IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID L. HENZLER,
Petitioner,

v. **No. 18-0507**

TURNOUTZ, LLC and,
LARRY MARKHAM,
Respondents.

RESPONDENTS' BRIEF

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Now, come the Respondents, TURNOUTZ, LLC ("Turnoutz") and LARRY MARKHAM, by counsel, W. Jesse Forbes, Esq. and the law firm of Forbes Law Offices, PLLC, and pursuant to the Scheduling Order of this Honorable Court hereby submit their brief in Response to the Petitioner's arguments for the Court's consideration upon this appeal, and submit that no error occurred below, therefore, the Circuit Court's Order granting summary judgment in favor of Respondents should be affirmed upon this appeal.

III. RESPONSE TO ASSIGNMENT OF ERROR

The Circuit Court did not err in finding that Petitioner had released and waived his alleged claims against the Respondents under the Severance Agreement and General Release (hereinafter the "Release Agreement" or the "Severance Agreement and General Release") that the Petitioner entered into, after the complained of employment action, in exchange for a severance package and appropriately found that Respondents were contemplated and included under said Release Agreement and entitled to the benefit of said Release Agreement under the terms and provisions therein. Therefore, the Circuit Court's Order granting summary judgment in favor of Respondents was clearly proper and appropriate as no genuine issue of material fact remained for trial.

IV. STATEMENT OF THE CASE

The Release Agreement signed by Petitioner in exchange for a severance package including the sum of $13,721.63, clearly released the Respondents herein, from all liability for the claims Petitioner brought in this litigation. Moreover, even if the Release Agreement had not applied, Petitioner has not established any violation of the West Virginia Human Rights Act because the fact the Petitioner was not hired by Respondents had nothing to do with his age, and no evidence exists to the contrary.

According to Petitioner[1], the alleged employment action of Respondents that forms the basis of Petitioner's claims, wherein the Respondents did not hire him, occurred in March 2016. AR 3; AR 87, AR 215-217. In or about April 2016, the month after that subject employment action, the Petitioner entered into and executed the Severance Agreement and General Release.[2] AR 97-105. *(See also,* AR 222, *Plaintiff's Response to Defendant's Requests for Admissions No. 1).*

The Release Agreement "irrevocably and unconditionally releases and forever discharges" M&J Operations LLC ("M&J"), CST Brands, Inc. ("CST"), CrossAmerica Partners LP (f/k/a Lehigh Gas Partners LP) ("CAP"), and "**each of their respective Affiliates, ...parents, partners, subsidiaries, divisions, assigns, predecessors, and successors (by merger, acquisition or otherwise), and the past, present, future officers, directors, ... managers, employees, agents, representatives**...from any and all claims, demands, causes of actions, and liabilities of any nature, both past and present, known and unknown, resulting from any act or omission of any kind occurring on or before the date of execution of this Agreement which arise under...any federal, state or local law, regulation or ordinance." AR 97-100. *(Emphasis Supplied).*

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[1] *See,* AR 3, Complaint at ¶ 7 and ¶ 8, and Plaintiff's Responses to Interrogatory Nos. 11 and 14 as contained at AR 215-217.

[2] The Release Agreement indicates that Petitioner signed the same on April 9, 2016, and that an Officer of his prior employer, M&J Operations LLC, signed the same on April 13, 2016. *(See,* AR 102).

As found by the Circuit Court below, the evidence shows that the Release Agreement clearly applies to the Respondents and encompasses the claims and causes of action brought by Petitioner in the instant civil action. AR 83-94. As "successor," "Affiliate" or other "Company Released Parties"[3] of M&J, CST, and CAP under the Release Agreement, Respondent Turnoutz, LLC and Respondent Larry Markham, as an officer and manager of Turnoutz, are released from such claims and causes of action by Petitioner, and for any liability thereunder. *Id.;* AR 97-105; 106-163; 174; 236-237. Petitioner's claims, therefore, are and were barred under the terms of the Severance Agreement and General Release, and therefore, the Circuit Court properly found that no genuine issue of material fact exists in this litigation which would circumvent the terms and conditions by which the Petitioner agreed to release all claims against the Respondents, as affiliates, successors, and/or other "Company Released Parties" to Petitioner's prior employer(s). AR 83-94; 52-82; 97-105; 106-163; 174; 236-237.

More particularly, prior to February 2016, CST, CAP or their affiliates (including M&J) owned, operated and managed the One Stop convenience stores and related fuel service stations where Petitioner worked (the "One Stop Sites"). AR 84. On or about February 24, 2016, Lehigh Gas Wholesale Services, Inc. ("LGWS/CAP"), an affiliate of CAP, and Turnoutz amended an existing master lease agreement pursuant to which LGWS/CAP agreed to lease the One Stop Sites to Turnoutz. AR 106-163. In turn, Turnoutz agreed to manage and operate the One Stop Sites as they were currently constructed and equipped. *Id.*

In addition, Lehigh Gas Wholesale LLC ("LGW/CAP"), another affiliate of CAP, and Turnoutz entered into franchise agreements that designated Turnoutz a franchise dealer of LGW/CAP and provided for LGW/CAP to control and direct the supply fuel at the One Stop

[3] "Company Released Parties" is a term utilized in the Severance Agreement and General Release to define and encompass all the successors, affiliates, etc., to-wit: all parties that were intended to be forever discharged and released from all claims of the Petitioner who signed the same. *See* ¶ 2.2 at AR 97-98.

Sites. *Id. and* AR 174. Contrary to the assertions of Petitioner, the Master Lease Agreement specifically references the PMPA Franchise Agreement, Fuel Supply Agreement and other related agreements between Turnoutz and LGW/CAP and provided clear and convincing evidence that Respondents were affiliates or other "Company Released Parties" of the same. AR 107 at ¶ A; AR 106-163. Moreover, the contractual amendments to said Master Lease Agreement frequently reference Turnoutz as a "Franchise Dealer" of LGW/CAP and make clear that Turnoutz is a franchisee of LGW/CAP, an affiliate of Petitioner's prior employer. *Id. and* AR 153-156; 160, 162, 106-163.[4] Therefore, all Petitioner's assertions that the contracts only referred to Respondents as "tenant" are factually incorrect, in addition to being irrelevant for purposes of assessing the relationship of Respondents with CAP, LGW, CST and M&J in the context of the Release Agreement. *Id. See also,* AR 130-131; 153-156; 160; 162; 106-163; AR 97-105.

