defendants West Virginia Media Holdings, LLC, IMG College, LLC, Payne, Alvarez, Cary, Ralph Ballard, Richard Ballard, Oliver Luck, and James Clements worked in combination to use their insider positions (or connections to insiders) at West Virginia University and the Foundation to personally enrich themselves and corporations in which they have a personal interest in relation to the acquisition of the Coliseum and Football Stadium scoreboards and video boards for the new WVU Basketball Practice Facility, the Facilities Building, and other

athletic facilities, as well as the disposition of WVU's Third-Tier Media Rights. *Verified Amended Complaint* ¶ 226.

4. Additionally, in regards to Defendant Ralph Ballard, the Plaintiff also alleges that "[a]s members and officers of the West Virginia Board of Governors and the Foundation and citizens of West Virginia, Defendants West Virginia Media Holdings, LLC, Payne, Alvarez, Cary, Ralph Ballard, Oliver Luck, and James Clements possess a legal or equitable duty to refrain making statements or taking actions that tend to deceive others, violate public or private confidence, or injure public interests." *Verified Amended Complaint* ¶ 219.

5. Plaintiff goes on to allege that "[d]efendants West Virginia Media Holdings, LLC, Payne, Alvarez, Cary, Ralph Ballard, Oliver Luck, and James Clements breached this duty by using their insider positions (or connections to insiders) at West Virginia University and the Foundation to personally enrich themselves and corporations in which they have a personal interest in relation to the acquisition of the Coliseum and Football Stadium scoreboards or in the disposition of WVU's Third-Tier Media Rights." *Verified Amended Complaint* ¶ 220.

6. On June 27, 2014 and July 8, 2014, the Ballards filed their Motions, seeking Summary Judgment.

7. After extensive briefing, on August 28, 2014, the Court heard oral argument from counsel for Ralph Ballard and Richard Ballard and WV Radio on the issues raised by the Motions and all related pleadings. Counsel for the remaining

Defendants were in attendance at the hearing, but did not address the merits of the pending Motions.

8. Discovery in this case is incomplete. The Ballards, nonetheless, are of the opinion that the issue presented in the pending motions for summary judgment is solely a question of law and that there are no disputed material facts which would provide any reason or basis to delay ruling on this matter at this time.

9. Plaintiff argues that formal discovery is far from complete, and that the pending motions are premature.

10. Plaintiff asserts that factual revelations about the Ballards' actions are continuing to unfurl and that because the ongoing discovery efforts of the parties have already produced evidence establishing the existence of issue of material fact the motions should be denied.

### **CONCLUSIONS OF LAW**

11. In considering a motion filed pursuant to West Virginia Rule of Civil Procedure 56, the West Virginia Supreme Court has stated that, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Aetna Cas. & Sur. Co., v. Fed. Ins. Co., 148 W. Va. 160, 171 (1963). A dispute about a material fact is "genuine only when a reasonable jury could render a verdict for the non-moving party if the record at trial were identical to the

record compiled in the summary judgment proceeding before the trial court.”

Powderidge Unit Owners Ass’n v. Highland Props., Ltd., 196 W. Va. 692, 698 (1996).

12. Summary judgment is appropriate only once a party opposing a motion for summary judgment has had adequate time to conduct discovery. Powderidge Unit Owners Ass’n v. Highland Props., Ltd., 196 W.Va. 692, 701(1996).

13. A party opposing summary judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence. Syl. pt. 5, Marcus v. Holley, 217 W.Va. 154 (2005). And, a motion for summary judgment should be denied when the moving party merely makes conclusory assertion that no genuine issue of material fact exists and that the moving party is entitled to judgment at law. Thornton v. Town of Eleanor, 182 W.Va. 634, 636 (1990).

14. The facts set forth in a plaintiff’s verified complaint constitute sworn statements to be treated as an affidavit for purposes of a motion for summary judgment. see Foster v. Good Shepherd Interfaith Volunteer Caregivers, Inc., 202 W.Va. 81, 85 (1998).

15. Neither Ralph Ballard nor Richard has been deposed; only two fact witnesses have been deposed at the time of filing of the motions.

16. Based on the Plaintiff’s proffer that discovery thus far has given rise to evidence showing that Ralph Ballard and Richard Ballard were significantly involved in orchestrating the improper award of the Third-Tier Media Rights contract to IMG, setting up meetings, providing insider information, and pushing to bring IMG (and its former incarnation ISP) to WVU for years, the Court is of the opinion that, under these

circumstances, the Motions for Summary Judgment are premature and that it would be unfair to proceed pending further discovery.

18. The moving defendants' argument essentially is that there is no implied private right of action based on alleged violations of the "procurement laws" of the State of W. Va.

Cited in support for the motions is the case of Hurley v. Allied Chemical Corp., 164 W.Va. 268, 262 S.E.2d 757 (1980), where the court adopted a four-factor test to determine whether a statute allowed by implication a private right of action. There, the statute under consideration was *W. Va. Code 27-5-9(a)*, which provided that "[n]o person shall be deprived of any civil right solely by reason of his receipt of services for mental illness, mental retardation or addiction, nor shall the receipt of such services modify or vary any civil right of such person . . . ."

The procurement law set forth in *W. Va. Code 18B-5-4* has been held in this case to be inapplicable to the process that resulted in the sale of WVU's Third Tier Media Rights to IMG. For this reason, whether an implied private right of action exists for violations of that statute is not material.

The claims for relief against the Defendants Ballard are "constructive fraud" and "civil conspiracy." Relating to the claim for relief for constructive fraud, the court is of the opinion that the motion is premature, pending factual development through discovery.

Based on the foregoing, it is therefore **ORDERED** that the pending Motions for Summary Judgment of the Defendants Ballard be **DENIED**.

The objections and exceptions of the Defendants' Ralph Ballard and Richard Ballard are noted and preserved.

The clerk shall forward true copies of this Order to the attorneys of record herein.

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

ENTER: September 8, 2014



Thomas C. Evans, III, Circuit Judge  
Business Court Division  
State of West Virginia

ENTERED Sept 8, 2014  
DOCKET LINE #: 701  
JEAN FRIEND, CIRCUIT CLERK