

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

WEST VIRGINIA RADIO CORPORATION

CIVIL ACTION NO. 13-C-468

Plaintiff,

HON. THOMAS C. EVANS, III

v.

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.

**PROTECTIVE ORDER**

By signing this Protective Order, West Virginia Radio Corporation, 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 (each a "Party," and collectively the "Parties") have agreed to be bound by its terms and to request its entry by the Presiding Judge. It is hereby **ORDERED** as follows:

**MATERIALS COVERED**

1. This Protective Order shall apply to documents and information that should be treated as confidential, as described in Paragraphs 3 and 4, and that are produced or disclosed during this civil action (the "action") by any Party to this action or by any non-party, whether pursuant to a subpoena served in this action or any other court order or process, including but not limited to information and documents disclosed:

- (a) through discovery or at any hearing;
- (b) in any pleading, document, affidavit, brief, motion, transcript, or other writing; or
- (c) in testimony given in a deposition or hearing, and any copies, notes, abstracts or summaries of such information.

The information and documents described in this Paragraph shall hereinafter be referred to as the "Litigation Materials."

2. "Confidential" or "Attorneys' Eyes Only" information shall mean or refer to any Litigation Materials designated as "Confidential" or "Attorneys' Eyes Only" by a Producing Party in the manner set forth in Paragraph 5 below. As used in this Protective Order, the term "document" shall include written, recorded or graphic material or any portion thereof, including computer software and databases, and the term "Producing Party" shall mean any Party and/or non-party witness who either produces or testifies as to confidential and/or proprietary information or who asserts a confidentiality interest in information produced or testimony given by another in this action.

3. Litigation Materials may be designated as "Confidential" where a Party and/or non-party witness believes, in good faith, that the Litigation Materials contain or refer to nonpublic financial information regarding the Producing Party or proprietary information regarding the Producing Party the disclosure of which would cause potential harm to the proprietary or business interests of the Producing Party that outweighs the public's right to access of such information or nonpublic information that should otherwise be deemed confidential.

4. Litigation Materials may be designated as "Attorneys' Eyes Only" where a Party and/or non-party witness believes, in good faith, that the Litigation Materials contain or reveal

trade secrets, pricing information, and/or other highly sensitive financial information, or highly sensitive commercial terms in contracts, purchase orders, invoices, or other agreements, the disclosure of which cause potential significant harm to the proprietary or business interests of the Producing Party or other Parties to the contracts, purchase orders, invoices, or agreements that outweighs the public's right to access such information.

#### **METHOD OF DESIGNATION**

5. A Producing Party may designate as "Confidential" or "Attorneys' Eyes Only" any Litigation Materials in the following manner:

- (a) The Producing Party shall mark any documents or items it wishes to designate "Confidential" or "Attorneys' Eyes Only" with the appropriate confidentiality markings at the time of production. Initial failure, by inadvertence or otherwise, to mark a particular item as "Confidential" or "Attorneys' Eyes Only" shall not preclude a subsequent marking of such item.
- (b) Deposition or other testimony taken in this action, including any document marked for identification during a deposition, may be designated "Confidential" or "Attorneys' Eyes Only" by any one of the following means:
  - i. by stating orally on the record that the information is "Confidential" or "Attorneys' Eyes Only" on the day the testimony is given;
  - ii. by sending written notice to all Parties designating information as "Confidential" or "Attorneys' Eyes Only" within ten (10) business days after the transcript of the testimony is delivered to the Party designating the testimony or document as confidential; or

- iii. by stamping or writing the "Confidential" or "Attorneys' Eyes Only" on the relevant portion of the transcript or document at or before the signing of the transcript by the witness or as soon thereafter as practicable.

All information disclosed during a deposition shall be deemed to have been designated "Confidential" for ten (10) business days after the transcript of the deposition has been delivered, whether or not any portion of the transcript or document has been so designated previously. Written notices of "Confidential" or "Attorneys' Eyes Only" information contained in a deposition transcript shall be attached by each Party to the face of the relevant transcript and each copy thereof in its possession, custody, or control.

- (c) Any Party may designate a document or information produced by a non-party pursuant to subpoena, Order of Court, or otherwise as "Confidential" or "Attorneys Eyes Only" by sending written notice to all Parties herein designating such document or information as "Confidential" or "Attorneys' Eyes Only" within ten (10) business days after the document is delivered to the Party designating the document as "Confidential" or "Attorneys' Eyes Only." All documents produced by non-parties shall be deemed to have been designated "Confidential" for ten (10) business days after the documents have been delivered, whether or not any portion of the document has been so designated previously.