Indeed, when Turnoutz commenced operating and managing the One Stop Sites in February 2016, Turnoutz and CAP worked to ensure a seamless transition. Turnoutz took over the One Stop Sites "as is." Turnoutz operated the convenience stores out of the structures owned by CAP or its affiliates. Turnoutz used the fixtures, the equipment and other personal property of CAP located at the One Stop Sites in operating the stores. AR 106-163; AR 164-184; AR 236-237.

Turnoutz also continued the same business operation as CAP and/or its affiliates at the One Stop Sites: (1) the fuel continued to be supplied by CAP or its affiliates with Turnoutz serving as a franchisee of LGW/CAP; (2) Turnoutz retained a vast majority of store-level and hourly employees at each One Stop Site; (3) Turnoutz offered the same or similar employment positions at each One Stop Site, with the same or similar job responsibilities and working conditions; (4) employees of

[4] It has not been disputed that LGWS/CAP and LGW/CAP are affiliates of CAP. CAP, LGWS/CAP and LGW/CAP are part of the same corporate family. *See* AR 97 (noting that CAP was formerly known as Lehigh Gas Partners LP, which demonstrates that all three entities are part of the same "Lehigh" family); AR 3 at ¶¶ 7-8 (Petitioner asserts in his Complaint that CAP was a party to the lease agreement AR 3 at ¶¶7-8).

CAP or its affiliates, including Petitioner, assisted with the transition of the One Stop Sites to Turnoutz and worked with Turnoutz in that regard; (5) Turnoutz continued to offer the same products and services at each One Stop Site as CAP; and (6) although the number of above store-level personnel positions decreased based on business efficiencies, Turnoutz hired territory managers who previously worked for CAP or its affiliates. *Id.*

That Turnoutz continued the business operation of, and was at least indirectly controlled by, CAP and/or its affiliates at the One Stop Sites is further demonstrated by the fact that Turnoutz used, at the One Stop Sites, CAP's proprietary marks, brands, pricing strategies, hours of operation and pay rates for store-level employees. AR 236-237. Indeed, at the One Stop Sites, Turnoutz retained 261 out of 294 store-level employees who worked for CAP and its affiliates at the same locations (or over 88% of such employees). *Id.* The only employees who were not retained by Turnoutz were those employees who: (i) failed drug screening; (ii) failed to attend a mandatory job fair without a valid excuse for non-attendance; (iii) were on leave; or (iv) otherwise failed to satisfy the requirements for continued employment at the stores, such as completion of paperwork or actually reporting for their shifts. *Id.* The retained employees simply changed employers on the day their respective stores started to be operated by Turnoutz; the operations at the store did not change and the employees' roles or responsibilities did not change. *Id.* Even the inventory remained at the One Stop Sites when the stores transitioned to Turnoutz. AR 106-163; AR 164-184; AR 236-237.

Moreover, Petitioner's arguments that Respondents are not affiliated with or successors to his prior employer are without merit, as Petitioner admits[5] that his prior employer was party to the lease agreements with Turnoutz, and Respondents produced these numerous contractual agreements showing their affiliation and contractual agreements with CAP and its affiliate entities. AR 106-163; AR 97-105, AR 52-82.

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[5] AR 3 at ¶¶7-8

Based on the foregoing, including the terms of Release Agreement, itself, the Master Lease Agreement and Amendments thereto, and the relationship of Respondents to the former employer(s) of Petitioner, the Circuit Court properly granted summary judgment in Respondents' favor as Petitioner's Complaint was barred, and each purported cause of action alleged therein was waived and released, under the terms of the Release Agreement; and no genuine issues of material fact existed for trial. AR 83-94; 52-82; 97-105; 106-163; AR 222; 236-237. The Circuit Court's conclusion is supported by the terms of the Release Agreement and by the undisputed facts in this case, specifically, Turnoutz's assumption of the continued operations of the One Stop Sites from Petitioner's former employer, which was accomplished through the use of lease and franchise agreements, the alleged adverse employment decision occurred in March of 2016, and Petitioner's execution of the Release Agreement in April of 2016 after the alleged adverse employment decision had already occurred and when Petitioner knew his former employer was transitioning the One Stop Sites to Respondents. *Id. See also,* AR 3; AR 215-217; AR 222.

V. SUMMARY OF ARGUMENT

In April 2016, Petitioner voluntarily signed the Release Agreement that released all "Company Released Parties"—including successors, assigns, affiliates and heirs of Petitioner's prior employer—from any and all claims, causes of action and liabilities of any nature that occurred prior to the date of execution of the Release Agreement. AR 97-105. In signing the Release Agreement, Petitioner released, among other claims, any claim that he may have had against the "Company Released Parties" at the time of signature of the Release Agreement that arose under West Virginia laws or regulations. AR 97-98. In exchange for his release of claims, Petitioner accepted a substantial severance payment as consideration. AR 97-105.

The Release Agreement is indisputably a binding contract to which Petitioner must adhere. The questions raised by this appeal are: (i) whether the claims that Petitioner asserts in his Complaint

are included in the Release Agreement; and (ii) whether Respondents, against whom the claims are brought, are "Company Released Parties" under the terms of the Release Agreement. The plain and unambiguous language of the Release Agreement, as applied to the undisputed evidence of record, results in an affirmative answer to both questions.

As it pertains to the first question, the alleged adverse employment action that serves as the basis for this lawsuit occurred in March of 2016. AR 3; AR 87, AR 215-217. Petitioner was offered and executed the Release Agreement in April of 2016, after the alleged adverse employment decision against the Petitioner had already occurred and only after Respondent Turnoutz had completed its employment decisions related to the transition. AR 102. By the terms of the Release Agreement, any claim or cause of action "resulting from any act or omission of any kind occurring on or before the date of execution" of the Release Agreement is released and forever discharged by Petitioner. AR 97-98. Therefore, any claim or cause of action that Petitioner may have had against Respondents as a result of the alleged March 2016 adverse employment action—including Petitioner's current lawsuit with its claim of age discrimination under the West Virginia Human Rights Acts—was released by Petitioner's execution of the Release Agreement in April 2016.

