

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS for and on behalf of
WEST VIRGINIA UNIVERSITY,

Plaintiff,

v.

Civil Action No. 07-C-851
(Hon. Robert B. Stone, Judge)

RICHARD RODRIGUEZ,

Defendant and Third Party Plaintiff,

v.

WEST VIRGINIA UNIVERSITY
FOUNDATION, INC., a West Virginia corporation,

Third Party Defendant.

**DEFENDANT/THIRD PARTY PLAINTIFF'S
RESPONSE TO THIRD PARTY DEFENDANT'S MOTION TO DISMISS**

Now comes the Defendant, Richard Rodriguez (hereinafter "Defendant"), by and through counsel, and submits the following Response to Third Party Defendant West Virginia University Foundation, Inc.'s Motion to Dismiss.

I. Necessary party

This Court should construe the Defendant's Third Party Complaint as a joinder of the West Virginia University Foundation as a necessary party under Civil Rule 19 and grant Defendant's alternative prayer that the West Virginia Foundation be joined as a Co-Plaintiff in this Action.

a. Request

Defendant's request that West Virginia University Foundation, Inc. (hereinafter "Foundation"), be made a party to this lawsuit is justified and appropriate under the West Virginia Rules of Civil Procedure. While Defendant's earlier pleading, captioned as a "third

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party complaint” may have applied to the wrong procedural vehicle for such joinder, this technical oversight should not discourage this Court from granting Defendant’s proper request that the Foundation be joined as a party. Indeed, this Court’s evaluation of Defendant’s procedural decisions must be made in light of the admonition of Civil Rule 1 that the rules: “Shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” W.V. R. Civ. P. 1. Emphasizing the same point, Rule 8(f) provides that “All pleadings shall be so construed as to do substantial justice.” W.V. R. Civ. P. 8(f).

Although the captioning of Defendant’s earlier pleading suggested that it was utilizing Third Party Practice under Civil Rule 14, the pleading was better designed to join the Foundation as a plaintiff under Civil Rule 19. The pleading actually describes such action at the end of its prayer for relief when it requests “That this Court in the alternative align West Virginia University Foundation, Incorporated, a necessary and indispensable party, as a co-Plaintiff with West Virginia University.” (See, “Third Party Complaint” at p. 27, ¶6 of Prayer for Relief). This request for joinder of the Foundation under Rule 19 is appropriate, and it should be granted.

b. Civil Rule 19.

Rule 19(a) of the West Virginia Rules of Civil Procedure provides as follows:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the

person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

W.V. R. Civ. P. 19(a). The purpose of this rule is to prevent actions from proceeding under circumstances where, in the interests of justice, an absent party ought to be included in the action.

The Rule's purpose was well articulated in the Official Comment to Rule 19 of the Federal Rules, which is substantially identical:

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Fed. R. Civ. P. 19 cmt. (1966).

Generally, all persons who are materially interested in the subject-matter involved in a suit, and who will be affected by the result of the proceedings, should be made parties thereto, and when the attention of the court is called to the absence of any such interested persons, it should see that they are made parties before entering a decree affecting their interests. WV Rules of Civil Procedure, Rule 19(a); State *ex rel.* One-Gateway v. Johnson (2000), 542 S.E.2d 894, 208, W.Va. 731.

c. Consequences of Failure to Join

As shall be discussed in detail below, adjudication of this lawsuit without joinder of the Foundation would run an extremely high risk of forcing this Court to grant "hollow" relief at some point in the future. Even at this early stage in the litigation, there is already **ample evidence suggesting that the Foundation is the entity at the heart of this dispute** and that its

inclusion in this action is necessary for complete relief to be accorded among the parties. The very nature of the Foundation indicates that Defendant's salary was substantially provided out of Foundation resources and that the monetary damages sought by Plaintiff would eventually be paid into the Foundation's coffers if Plaintiff were successful. In fact, if Plaintiff's obligations under its contract with Defendant were not being fulfilled with money from the Foundation, there is serious reason to believe that Plaintiff has violated state law. Furthermore, the exclusion of the Foundation could possibly expose the current parties to inconsistent liabilities and unnecessary litigation. At the very least, this Court should join the Foundation as a party plaintiff to this action until Defendant has been allowed sufficient discovery to ascertain the Foundation's true role in the former relationship between Plaintiff and Defendant.