**TREATMENT OF "CONFIDENTIAL"  
OR "ATTORNEYS' EYES ONLY" MATERIALS**

6. No copies of Litigation Materials designated as "Confidential" or "Attorneys' Eyes Only" shall be made except to the extent necessary for the preparation and conduct of this litigation, including discovery, motion practice, evidentiary hearings, trial, and appeal. Any person responsible for making such copies must ensure that the copies adequately reflect any "Confidential" or "Attorneys' Eyes Only" stamp or legend thereon.

7. Litigation Materials designated "Confidential," including any copies, notes, abstracts or summaries thereof, shall be maintained in confidence by the person to whom such materials are produced or disclosed, shall be used only in connection with this action and may not be used for any other purpose, and shall not be disclosed to any person, except as follows:

- (a) any court and its staff in connection with this civil litigation;
- (b) any court reporter who records any deposition or other testimony in this action;
- (c) any attorney acting as counsel to a Party;
- (d) any paralegal, clerical employee, and/or law clerk retained or employed and supervised by any attorney acting as counsel to a Party;
- (e) any employee of a Party who has been directed to assist in this action by any attorney acting as counsel to a Party; and
- (f) any actual or prospective expert or consultant identified and/or retained by any Party to assist it in this action.

In the event that a Party desires to disclose to any person not included in (a) through (f) above any document designated as "Confidential," such Party shall provide at least five (5) business days' advance notice in writing to attorney(s) for the Producing Party or the Party claiming the protected status. Should the Producing Party or the Party claiming the protected

status object to the disclosure of such "Confidential" information in writing to the Party seeking disclosure, the Party seeking disclosure may seek appropriate relief from the Court. Until the Court resolves the application, no such disclosure shall be made. The Party seeking disclosure shall have the burden of establishing that disclosure to any person not included in (a) through (f) should occur.

8. Litigation Materials designated "Attorneys' Eyes Only," including any copies, notes, abstracts or summaries thereof, shall be maintained in confidence by the person to whom such materials are produced or disclosed, shall be used only in connection with this action and may not be used for any other purpose, and shall not be disclosed to any person, except as follows:

- (a) any court and its staff in connection with this action;
- (b) any court reporter who records any deposition or other testimony in this action;
- (c) any attorney acting as counsel to a Party with respect to this action, except as follows:
  - (1) In-house counsel for West Virginia Radio Corporation, IMG College, LLC, and West Virginia Media (each a "Media Party" and together the "Media Parties") shall not have access to any documents designated as "Attorneys' Eyes Only" by any other Media Party. In-house counsel for the Media Parties shall have access to any documents designated as "Attorneys' Eyes Only" by any party other than a Media Party;
- (d) any paralegal, clerical employee, and/or law clerk retained or employed and supervised by any outside attorney acting as counsel to a Party with respect to this action; and

- (e) any actual or prospective expert or consultant identified and/or retained by any Party or said Party's counsel with respect to this Action.

In the event that a Party desires to disclose any document designated as "Attorneys' Eyes Only" to any person not included in Paragraph 8(a) - 8(e), such Party shall provide at least five (5) business days' advance notice in writing to attorney(s) for the Producing Party or the Party claiming the protected status. Should the Producing Party or the Party claiming the protected status object to the disclosure of such "Attorneys' Eyes Only" information in writing to the Party seeking disclosure, the Party seeking disclosure may seek appropriate relief from the Court. Until the Court resolves the application, no such disclosure shall be made. The Party seeking disclosure shall have the burden of establishing that disclosure to any person not included in 8(a) - 8(e), should occur.

9. Each person to whom information designated as "Confidential" or "Attorneys' Eyes Only" is revealed, disclosed, or made available for inspection, except the persons identified in Paragraphs 8(a) - 8(e), shall, prior to having access to such information, (i) be provided with a copy of this Protective Order, and (ii) sign an acknowledgement that he or she has read this Protective Order and agrees to be bound by its terms and conditions.

10. All persons authorized to receive "Confidential" or "Attorneys' Eyes Only" information under this Protective Order (other than any court and its staff) to whom any "Confidential" or "Attorneys' Eyes Only" materials are furnished, shown or disclosed, shall be given a copy of this Protective Order, and shall be bound by its terms.

11. All persons authorized by this Protective Order to receive copies of Litigation Materials designated "Confidential" or "Attorneys' Eyes Only" shall maintain such information

as "Confidential" or "Attorneys' Eyes Only" in accordance with this Protective Order and shall use such information solely for this action.

**FILING "CONFIDENTIAL" OR  
"ATTORNEYS' EYES ONLY" DOCUMENTS**

12. If Litigation Materials designated "Confidential" or "Attorneys' Eyes Only," or quotes from or makes reference to the specific content of the "Confidential" or "Attorneys' Eyes Only" portion(s) of such materials, are included in any filing with the Court or otherwise disclosed to the Court, such papers or motions shall be labeled "Confidential—Subject to Protective Order" or "Attorneys' Eyes Only—Subject to Protective Order" and, unless otherwise agreed by counsel or directed by the Court, shall be filed or lodged with the Court in a sealed envelope and kept under seal.