With respect to the second question, based on the relationship that existed between Respondents and Petitioner's prior employer, contractual and otherwise, Respondents clearly were included as successors, affiliates, assigns, heirs and/or other "Company Released Parties" of the Petitioner's prior employers under the terms and conditions of the Release Agreement. For instance, Respondents certainly were intended to be considered "successors" of Petitioner's prior employer as that term is broadly used in the Release Agreement, given Respondents' assumption of CAP's responsibilities at the One Stop Sites. AR 236-237. Respondents, moreover, were intended to be included as "Affiliates," as that term is defined in the Release Agreement, based on the ongoing contractual and franchise arrangements that existed between Respondents and CAP

affiliates, pursuant to which CAP managed and controlled certain material aspects of Respondents' operations. AR 106-163. Accordingly, any claim that Petitioner may have had against Respondents at the time Petitioner executed the Release Agreement was waived and released and forever barred under the terms of that contract. AR 97-105; 106-163; 174; 236-237.

Therefore, the Circuit Court properly held that the Petitioner was precluded from maintaining any of the claims asserted in his Complaint against the Respondents, under the terms of the Release Agreement, and thus, appropriately granted summary judgment to the Respondents, as no genuine issue of material fact remained for trial. AR 83-94.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents are confident that there was no error below and, therefore, Pursuant to Rule 18 of the W.Va. Rules of Appellate Procedure, oral argument is unnecessary herein, as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This appeal is appropriate for a memorandum decision by this Honorable Court.

VII. ARGUMENT

A. Legal Standard for Summary Judgment.

The Circuit Court's Order in which it granted summary judgment in favor of Respondents is reviewed de novo. *Syl. Pt. 1, Painter v. Peavey,* 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994). This Court has made clear that when there is no real dispute as to the factual issues in a case, summary judgment is an appropriate mechanism to resolve the controversy. *Johnson v. Mavs*, 191 W.Va. 628, 630, 447 S.E.2d 563, 565 (per curiam) (1994). In *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995), the Court held,

> Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is `designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,'" if there essentially "is no real dispute as to salient facts" or if it only involves a question of law. *Painter*, 192 W.Va.

at 192 n. 5, 451 S.E.2d at 758 n. 5, quoting *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 22, 207 S.E.2d 191, 194 (1974). Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation. To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message, hereby, is modified.

Upon a motion for summary judgment, this Honorable Court has held that:

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavey,* 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994).

"The essence of the court's inquiry on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Wilson v. Daily Gazette Co.,* 588 S.E.2d 197, (W.Va. 2003).

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." *Syl. Pt. 2, Painter v. Peavey,* 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994), *citing Syllabus Point 3, Aetna Casualty & Surety Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963) and citing Syllabus Point 1, *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992).

Summary judgment is proper where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. West Virginia Rules of Civil Procedure 56(c), *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994), Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995), *v. Law*, 461 S.E.2d 451 (W.Va. 1995), *Powderidge Unit Owners Ass'n. V. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996); *Dawson v. Norfolk & W. Ry.*, 197 W.Va. 10, 475 S.E.2d 10 (1996); *Greenfield v. Schmidt Baking Co.*, 485 S.E.2d 391 (W.Va. 1997).

Summary judgment is proper where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *West Virginia Rules of Civil Procedure* 56(c), *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994), *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995), *Jividen v. Law*, 461 S.E.2d 451 (W.Va. 1995), *Powderidge Unit Owners Ass'n. V. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996); *Dawson v. Norfolk & W. Ry.*, 197 W.Va. 10, 475 S.E.2d 10 (1996); *Greenfield v. Schmidt Baking Co.*, 485 S.E.2d 391 (W.Va. 1997).

B. Under the Plain Language of the Release Agreement, Petitioner Released and Waived the Subject Claims Against Respondents.

The Circuit Court correctly granted summary judgment based on its application of the plain and unambiguous language of the Release Agreement. The Release Agreement expressly released any claim based on an adverse employment decision that occurred before the execution of the Release Agreement, which would include the employment decision at issue here. AR 3; AR 87; AR 215-217; AR 97-105. Furthermore, the broad and expansive definition of "Company Released Parties" in the Release Agreement clearly included the Respondents as parties entitled to the benefit of the release of claims given the Respondents' role in the continued operation of the One Stop Sites and the ongoing contractual relationships between Respondents and Petitioner's previous employer. AR 97-105; AR 106-163

"When the language used in a contract is plain and unambiguous, courts are required to apply, not construe, the contract." *Cabot Oil & Gas Corp. v. Huffman*, 227 W.Va. 109, 705 S.E.2d 806, 814-15 (W.Va. 2010). "'A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.'" *Id.* (quoting Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962)). Furthermore, the Court must consider a contract "as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." *Id.* (citations and quotations omitted).

Here, the relevant language of the Release Agreement is plain and unambiguous, and the application of that clear language to Petitioner's allegations and the undisputed evidence of record results in the conclusion that Petitioner is precluded from bringing this current action against Respondents as the Circuit Court accordingly found in awarding summary judgment.

1. The Release Agreement Bars Petitioner from Bringing the Subject Age

Discrimination Claim Against any "Company Released Parties."

The Release Agreement plainly and unambiguously bars Petitioner from bringing or filing any claims whatsoever against "Company Released Parties" to the extent the claims arose prior to Petitioner's execution of the Release Agreement. AR 97-105. In particular, in Section 2.2 of the Release Agreement, Petitioner "irrevocably and unconditionally releases and forever discharges" all "Company Released Parties" "from any and all claims, demands, causes of action, and liabilities of any nature, both past and present, known and unknown, resulting from any act or omission of any kind occurring on or before the date of execution of this [Release] Agreement which arise under contract or common law, or any federal, state or local law, regulation or ordinance." AR 97-98. Petitioner executed the Release Agreement on April 9, 2016. AR 102.

The application of the foregoing plain language of the Release Agreement to the circumstances here is straightforward and uncontroverted. The alleged adverse employment action at issue here occurred in March 2016 and was "before" the date of Petitioner's execution of the Release Agreement. AR 3; AR 87; 83-94; AR 215-217. Therefore, any claims or causes of action that Petitioner may have had against any "Company Released Parties" arising from that March 2016 adverse employment action were irrevocably and unconditionally released and forever discharged upon Petitioner's execution of the Release Agreement and his acceptance of the severance payment. *Id.*

2. The Respondents are "Company Released Parties" Under the Release Agreement, Precluding Petitioner's Claims Against Them.

The Release Agreement plainly and unambiguously details the persons and entities included in the definition of "Company Released Parties"—that is, those entitled to Petitioner's release of claims. That clear language, as applied, reflects the intent of the parties to include Respondents as a "Company Released Party" against whom Petitioner cannot file suit.