II The Foundation must be made a party to this action because it is inextricably intertwined with the Plaintiff and the West Virginia University Athletic Budget; therefore Defendant is entitled to discovery to ascertain the Foundation's role regarding the contract between Plaintiff and Defendant.

a. Employment Penalty

The reasonableness of the penalty clause that Plaintiff included in the "Second Amendment to the Employment Agreement for Richard Rodriguez" is certain to be a major issue in this case. Plaintiff claims to have suffered monetary damages as a result of Defendant's acceptance of the coaching position offered to him at the University of Michigan. The fact of the matter, however, is that Plaintiff depends substantially on the Foundation in order to meet a great many of its financial obligations, including those it incurred toward Defendant under the contract at issue. Plaintiff and the Foundation are financially entangled to such a large extent that the Foundation may turn out to be the real party in interest in this action. Indeed, the only way for

Defendant – or for this Court – to determine the reasonableness, enforceability, and application of the penalty clause at issue will be to join the Foundation as a party to this action, fully subject to the rules of civil discovery.

b. Foundation Publication

According to the West Virginia University Foundation Fact Sheet (attached hereto as “Exhibit A”), the Foundation manages a total of at least \$567 Million in assets for Plaintiff. (“Exhibit A at p.1). During the last six months of 2007 alone, the foundation transferred \$22.7 Million to the Plaintiff for support – a feat that involved processing over 10,000 invoices. (Id.) The Foundation boasts of the flexibility that its status as an independent entity lends to the Plaintiff. Among the advantages trumpeted by the Foundation is its usefulness in helping the Plaintiff to circumvent state laws requiring state accounts to be closed at the end of each fiscal year. (Id. at p.2). The Foundation apparently also revels in its capacity to shield the Plaintiff from the West Virginia Freedom of Information Act as well as those provisions of the Internal Revenue Code that might prove onerous for a state university that was conducting its financial transactions in the open. (*See id.*).

c. Case Law

The West Virginia Supreme Court of Appeals has already recognized the unique status of the Foundation and its considerable involvement with the Plaintiff. In 4-H Road Community Association v. West Virginia University Foundation, 182 W. Va. 434, 388 S.E. 2d 308 (W.Va. 1989), the court noted:

By statute, any gift made directly to the University, a public institution, must be paid directly into the State Treasury and held in a special account. W.Va.Code, 12-2-2(c) [1983]. In contrast, under its corporate by-laws, the Foundation,

manages and holds legal title to only those donations made directly to the Foundation. Foundation support for the University, though extensive, is not a budgeted item of the University...

One of the documents in the record is a 1984 Board of Regents memorandum entitled "policy statement" regarding gifts to the University, which outlines the manner the University's needs are coordinated with the Foundation's fund raising efforts. The purpose of the Board of Regents' policy statement was to "promote the maximum return from the solicitation of gifts [by avoiding] disruptive and embarrassing competition among the several schools, colleges and units of the University." In listing the roles of all the parties, the Board of Regents referred to the Foundation as "the primary gift solicitation agency for West Virginia University."

Id. at 435-36. In spite of the significant nexus it acknowledged between Plaintiff and the Foundation, the court in 4-H Road went on to hold that the Foundation was not a "public body" for purposes of West Virginia's Freedom of Information Act. Id. at 312-13. Now, almost twenty years later, the Foundation has doubtless taken great advantage of that holding in structuring transactions with the Plaintiff and various third parties.

More recently, in Affiliated Construction Trades Foundation v. University of West Virginia Board of Trustees, 210 W. Va. 456, 557 S.E. 2d 863 (W. Va. 2001), the West Virginia Supreme Court of Appeals decided a similar case in which the Foundation had helped the Plaintiff to circumvent the minimum wage and competitive bidding requirements applicable to public authorities. Id. at 869-70 *citing* W. Va. Code §21-5A-2. The suit was brought by a labor union representing the workers involved in the construction of a university building and sought a ruling that the Foundation be deemed a "public authority" since it had contracted on behalf of the university. Id. at 868. The Supreme Court of Appeals affirmed the trial court's decision finding that the Foundation was the only party that had contracted with the plaintiffs in that case and that the Foundation was not a "public authority" subject to the wage and bidding

requirements for state entities. Id. at 870, 880. It is worth noting, however, that while in that case the Foundation was the only party to contract with the plaintiffs, the University was also joined as a party to the action. Id. at 863, 868.