13. Nothing contained herein shall prevent any of the Parties from using "Confidential" or "Attorneys' Eyes Only" information in connection with any motion filed with the Court (in accordance with the requirements of Paragraph 12), or in trial, a hearing, or any other proceeding in this action.

14. Nothing contained herein shall prevent any Producing Party from seeking further protection with respect to the use of any information designated as "Confidential" or "Attorneys' Eyes Only" in connection with any trial, hearing, or other proceeding in this action.

**INADVERTENT DISCLOSURE**

15. If information designated as "Confidential" or "Attorneys' Eyes Only" is disclosed to someone not authorized to receive such information under this Protective Order, or if a person so authorized breaches any of his or her obligations under the Protective Order, counsel who learns of such unauthorized disclosure or breach shall, to the extent consistent with applicable ethical cannons and/or rules, immediately give notice of such unauthorized disclosure

or breach and take all actions reasonably necessary to mitigate the harm caused by such unauthorized disclosure or breach.

16. If any document (including electronically stored information) subject to a claim of privilege or of protection by the work-product doctrine is inadvertently produced in discovery by any Party, the Producing Party may notify any Party or third party that received the document of the claim and the basis for it. After being notified, any Party or third party that received the document must promptly return or sequester the specified document and any copies it made; must not use or disclose the document until the claim is resolved; must take reasonable steps to retrieve the document if the Party disclosed it before being notified of the claim of privilege or protection; and may promptly present the document to the Court under seal for a determination of the claim of privilege or protection. The disputed document must be maintained in strict confidence until the claim is resolved.

**DISPUTES CONCERNING DESIGNATIONS OF  
"CONFIDENTIAL" OR "ATTORNEYS' EYES ONLY"**

17. If any Party (i) objects to the designation of any Litigation Materials as "Confidential" or "Attorneys' Eyes Only" or (ii) objects to any other Party's use of this Protective Order, the objecting Party shall state the objection in writing to such other Party's counsel, or, if the challenged information was produced by a third-party, shall notify the opposing Party and the third-party of its objection in writing. The Parties and/or third-party shall first try to dispose of such dispute in good faith on an informal basis. If the dispute cannot be resolved informally within ten (10) days, the party opposing the designation of the information may apply for appropriate relief from this Court, which shall be permitted to conduct an *in camera* inspection of the materials. The Party seeking the designation of the information as "Confidential" or "Attorneys' Eyes Only" shall have the burden of establishing

that the information is entitled to such treatment. Until the Court rules on any such motion, the Litigation Materials shall continue to be deemed "Confidential" or "Attorneys' Eyes Only" as designated under the terms of this Protective Order, and all other terms and conditions of this Protective Order shall remain in full force and effect.

#### **SUBPOENA BY THIRD PARTY**

18. If any Party receives a subpoena or document request from a non-party to this Protective Order seeking production or other disclosure of another Party's "Confidential" or "Attorneys' Eyes Only" information, the Party upon whom the subpoena or request is served shall give written notice to counsel for the Party whose material is sought within five (5) business days, identifying the "Confidential" or "Attorneys' Eyes Only" material sought and enclosing a copy of the subpoena or document request. No production or disclosure of "Confidential" or "Attorneys' Eyes Only" Litigation Materials shall be made until the designating Party has received a reasonable opportunity to consider or respond to the subpoena or document request.

#### **ATTENDANCE AT DEPOSITIONS**

19. Because this action involves the disclosure and use of Litigation Materials designated as "Confidential" or "Attorneys' Eyes Only," depositions taken in the action shall, pursuant to Rule 26(c)(5) of the West Virginia Rules of Civil Procedure, be conducted with only the parties, a representative of an institutional party, counsel of record and a duly authorized court reporter and videographer being present. If an in-house counsel for a Media Party as defined in Paragraph 8(c) of this Protective Order is in attendance at a deposition, the deposition will be paused to allow such in-house counsel to be excused before questioning occurs relating to a document designated as "Attorneys' Eyes Only" by another Media Party. Such in-house

counsel will be allowed to return upon completion of the questioning relating to the document designated as "Attorneys' Eyes Only."

**AMENDMENT TO THIS CONFIDENTIALITY  
AGREEMENT AND PROTECTIVE ORDER**

20. This Protective Order may be modified at any time by written stipulation of the Parties as approved by an Order of Court. In addition, a Party may at any time apply to the Court for modification of this Protective Order pursuant to a motion brought in accordance with the rules of the Court.

**RESERVATION OF RIGHTS**

21. Nothing contained in this Protective Order shall prevent any Party from disclosing its own "Confidential" or "Attorneys' Eyes Only" information to any person.