As is typical of most employment severance and release agreements, the definition of

"Company Released Parties" in the Release Agreement is extremely broad in order to include all possible persons and entities connected to, affiliated with or any way related to the Petitioner's prior employers. AR 97-105; *See also,* 106-163. In exchange for the thousands of dollars paid to the Petitioner as a severance payment, the "release" net was cast wide and captures all persons or entities that had any relation or affiliation to the prior employers, which undoubtedly includes the Respondents. *Id.* In fact, the relationship between Petitioner's prior employers and Respondents was so intertwined and extensive at the time the Release Agreement was executed, Respondents qualify as "Company Released Parties" in several ways.

a. Respondents Are "successors (by merger, acquisition or otherwise)" of Petitioner's Former Employers.

The term "Company Released Parties" includes those entities that are "successors (by merger, acquisition or otherwise)" of Petitioner's former employers and any officers, employees or agents of those successor entities. AR 97. Respondents are successors of Petitioner's former employers as Respondents took over the management and operations of the One Stop Sites for the former employers. AR 97-105; 106-163; 174. Respondents continued, without interruption, the same business operations of M&J and CAP in the same facilities offering the same services and products with the same equipment and inventory under the same names and brands while employing the same work force who had the same responsibilities as they did under M&J and/or CAP. *See Statement of Case supra*, AR 164-237. Indeed, employees of CAP or its affiliates, including Petitioner, worked with and assisted Respondents in the transition of the business operations from CAP to Respondents. *See id.* Such continuity of operations—with a seamless, cooperative transition between entities—clearly evidences that Respondents were the successors, affiliates and/or assigns of CAP and M&J or otherwise were "Company Released Parties" of the Petitioner's prior employers. *Id.*

Additionally, when Petitioner executed the Release Agreement after this transition period,

Petitioner not only had knowledge of Respondents' succession to CAP's operation but also he was involved in that succession, further proving that Respondents were included in the release of claims as a successor to CAP. *Id. See also,* AR 3. Indeed, Petitioner was offered a severance package not because he was no longer employed by CAP, but because he was no longer employed by CAP and was not retained by Respondent Turnoutz. If Petitioner would have been retained by Respondent Turnoutz in March 2016, there would have been no need for a severance package and release. Thus, the parties of the Release Agreement clearly intended to include Respondents in the term "Company Released Parties," which they did with the use of such plain language as "successors (by merger, acquisition or otherwise)" of Petitioner's former employers.

b. Respondents Are "Affiliates" of Petitioner's Former Employers.

Moreover, Respondents meet the definition of "Affiliates" under the Release Agreement, which is another way Respondents qualify as "Company Released Parties" as "Affiliates" are in included in the definition of "Company Released Parties." AR 97-98.

The Release Agreement specifically defines the term "Affiliate" as follows:

> For purposes of this Agreement, the term "Affiliate" is a **person or entity that directly, or indirectly through one or more intermediaries**, controls, or **is controlled by**, or is under common control with, **the person or entity specified**. The term "control" (including the terms "controlling," "controlled by" and "under common control with") **means the possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person or entity**, whether through the ownership of voting securities, **by contract, or otherwise.**

AR 98, end of § 2.2 (emphasis added). When Petitioner executed the Release Agreement, CAP and its affiliates (LGWS/CAP and LGW/CAP) were in several significant contractual relationships with Respondent Turnoutz that granted CAP and its affiliates authority to make decisions that controlled or impacted the management and/or policies of Respondents.[6] In other words, Respondents were

[6] By Petitioner's own admissions, the Respondent Turnoutz is a successor, affiliate, and/or assign of CAP, as the Complaint asserts the existence of a lease agreement(s) entered between Turnoutz and Petitioner's prior

"Affiliates" of CAP, or officers and agents of "Affiliates" of CAP, and therefore qualify as "Company Released Parties" under the Release Agreement based on that definition. AR 97-105; AR 106-163.

Under the Master Lease Agreement and its amendments (*see* AR 106-163), CAP and its affiliates possessed certain rights and powers with respect to the One Stop Sites. *Id.* That authority gave them the ability to affect, directly and indirectly, Respondents' management of and policies at the One Stop Sites. *Id.* Moreover, the franchise agreements that existed between CAP affiliates and Respondent Turnoutz gave CAP and its affiliates the power to direct the management and policies of vital components of Respondents' operations at the One Stop Sites---that is, the fuel operation and the proprietary marks. AR 107 at ¶ A; AR 106-163.

Accordingly, those contracts gave CAP and its affiliates the power and authority over Respondents contemplated by the definition of "Affiliate" in the Release Agreement. *Id.* Therefore, the Respondents meet the definition of "Affiliate" and were entitled to summary judgment as a matter of law, and no error occurred in the Circuit Court's final Order granting the same. AR 83-94; *See also,* AR 97-105; AR 106-163.

3. Petitioner Cannot Avoid the Application of the Plain Language of "Company Released Parties" by Cherry-Picking Words of the Release Agreement, Relying on the Language of Other Contracts, and Citing Inapplicable Case Law.

Petitioner attempts to avoid the plain language of the Release Agreement by employing various futile tactics—inappropriately parsing the definition of "Company Released Parties," relying on the language of other contracts, failing to acknowledge the full contractual and successor relationship of Respondents and CAP, and citing to inapposite cases that are easily distinguishable from the present appeal. Each argument of the Petitioner fails and has no bearing on the

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employer, CAP, whereby Turnoutz would lease the forty-one convenience store locations previously operated by CAP. (*See* AR 3, Complaint at ¶ 7, *see also* AR 222, Plaintiff's Response to Requests for Admissions No. 1).

application of the clear language of the Release Agreement, which results in the preclusion of Petitioner's claims against Respondents.

As explained above, the Release Agreement includes in the definition of "Company Released Parties" "successors (by merger, acquisition or otherwise)" of Petitioner's former employers, which encompasses Respondents. AR 97-98. Petitioner seeks to prevent the expansive reach of that plain language by focusing solely on the word "successor" and contending that the Release Agreement only applies to those entities that succeeded Petitioner's former employers by merger or acquisition. *See* Pet'r Brief, 8-9. Petitioner completely ignores an important part of the successor clause, that is, the words "or otherwise." Consideration of those two words in the context of the full phrase "successors (by merger, acquisition **or otherwise**)," easily defeats Petitioner's faulty approach to contract interpretation and demonstrates the inclusion of Respondents in the release of claims. AR 97-98.