The Foundation's own self-characterizations establish the necessity of its joinder in the present action. Moreover, the Supreme Court of Appeals has repeatedly acknowledged the considerable entanglement between the Foundation and Plaintiff when faced with other accusations about the relationship between the two entities. Indeed, the overlap between Plaintiff's Officers and Board of Governors and the Foundation's Board of Directors makes meaningful distinction between the bodies extremely difficult. The only way for this court to ensure that complete relief is afforded to all parties in this action to join the Foundation as a party co-Plaintiff to this lawsuit.¹

III. The Foundation must be joined as a party to this action because the contract at issue apparently fails to comply with certain statutory requirements that would be applicable if the Plaintiff were the real party in interest.

A. Statutory Requirements

The necessity of the Plaintiff's involvement as a party to this lawsuit is highlighted by Plaintiff's apparent failure to comply with statutory requirements for those contracts that truly involve a financial commitment on Plaintiff's part. As a state university, Plaintiff is subject to certain statutory rules regarding the formation of contracts and its assumption of financial obligations. Even though the discovery process in this case is still in its infancy, there are obvious early indications that some of the statutory requirements that would have been applicable to Plaintiff's instant contractual obligations were not met. These indications point directly to the

¹ The Foundation after discovery is completed can certainly file a Summary Judgment Motion.

conclusion that the Foundation was the entity with financial responsibility for fulfilling Plaintiff's contractual obligations to Defendant, and that Plaintiff even treated the Foundation as the real party with an interest in the contract.

B. Appropriate Requirements

West Virginia Code Section 12-3-17 provides as follows:

Except as provided in this section, it shall be unlawful for any state board, commission, officer or employee: (1) To incur any liability during any fiscal year which cannot be paid out of the then current appropriation for such year or out of funds received from an emergency appropriation; or (2) to authorize or to pay any account or bill incurred during any fiscal year out of the appropriation for the following year: Provided, That nothing contained herein shall prohibit entering into a contract or lease for buildings, land and space, the cost of which exceeds the current year's appropriation, even though the amount is not available during the then current year, if the aggregate cost does not exceed the amount then authorized by the Legislature. Nothing contained herein shall repeal the provisions of the general law relating to the expiration of appropriations for buildings and land. Any member of a state board or commission or any officer or employee violating any provision of this section shall be personally liable for any debt unlawfully incurred or for any payment unlawfully made.

The case law interpreting Section 12-3-17 indicates that Plaintiff could not have made a valid contract with Rodriguez unless budget appropriations were made to cover all of the University's obligations under the Second Amendment to the Employment Agreement. The West Virginia Supreme Court of Appeals in State ex. rel. Point Towing Co. v. McDonough, 150 W.Va. 724, 149 S.E.2d 302 (1966) completely invalidated a contract for the purchase of a boat by the State Department of Natural Resources. In making the contract, the state agency had promised to pay the seller out of the following year's budget appropriations. The court invalidated the contract as violating Section 12-3-17, stating, "While an officer of a state spending unit necessarily must consider the legislative appropriation in planning the spending operations of his department, he

can not spend funds from that appropriation until they actually exist for expenditure.” *Id.* at 729.

Plaintiff has done nothing to indicate that it complied with the requirements of this statute in entering into the Second Amendment to Rodriguez’s Employment Agreement. Defendant does not believe that Plaintiff will be able to point out the appropriation for its obligations to Rodriguez under the Second Amendment. This is especially true of the reciprocal penalty provision of the Second Amendment, regarding which Defendant is highly skeptical that any reserve or emergency appropriation was made. The most likely explanation for this apparent defiance of state law is that the money was really coming from the Foundation.