22. Nothing contained in this Protective Order shall constitute: (a) an admission that any information designated "Confidential" or "Attorneys' Eyes Only" is, in fact, confidential, even if a Party has not objected to this designation; (b) an agreement by the Parties to produce any documents or supply any information or testimony in discovery not otherwise agreed upon or required by rules of Court or by Court Order; (c) a waiver by any person or Party of any right to object to or seek a further protective order with respect to any discovery request in this or any other action; (d) a waiver of any claim of immunity or privilege with regard to any testimony, documents, or information; or (e) a waiver by any Party of its right to apply to the Court for an order designed to preserve the confidentiality of its "Confidential" or "Attorneys' Eyes Only" information at trial.

23. The restrictions against disclosure set forth in this Protective Order shall not apply to information when such information:

- (a) is at any time independently developed without use of or without reliance upon any of the Producing Party's "Confidential" or "Attorneys' Eyes Only" information;
- (b) is rightfully acquired from an independent source, without restrictions as to use or obligations as to confidence;
- (c) was, prior to disclosure, rightfully in the possession or knowledge of the receiving Party;
- (d) is publicly available;
- (e) is required by law to be made available to third parties as discussed;
- (f) was publicly released; or
- (g) was, is, or becomes public knowledge in a manner not in violation of this Protective Order.

**LEGAL ADVICE BASED UPON CONFIDENTIAL  
INFORMATION OR ATTORNEYS' EYES ONLY MATERIAL**

24. Nothing in this Protective Order shall bar or otherwise prevent any attorney herein from rendering legal advice to his or her client that is based on the attorney's examination or knowledge of "Confidential Information" or "Confidential Information – Attorneys' Eyes Only" Materials; provided, however, that in rendering such legal advice and in otherwise communicating with his or her client, such attorney shall not disclose the contents or source of any "Confidential Information" or "Confidential Information – Attorneys' Eyes Only" materials to any person not authorized to receive such information under the terms of the various provisions of this Protective Order.

### **CONCLUSION OF THE LITIGATION**

25. Within sixty (60) days of the conclusion of this action, including any post-trial motions or appellate proceedings, counsel of record for the Parties shall secure the return of all Litigation Materials designated "Confidential" or "Attorneys' Eyes Only," including all copies thereof and notes, abstracts, or summaries made therefrom, from all persons to whom such materials were disclosed under the terms of this Protective Order, and shall either destroy all such materials or return them to counsel for the Party who produced such materials. In the event any such person elects to destroy the materials, he or she shall certify the destruction in writing to counsel for the Producing Party. Counsel may retain their work product (including briefs, memoranda, deposition transcripts, drafts, etc.), court filings, and transcripts and exhibits that incorporate, describe, or refer to Litigation Materials designated as "Confidential" or "Attorneys' Eyes Only," provided that counsel retaining the Litigation Materials designated as "Confidential" or "Attorneys' Eyes Only" continues to treat them in the manner provided herein.

### **CONTINUING EFFECT**

26. Insofar as the provisions of this Protective Order restrict the use or communication of any document or information, the Protective Order shall continue to be binding after the conclusion of this litigation, except that a Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of this Protective Order, and the Court shall retain jurisdiction of all Parties bound hereby for the purposes of this Protective Order.

The Circuit Clerk is directed to send a certified copy of this Protective Order to all counsel of record upon entry.

Entered this the 4 day of March, 2014.

Thomas C. Evans  
The Honorable Thomas Evans

13-C-468

Prepared, submitted, and approved by:

Frank E. Simmerman, Jr.  
Frank E. Simmerman, Jr. (WVSB# 3403)  
Chad L. Taylor (WVSB# 10564)  
Frank E. Simmerman, III (WVSB# 11589)  
SIMMERMAN LAW OFFICE, PLLC  
254 East Main Street  
Clarksburg, West Virginia 26301  
Phone No. (304) 623-4900

Clifford B. Levine (Admitted *Pro Hac Vice*)  
Morgan J. Hanson (Admitted *Pro Hac Vice*)  
Ingrid Bohme (Admitted *Pro Hac Vice*)  
COHEN & GRIGSBY, P.C.  
625 Liberty Avenue  
Pittsburgh, Pennsylvania 15222-3152  
(412) 297-4900  
*Counsel for West Virginia Radio Corporation*

Jeffrey M. Wakefield  
Jeffrey M. Wakefield (W. Va. Bar # 3894)  
Erica M. Baumgardner (W. Va. Bar # 6862)  
Wesley P. Page (W. Va. Bar # 10529)  
FLAHERTY SENSABAUGH  
BONASSO, PLLC  
200 Capitol Street  
P.O. Box 3843  
Charleston, WV 25338-3843

*Counsel For Defendant West Virginia  
University Board of Governors  
and  
Liaison Counsel for the Defendants*

1922101.v1

ENTERED March 6, 2014

DOCKET UNIT # 446

JAN FINE, CLERK