As this Court has previously held, "the term 'otherwise' is defined as 'under other circumstances[,] ... in another manner; differently[.]'" *Roberts v. Adkins*, 191 W.Va. 215, 444 S.E.2d 725, 729 (1994) (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1372 (2d ed. unabridged 1987)). *See also Lakatos v. Estate of Billotti*, 203 W.Va. 553, 509 S.E.2d 594, 597 (1998) ("The words 'or otherwise' contained in W.Va. Code § 42-4-2 (1931) mean, in addition to descent and distribution, will, and policy or certificate of insurance, **any and every other way** one could take property . . . ." (emphasis added)). Therefore, the use of "or otherwise" in conjunction with the words "merger, acquisition" means "Company Released Parties" in the Release Agreement intended to include entities that succeeded Petitioner's former employers in any number of ways, apart from a merger or acquisition. AR 97-98. Respondents, with its succession to the operation and management of the One Stop Sites, certainly would qualify as a successor under circumstances that were different from a merger or acquisition. Moreover, in the context of a release agreement, where

employers seek the widest release possible in exchange for the severance payment, the use of the word "otherwise" in defining the "Company Released Parties" should be read and applied broadly to capture the intended scope of the release. *See Chevron U.S.A. v. Bonar*, 2018 WL 871567 (W. Va. Feb. 14, 2018) (noting that "in ascertaining the meaning of [the contract] term as intended by the parties to the contract, we are obliged to consider the context in which it is used").

Petitioner also utilizes definitions from Black's Law Dictionary and various cases dealing with "successor entities" and "successor corporations" to support his tortured argument that Respondents are not contemplated by the Release Agreement. *See* Pet'r Br. 8-9. However, a review of those authorities demonstrates that these arguments are entirely without merit. *See Davis v. Celotex Corp.*, 187 W. Va. 566, 573, 420 S.E.2d 557, 564 (1992) (discussing a corporation's liability for asbestos claims in a non-contract case); *West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.Va. 465, 477-78, 796 S.E.2d 574, 586-87 (2017) (applying Arizona law and discussing a successor entity's liability by operation of law and not pursuant to contract language). It was not necessary for the Circuit Court below or for this Court to determine whether Respondents meet a definition of successor corporation or successor entity under those prior cases or under a generic definition from Black's Law Dictionary. Instead, one only has to look at the four corners of the contract, in this case, the Release Agreement entered into by Petitioner. AR 97-105. In the Release Agreement, entities such as the Respondents were clearly contemplated by the contract's own terms. *Id.* Nevertheless, the Petitioner completely ignores the language of the contractual agreement in this case, and fails in his brief to even acknowledge the term "Company Released Parties" as defined in the Severance Agreement and General Release, and which the Circuit Court correctly found was applicable to the Respondents, thereby entitling them to summary judgment in this matter. AR 97-105; AR 83-94.

Petitioner's singular focus on the use of the words "landlord" and "tenant" in the Master

Lease Agreement (*see* Pet'r Br. 8) inaccurately and incompletely portrays the relationship of Respondents and Petitioner's former employers, as established by the evidence in this case. The Master Lease Agreement and subsequent amendments thereto make clear that Turnoutz is an affiliate/franchise dealer of CAP and/or its affiliates. AR 106-163. Further, it is abundantly clear from the record of this proceeding, that Respondents have had more than just a landlord/tenant relationship with Petitioner's prior employer. AR 97-105; 106-163. Respondents are and were—by virtue of its succession to the operation and management of the One Stop Sites and their contractual agreements with CAP and its affiliates—successors, Affiliates, assigns, heirs, and/or other "Company Released Parties" as contemplated and/or defined under the terms and conditions of the Severance Agreement and General Release voluntarily entered by Petitioner. *Id.*

Essentially, what Petitioner wished the Circuit Court to ignore, and now wishes this Honorable Court to ignore, is that the exact purpose of the Release Agreement was to prevent these precise circumstances—that is, a CAP employee who was not provided a position with Respondent Turnoutz would claim some meritless, untoward purpose for not being offered such further employment. Petitioner entered into this bargain and agreement of his own accord and has not alleged that the Release Agreement is in any way invalid. AR 222. In fact, Petitioner received a substantial sum of money in exchange for his agreement not to bring the exact type of claims he now brings. AR 97. Nevertheless, Petitioner now seeks to have both the benefit of the compensation he received by entering the Release Agreement, and the ability to bring the exact type of claims he promised not to seek therein. This Court should not allow it. Petitioner should not be permitted to breach the clear language and intent of the Release Agreement. AR 97-105. Rather, Petitioner's claims against Respondents should be dismissed with prejudice as barred under the Release Agreement and the Circuit Court's final order awarding summary judgment should be affirmed upon this appeal.

Respondents are successors, "Affiliates" and/or other "Company Released Parties" who are entitled to the benefit of the Severance and General Release Agreement that the Petitioner knowingly signed with his former employer. AR 97-105. The Release Agreement released the Respondents from any liability for Petitioner's claims, which arose before the Release Agreement was executed. *Id.* Thus, the Circuit Court properly and appropriately granted Respondents' motion for summary judgment, as no genuine issue of material fact remained for trial. AR 83-94.

C. Enforcement and Binding Nature of Settlement and Release Agreements as Written Contracts.

It is well settled that "settlements are highly regarded and scrupulously enforced, so long as they are legally sound." *DeVane v. Kennedy*, 519 S.E.2d 622, 637 (W.Va. 1999). Because "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[,]...it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syl. pt. 1, *Sanders v. Roselawn Mem'l Gardens*, 159 S.E.2d 784 (W.Va. 1968).

The "Severance Agreement and General Release" that Petitioner signed in return for substantial and valuable consideration is a legally sound, fairly made, and lawfully binding contract that must be upheld. *See, DeVane v. Kennedy*, 519 S.E.2d 622, 637 (W.Va. 1999); Syl. pt. 1, *Sanders v. Roselawn Mem'l Gardens*, 159 S.E.2d 784 (W.Va. 1968).

As explained above, the facts before the Circuit Court in this case made clear that that the Respondents were "Company Released Parties," under the contractual Severance Agreement and General Release. Further, given the language of the release, the Respondents were additionally contemplated by that agreement as successors, assigns, heirs, and/or Affiliates, who were entitled to the benefit of the bargain made by Petitioner in which Petitioner waived all his rights to employment-related claims and released and discharged from any liability all "Company Released Parties" from such actions. AR 20-38; 97-105; 52-82. As found by the trial court, Petitioner's claims

against Turnoutz and Larry Markham are and were released, waived, discharged, and barred by the terms and conditions of the Severance Agreement and General Release that was signed by Petitioner in return for valuable consideration as a legally binding contract forever discharging and releasing the Respondents herein from such claims. AR 83-94; AR 52-82; AR 97-105; AR 222.