Similarly, West Virginia Code Section 18B-2A-4(w) provides that the Governing Board of West Virginia University has the power to “transfer funds from any account specifically appropriated for their use to any corresponding line item in a general revenue account at any agency or institution under their jurisdiction as long as such transferred funds are used for the purposes appropriated.” At this point, Plaintiff has not provided any evidence of its compliance with this requirement in making its payments to Defendant under the terms of the contract at issue. Furthermore, Plaintiff has not and, upon information and belief, will not be able to show that any reserve appropriation was made in order to guarantee its reciprocal promise to pay Defendant a penalty for breach of the contract at issue. *See* “Second Amendment to the Employment Agreement for Richard Rodriguez” at p.3, ¶7. The lack of such required appropriation inescapably leads to the conclusion that either (or both) the contract between Plaintiff and Defendant lacked the mutuality required for it to be enforceable, or the Foundation was in fact to be the entity financially responsible for the Plaintiff’s obligations under the contract with Defendant. The only way for this Court and Defendant to get to the bottom of this

issue is for the Foundation to be joined as a party to this action pursuant to Civil Rule 19.

C. Attorney General

Additionally, the West Virginia Code requires that contracts entered into by Plaintiff be approved as to form by the West Virginia Attorney General. W. Va. Code §§5A-3-13, 18B-5-4(c). Again, Plaintiff has provided no evidence and, upon information and belief, will not be able to provide any evidence to indicate that it obtained the Attorney General's approval for the contract it entered into with Defendant. This inattention to a statutory requirement that would seem clearly applicable to the contract at issue is probative of the fact that Plaintiff all along regarded the Foundation as the only entity with a real interest in its contract with Defendant.

Plaintiff cannot claim to be the sole proper plaintiff in this action when it failed to abide by those statutory requirements applicable to the contractual obligations it allegedly entered into with Defendant. The evidence already available to Defendant indicates that Plaintiff at most only regarded itself as a responsible party under the contract at issue when it was convenient for Plaintiff to do so. To some significant degree, it appears that both Plaintiff and the Foundation recognized that the Foundation was the party with a real interest in the contract at issue. Accordingly, this Court must join the Foundation as a party to this lawsuit.

IV The Foundation was at least an intended third party beneficiary to the contract between Plaintiff and Defendant; therefore, the Foundation must be joined to this action as a party plaintiff.

A Foundation is a Beneficiary

While the Foundation is likely a real party in interest to the contract that is the subject of the instant action, it is at least clear from the evidence presently available to Defendant that the Foundation was an intended beneficiary of the penalty provisions of the contract that are

presently at issue. The Foundation's status as an intended beneficiary had already been determined by the established course of conduct between Plaintiff and varsity athletic coaches that were departing for the University of Michigan. Because the Foundation was an intended beneficiary of the penalty provisions at issue, the Foundation's interest in this action is sufficient to make it a necessary party to be joined under Civil Rule 19.

Unless otherwise agreed between promissor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

- (a) the performance of a promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
- (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts §302 (1979). Furthermore, under West Virginia law, such an intended donee beneficiary of a contract can sue to enforce a contract for his own benefit.

Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co., 123 W. Va. 53, 14 S.E. 2d 922, 927 (W. Va. 1941).

B Prior actions of Plaintiff and Foundation

The circumstances of this case demonstrate that the Foundation was an intended beneficiary of the penalty provision of the "Second Amendment to the Employment Agreement for Richard Rodriguez." Not four months prior to the execution of the Amendment, former West Virginia Men's Basketball Coach John Beilein had entered into a "Resolution and Termination Agreement" (attached hereto as "Exhibit B") with Plaintiff which purported to terminate all obligations under Coach Beilein's Employment Agreement with Plaintiff. **The "Resolution and Termination Agreement" provided that in settlement of Plaintiff's supposed rights under a**

nearly identical penalty clause in his Employment Agreement, Coach Beilein would pay the sum of \$1.5 Million Dollars to the Foundation. (“Exhibit B” at p.2, ¶4). This “Resolution and Termination Agreement” between Plaintiff and Coach Beilein was not confidential, and it was known to both Plaintiff and Defendant at the time the “Second Amendment” at issue here was executed.