Moreover, it is abundantly clear from the evidence in this case, that Petitioner's prior employer CAP or its affiliate was a party to the Master Lease Agreement and Amendments thereto with Respondent Turnoutz and that CAP or its affiliate was in a franchisor/franchisee relationship with Respondent Turnoutz, which, taken together, establishes the Respondents as Affiliates/successors/assigns/heirs and "Company Released Parties" of the Petitioner's prior employer under the terms of the Release Agreement. AR 97-105; 106-163. Therefore, the Circuit Court correctly found that Respondents were released from any liability to Petitioner as the employment claims made in his Complaint were barred, as he had waived his rights to bring such actions by his voluntary acceptance of the Release Agreement. *See* AR 83-94; AR 97-105; AR 106-163; AR 52-82.

Pursuant to the Release Agreement admittedly signed by Petitioner, and the severance package and payments he accepted in exchange, the Circuit Court appropriately found that Petitioner had released all claims against the Respondents under the terms and conditions thereof, as follows:

> "Employee hereby irrevocably and unconditionally releases and forever discharges M&J, CST Brands, Inc. ('CST'), CrossAmerica Partners LP **(f/k/a Lehigh Gas Partners LP) ("CAP"), each of their respective Affiliates (as hereinafter defined)** parents, partners, subsidiaries, divisions, assigns, predecessors, and **successors (by merger, acquisition or otherwise)**, and the past, present and future officers, directors, trustees, partners, shareholders, managers, employees, agents, representatives, volunteers, consultants, insurers and attorneys of and for each of the foregoing, and their respective heirs, executors, administrators, legal representatives and assigns **(hereinafter referred to as the "Company Released Parties")** from any and all claims, demands, causes of actions, and liabilities of any nature, both past and present, known and unknown, resulting **from any act or omission of any kind occurring on or before the date of execution of this**

Agreement which arise under...any federal, state or local law, regulation or ordinance."

AR 97-98 at § 2.2, et seq. AR 99-105 (emphasis added).

Therefore, under the terms and conditions of the Release Agreement signed by Petitioner, and as further explained above in Section VII. B. of this brief, the Respondents herein are clearly successors and/or "Affiliates" and/or other "Company Released Parties" against whom the Petitioner forever agreed to release and discharge all claims of the type and nature asserted in his Complaint, which occurred before the date of execution of the Release Agreement and arise under state law. Therefore, the Circuit Court properly found that no genuine issue of material fact exists to be tried in this matter, as the Release Agreement bars all the Petitioner's claims made herein and this Honorable Court should affirm the final order of that court which awarded summary judgment in favor of the Respondents. *See, DeVane v. Kennedy*, 519 S.E.2d 622, 637 (W.Va. 1999); Syl. pt. 1, *Sanders v. Roselawn Mem'l Gardens*, 159 S.E.2d 784 (W.Va. 1968).

Furthermore, § 2.3 of the Petitioner's Severance Agreement and General Release in pertinent part, specifically bars the claims asserted in Petitioner's Complaint, as the conditions of the aforesaid section thereof provides as follows:

> 2.3 Employee additionally hereby irrevocably and unconditionally releases and forever discharges **Company Released Parties** from any and all claims, demands, causes of action and liabilities **arising out of or in any way connected with, directly or indirectly, Employee's employment with M&J or any incident thereof, including, without limitation, his treatment by M&J or any other person, the terms and conditions of his employment, and any and all possible state or federal statutory and/or common law claims, including but not limited to:**
>
> **(a) All claims which he might have arising under Title VII of the Civil Rights Act of 1964, as amended; ...the Age Discrimination in Employment Act, as amended; the Older Worker Benefit Protection Act of 1990; the West Virginia Human Rights Act and any other applicable West Virginia law; ...the retaliation provisions of the Labor Laws of West Virginia...**
>
> ...
>
> **(d) All other claims, whether based on contract, tort (personal injury), or statute arising from Employee's employment, the separation from that**

employment, or any investigation and/or interview conducted by or on behalf of M&J.

AR 98-99, § 2.3 (emphasis added).

Clearly, the claims made in Petitioner's Complaint arise directly or indirectly out of his employment and his separation from that employment; (*see* Complaint in its entirety AR 3 and specifically ¶¶ 7, 8 at AR 3); and such claims are therefore barred as a matter of law, by the legally binding Severance Agreement and General Release he signed with his prior employer in return for valuable consideration. *See* AR 97-105. The Complaint asserts the existence of a lease agreement(s) entered between Turnoutz and Petitioner's prior employer, CAP, whereby Turnoutz would lease the forty-one convenience store locations previously operated by CAP where Petitioner worked. (*See*, AR 3at ¶ 7; *see also*, AR 97-105). Petitioner's Complaint further asserts that, prior to entering into the Release Agreement, Petitioner applied for an employment position with Turnoutz as a result of the lease agreement(s) between CAP and Turnoutz. (AR 3 at ¶¶ 8-9). Therefore, there was and is no genuine issue of material fact that Petitioner's claims arose directly or indirectly from his prior employment and his attempt to continue that employment with the successor of his employer, and all such claims were released by the Petitioner by his acceptance of the terms and conditions of the Severance Agreement and General Release in return for valuable consideration from his prior employer. AR 97-105. Petitioner cannot avoid his commitments and obligations under a legally binding settlement agreement by recasting an employment decision by a successor, assign and/or affiliate of CAP and M&J made prior to the Release Agreement—which is clearly covered under the Release Agreement—as a decision not to hire by a third party with no affiliation or connection with his former employer. *Id., See also,* AR 106-163. The undisputed evidence demonstrates that Turnoutz, through contracts and its continuation of the business operations of CAP and M&J, is a successor, assign and/or "Affiliate" and/or other "Company Released Party" of Petitioner's former employer. AR 97-105; AR 106-163; *see also* Section VII. B., *supra.*

Petitioner's claims are by definition, *derivative* of his termination from employment with M&J that were released by the Severance Agreement and General Release. *(See The Law Dictionary, Black's Law Dictionary Free Online Legal Dictionary, 2nd Edition),* defining "[d]erivative" as "[c]oming from another" or "that which has not its origin in itself, but owes its existence to something foregoing.")). Nevertheless, Petitioner brought this action specifically alleging claims and causes of action against his former employers' successors and/or otherwise "Company Released Parties," that arise out of [or derive from] his prior employment and separation from that employment as defined in the Release Agreement. AR 97-105. The claims of Petitioner in his Complaint against Respondents are the specific types released by the Release Agreement. *See* AR 98-99 § 2.3. In fact, Petitioner even acknowledged in the Release Agreement that he was releasing any and all claims under the West Virginia Human Rights Act, including age discrimination claims. *Id.* Yet, Petitioner brings this suit alleging age discrimination under the West Virginia Human Rights Act[7]. Petitioner has waived, released and forever discharged his right to bring such claims; therefore, the Circuit Court's award of

[7] Petitioner attempts to argue for the first time in this appeal in Footnote 5 of his brief that "it is unlikely that waiving any claims arising under the West Virginia Human Rights Act against an entity that is not even named in the document would comport with the requirements of W.Va. C.S.R. §77-6-3 relating to the requirement that such a waiver be knowing and voluntary." As Petitioner failed to argue below, and failed to present any evidence in support of such an argument, that his agreement in releasing his claims and executing the Release Agreement in question was not knowing or voluntary, Petitioner has waived his right to assert the same in this appeal. *See State v. Browning,* 199 W.Va. 417, 425, 485 S.E.2d 1, 9 (1997). Further, even if this argument had been presented, it is without merit. There was no evidence presented below that Petitioner did not knowingly and voluntarily enter into the Release Agreement. To the contrary, the discovery below demonstrated that Petitioner had signed the Release Agreement, and accepted the sum of $13,721.63, in exchange for the release. The Release Agreement specifically identified the exact types of claims at issue here, i.e. claims for age discrimination under the West Virginia Human Rights Act. To assert that Petitioner did not knowingly and voluntarily enter into the agreement or that he could not waive such rights flies in the face of his admissions in this case. Petitioner admitted in discovery that he voluntarily signed the Release Agreement and that he was provided a severance package in exchange. He has never asserted the agreement was invalid; instead, he simply attempts to have his cake and eat it too, as he wishes to keep the severance package, including the $13,721.63, but not be bound by the terms he agreed to in exchange for the same. Petitioner entered into the Release Agreement after knowing Turnoutz was taking over the One Stop Sites, and after his interview for employment with Turnoutz. Nonetheless, he executed the agreement promising not to bring these types of claims. This argument should not be looked upon favorably by this Honorable Court as Petitioner essentially asks this Court to negate basic concepts of contract law so that Petitioner may assert claims he has already compromised and waived.

summary judgment in favor of the Respondents should be affirmed upon this appeal. AR 98-99; AR 83-94.

Petitioner presented no evidence below and can prove no set of facts, which would allow him to avoid the legally sound and lawfully binding terms and conditions of the Severance Agreement and General Release which he accepted in return for valuable consideration. AR 40-51; AR 52-82; AR 97-105; AR 106-163; AR 210-233. In fact, Petitioner has produced no evidence in discovery that in any way relieves him from his settlement and release of all claims against the Respondents, Turnoutz and Larry Markham. *Id. See also,* AR 210-233. Moreover, in Response to the Respondents' Requests for Admissions, Request No. 1, the Petitioner ADMITTED that he voluntarily signed the Severance Agreement and General Release with M&J, CST, Lehigh Gas and CAP, in 2016, which admission bars all the claims the Petitioner has made against the Respondents, Turnoutz and Larry Markham, in this litigation. AR 222; AR 97-105

Tellingly, in the plain language of § 3.5 of the Release Agreement, the Petitioner, as the Employee, specifically promised and represented that he would not bring any claims suits or actions against the "Company Released Parties" related to the employment or separation therefrom, and he breached and violated the Severance Agreement and General Release by filing the instant action against the Respondents, Turnoutz, LLC and Larry Markham, who are clearly "Company Released Parties," within the meaning of and under the terms of the aforesaid Severance Agreement and General Release. *See* AR 97-105; AR 106-163; *see also* Section VII.B. of this brief above. In the case at bar, in response to the Respondents' interrogatories and requests for production, the Petitioner produced no documents or evidence[8] that would relieve him of the binding promises and obligations of the Release Agreement, including his release, waiver, and discharge of all the claims he now asserts against the Respondents, who are patently released from such claims as "Company

[8] AR 210-233, *Plaintiff's Responses to Defendants First Set of Combined Discovery Requests.*

Released Parties." *Id. and* AR 210-233. Therefore, the Petitioner's Complaint and this appeal are both without merit as Petitioner has forever waived, released and discharged all the claims brought in his Complaint by his prior acceptance of the Severance Agreement and General Release in return for substantial and valuable consideration, and the Circuit Court properly granted Respondents summary judgment as a matter of law.

A party moving for summary judgment does not need to negate elements of claims on which nonmoving party would bear burden at trial; rather, nonmovant must come forward with evidence which will be sufficient to enable it to survive motion for directed verdict at trial and, if nonmoving party fails to meet that burden, motion must be granted. *See Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 196 W.Va. 692 (1996); W.Va. R.Civ.P., Rule 56. Petitioner did not and cannot produce any evidence which would survive a motion for directed verdict at trial, due to his admission that he voluntarily signed the Severance Agreement and General Release, which bars all the claims and causes of action that were asserted in his Complaint; therefore, the Respondents' motion for summary judgment was properly granted. AR 222; AR 210-233; AR 52-82.

To be entitled to summary judgment in "employment discrimination context, the employer must persuade the court that even if all inferences that could reasonably be drawn from evidentiary materials of record were viewed in light most favorable to employee, no reasonable jury could find for employee." *Conrad v. ARA Szabo*, 480 S.E.2d 801, 809 198 W.Va. 362, 370 (1996); *see also* Rules Civ. Proc., Rule 56(c), Code 5-11-1 et seq. Herein the Petitioner presented no evidence in support of his claims or in opposition to the Respondents' motion for summary judgment. AR 40-50; AR 52-82.