Thus, at the time the “Second Amendment” was executed, both parties recognized that whatever rights Plaintiff might have against Defendant would inhere to the benefit of the Foundation; indeed such benefit to the Foundation was intended by both parties to the contract. Moreover, at the time the “Second Amendment” was executed, it could not have been clearer that Plaintiff intended to give the Foundation the benefit of whatever rights it might have against Defendant under the contract. Accordingly, the Foundation was an intended beneficiary of the penalty provisions at issue and may therefore have enforcement rights against the existing parties to this action.

Given the Foundation’s legal status as an intended beneficiary of the penalty provisions at issue, the Foundation must be joined as a party to the present action. A failure to join the Foundation as a party to this action could subject either of the existing parties to a substantial risk of incurring multiple or otherwise inconsistent liabilities. Moreover, there is reason to believe that the Foundation is a privy of the Plaintiff in this case, and, having now appeared and filed a Motion in this case, the Foundation has clearly had a full opportunity to litigate in the present action. Therefore, if the Foundation were excluded from this lawsuit, one of the existing parties could be collaterally estopped from obtaining full and adequate relief through a future action. *See State v. Miller*, 194 W. Va. 3, 459 S.E. 2d 114 (1995).

The Foundation is a real party in interest in the present matter, and its status as a third party beneficiary of the penalty provisions at issue is clear in any case. The Foundation is a necessary party to this action to ensure the most fair and efficient resolution of this action. For justice to prevail, this Court should join the Foundation as a party to this action under Civil Rule 19.

V CONCLUSION

In the interests of justice, this Court should construe Defendant's earlier pleading as a request to join the Foundation as a party to this action pursuant to Rule 19 of the West Virginia Rules of Civil Procedure. This Court should grant that request because the Foundation is so inextricably intertwined with Plaintiff that it appears to be a real party in interest to the present action. The Foundation's status as such is evidenced by Plaintiff's own treatment of the Foundation. Further, it is clear from the circumstances surrounding the execution of the "Second Amendment to the Employment Contract of Rich Rodriguez" that the Foundation was an intended beneficiary of the penalty provision at issue. For all these reasons, the Foundation must be joined as a party to the present action. At the very least, the Court should postpone a decision on the Foundation's Motion to Dismiss until such time as Defendant has had the opportunity to conduct sufficient discovery to ascertain the Foundation's true role in the relationship between Plaintiff and Defendant.

RICHARD RODRIGUEZ
-----By Counsel-----



Sean P. McGinley, Esq. (WV Bar No. 5836)
DITRAPANO BARRETT & DIPIERO PLLC

604 Virginia Street East
Charleston, WV 25301
Phone: 304-342-0133
Fax: 304-342-4605

Marvin A. Robon, Esq. (OH/0000644)

R. Ethan Davis, Esq. (OH/0073861)

BARKAN & ROBON LTD.

1701 Woodlands Drive, Suite 100

Maumee, OH 43537

Phone: (419) 897-6500

Fax: (419) 897-6200

Counsel for Defendant

WVU FOUNDATION

WVU FOUNDATION FACT SHEET (Updated 2/11/08)

Employees

- Number of full-time Foundation employees: 82
- Number of student interns: 4
- Number of WVU students employed part-time by the Foundation: (WVU students are employed through the Foundation's telemarketing program, Mountaineer Line. The average number of student callers is 35.)
- Number of development staff employed by WVU and other University-affiliated agencies: 22

Foundation Asset Management

The WVU Foundation manages assets for the benefit of WVU, the Foundation and for others. Total assets under management of \$1.04 billion as of Dec. 31, 2007 were as follows:

- Endowment (for the benefit of WVU): \$456 million
- For other entities: \$428 million
- For WVU: \$111 million
- WVU Foundation (includes One Waterfront Place): \$43 million

One of the primary functions of the Foundation is investment management. The investment pool value as of Dec. 31, 2007 was \$452 million; cash and short term investments totaled \$134 million; other long-term investments and receivables totaled \$428 million. Asset management services are provided by the Foundation to other entities including WVU Research Corp., BRIM, WVU Hospitals and WVU Alumni Association. The Foundation owns One Waterfront Place, occupying one floor and leasing at cost the remaining six floors to WVU.