Further, the Release Agreement he signed with his prior employer, clearly advised Petitioner to consult with an attorney prior to entering the same, and he voluntarily entered the agreement waiving his rights to bring the exact employment claims, including but not limited to age

discrimination and the West Virginia Human Rights claims, that he brought against Respondents. AR 52-82; AR 97-105. Further, Petitioner had the right to back out of the Release Agreement for a period of days after signing the same, but did not do so. *Id.*

By Petitioner's own admission he signed the Settlement Agreement and General Release with M&J, CST and CAP, and thereby he has released, waived and forever gave up all rights to bring the claims alleged in his Complaint upon his acceptance and receipt of the substantial severance pay provided for thereunder. AR 222; AR 97-105. Because of such admission and the release of claims provided under the Release Agreement, no reasonable jury could find for the Petitioner under any inference. *Id.* Moreover, as set forth herein, the Petitioner has not produced and cannot produce any evidence or documents that either question the validity or content of the Release Agreement or undermine or defeat the effect of the Release Agreement on Petitioner's claims. AR 40-50; AR 52-82; AR 210-233; AR 97-105. Further, Petitioner has waived any right to assert that he did not knowingly and voluntarily waive his rights under the W.Va. Human Rights Act. AR 98-99. Therefore, the Circuit Court correctly found that Respondents were entitled to summary judgment as a matter of law as it was shown by the evidence presented that there are no genuine material facts at issue upon which a reasonable jury could have rendered a verdict for the Petitioner. AR 83-94.

Summary judgment should be granted where "there is no genuine issue as to any material fact and...[the movant] is entitled to a judgment as a matter of law." W.Va. R.Civ.P. 56(c). A "genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." Syl. Pt. 5 (in part), *Kelley v. City of Williamson,* 655 S.E.2d 528, 530 (W.Va. 2007). Where "there is no evidence to support the non-movant's case and...the evidence is so one-sided that the movant must prevail as a matter of law," summary judgment is appropriate. *Calhoun v. Traylor,* 624 S.E.2d 501, 504 (W.Va. 2005) (internal quotations and citation omitted).

For all the foregoing reasons and pursuant to the foregoing authorities, the Respondents herein were clearly entitled to summary judgment as a matter of law, as no reasonable or rational trier of fact could find in favor of the Petitioner, as all evidence favors the Respondents, due to the terms and conditions of the Severance Agreement and General Release with Petitioner's prior employer(s) that Petitioner accepted for valuable consideration, which Release Agreement clearly contemplated that the claims made by the Petitioner in the case at bar were forever released and discharged against these Respondents as successors, "Affiliates," and/or otherwise as "Company Released Parties" as defined therein. AR 97-105.

"[S]ettlements are highly regarded and scrupulously enforced, so long as they are legally sound." *DeVane v. Kennedy*, 519 S.E.2d 622, 637 (W.Va. 1999). The evidence of record indicates that Petitioner voluntarily and knowingly signed the Severance Agreement and General Release; and Petitioner presented no evidence to the contrary. The Severance Agreement and General Release provided substantial and valuable consideration to the Petitioner for the release of all claims such as the ones made against the Respondents herein; therefore, the agreement is legally sound, lawfully binding, and should be upheld and enforced by this Honorable Court by affirming the award of summary judgment entered by the Circuit Court below.

D. Petitioner Failed to Make a Prima Facie Case of Age Discrimination and No Additional Discovery is Warranted.

Although the Circuit Court properly granted the Respondents' motion for summary judgment on the grounds that the Release Agreement signed by the Petitioner released Respondents from all liability for Petitioner's employment claims, the Respondents submit the following uncontroverted facts to dispute the Petitioner's claims in this appeal that he somehow made a prima facie case of age discrimination and is entitled to additional discovery. Based on the absence of evidence to establish even a prima facie case of age discrimination, and given the discovery already conducted in this case, this Court should deny Petitioner's request for any additional discovery as

both futile and unwarranted, and affirm the Circuit Court's Order granting summary judgment in favor of Respondents.

This matter was clearly ripe for decision on Respondents' motion, and the trial court's award of summary judgment was timely, proper and appropriate in all respects. Petitioner failed to present any evidence of a prima facie of age discrimination in opposition to Respondents' motion for summary judgment below. AR 40-50; AR 45; AR 52-82; AR 210-233; AR 6-19; AR 174, AR 178.[9] Instead, the evidence below, presented in discovery by the Respondents, demonstrated that there were legitimate non-discriminatory factors that led to the Petitioner not being offered a position with Turnoutz. AR 174; AR 178; AR 52-82.

Respondents, Turnoutz and Larry Markham, denied all Petitioner's claims of age discrimination in their Answer to the Complaint. AR 6-19. Respondents' valid, non-discriminatory, and reasonable grounds upon which Petitioner was denied employment are of record in their responses to the Petitioner's discovery requests as the same were submitted as evidence in support of Respondents' motion for summary judgment. AR 174, AR 178; AR 52-82. Respondents further produced the ages, identities, and applications containing the qualifications of the persons hired instead of Petitioner in discovery and submitted the same as evidence in support of their motion for summary judgment. AR 178; AR 52-82. This evidence demonstrated that the four people hired instead of Petitioner were approximately 57, 50, 50 and 44 years of age. AR 55; AR 178. No one under the age of 40 was hired instead of Petitioner. *Id.*

Furthermore, despite being provided the ages, identities and applications of the persons hired, in response to Respondents' discovery requests, the Petitioner produced absolutely NO evidence to support his assertions that the persons hired were substantially younger than him or that

[9] None of the authorities cited by the Petitioner relating to prima facie evidence of age discrimination are applicable to this case, as Petitioner waived his right to assert the same by presenting no evidence below in support of such claims. *See* AR 52-82; AR 40-51; AR 210-233.

they were less qualified. AR 52-82; AR 210-233. In fact, upon this appeal, in his brief, the Petitioner makes no citations to the record where any such evidence appears, as none exists, but instead he cites only to the bare allegations as made in his Complaint. AR 3-4. Conversely, Petitioner's discovery responses which failed to present any evidence in support of his claims were submitted to the trial court as evidence in support of Respondents' motion for summary judgment. AR 210-233.

Thus, Petitioner did not and cannot make a prima facie case of age discrimination. AR 210-233; AR 52-82. Petitioner has completely failed to point to any evidence below in support of his conclusory and meritless claims. *Id., See also* AR 1. The record shows that Petitioner filed his Complaint on October 17, 2016; the hearing on the subject motion was held on December 18, 2017; and the final Order which awarded summary judgment to Respondents was entered on May 7, 2018. (See, AR 1).

Accordingly, Respondents' motion and the evidence presented below, met the legal standards required for an award of summary judgment, and no error occurred in the Circuit Court's entry of the same. Petitioner is not entitled to any additional discovery, and the Circuit Court's Order dismissing Petitioner's Complaint with prejudice should be affirmed.

VIII. CONCLUSION

WHEREFORE, the Respondents, Turnoutz, LLC and Larry Markham pray that this Honorable Court will affirm the final order of the Circuit Court, which awarded Respondents summary judgment, and dismiss this appeal from the docket of the Court.

Respectfully submitted,

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