Gifts

During the six months ending Dec. 31, 2007, the Foundation received \$38.4 million in gifts, including gifts in-kind. This included 19,473 gifts from 14,071 donors.

Support

During the six months ending Dec. 31, 2007, the University requested \$19 million for its benefit. In addition, \$3.7 million in gifts in-kind were transferred to the University. Ten-thousand invoices were processed.

Funds:

As of Dec. 31, 2007, the Foundation had 3,784 active funds, including:

- 1,400 scholarship funds (both endowed and non-endowed) Some funds provide multiple scholarships.
- 103 chairs, professorships and deanships
- 1,958 endowed funds

Operating Budget

-FY 08 operating budget: \$8.2 million

Foundation operations are supported through investment and financial management fees and investment income through the following sources: one-percent investment/management fee on endowment funds; investment management/services fees on agency funds; and earnings on non-endowed funds. Approximately 12% of the budget is overhead. That includes the costs associated with the Foundation's building occupancy, legal fees, human resource functions and president's office.

Stewardship

-Stewardship of gifts/donations is extremely important. The WVU Foundation administers and invests these funds under policies that ensure it operates in a cost-conscious environment conducive to carrying out its mission. Return on the endowed investment pool for the six months ending Dec. 31, 2007 was 2.5%. The pool is invested in 80 funds and managed by 34 well respected asset managers.

Independence

- The existence of the Foundation as an independent organization offers several important advantages to the University and to donors. They include:
 - Confidentiality of donor information and anonymity when requested
 - Maintenance of fund accounts from one fiscal year to the next, whereas many state accounts must be closed at the end of each fiscal year
 - Flexibility in the investment options of money needed for near-term disbursements
 - Diversity in choosing long-term investment opportunities for endowed assets
 - Timeliness, flexibility and service made available to the University through efficiency-centered, streamlined business operations
 - Long-term perspective on the needs and priorities of the University unaffected by political vagaries and other short-term circumstances

Technology

-In July 2005, the Foundation began implementing new financial and development systems from Blackbaud, Inc., a leading provider of software and services designed specifically for non-profit organizations. As the result of implementing these systems, the Foundation has embarked on a program of upgrading its technological and data infrastructure, as well as evaluating each of its core business practices. The Blackbaud system is currently used by more

than 500 Foundation and University employees. This past year saw many of the components of the technological and security infrastructure upgraded or replaced. In addition, key data services were added to improve the accuracy and reliability of the Foundation's constituent database, which now has over 300,000 entries. The Foundation is currently working on technology improvements in areas such as gift processing, fund management and reporting, as well as continuing to make incremental improvements in technology, security and data infrastructure.

Board of Directors

-The Foundation is governed by a 34-member Board of Directors, elected by the members. All serve without compensation.

**Additional information about the WVU Foundation can be found in its 2006-07 Annual Report at <http://www.wvuf.org/index.php?page=annreport>*

RESOLUTION AND TERMINATION AGREEMENT

This Resolution and Termination Agreement (hereinafter "Agreement"), made and entered into this 26th day of April, 2007, by and between WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS, for and on behalf of West Virginia University (hereinafter "University"), and JOHN P. BEILEIN (hereinafter "Coach").

WHEREAS, University and Coach have entered into an Employment Agreement on April 18, 2002, First Amendment to the Employment Agreement on June 24, 2003, Second Amendment to the Employment Agreement on April 30, 2004, and Third Amendment to the Employment Agreement on March 30, 2005, all of which related to the employment terms and termination terms of Coach as the Head Men's Basketball Coach at West Virginia University; and

WHEREAS, the parties are desirous of terminating and resolving all of the terms and conditions of all agreements relating to employment of Coach upon mutually satisfactory terms.

NOW, THEREFORE, WITNESSETH: That for and in consideration of the sum of Ten Dollars (\$10.00), and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledge by each of the parties, the parties do agree as follows:

- (1) The parties release each other from all duties, responsibilities and conditions set forth in all employment contracts and amendments.
- (2) Coach shall be entitled to any and all benefits and/or bonuses accrued as of April 3, 2007 under the terms of all prior contracts and amendments, and University shall pay any such accrued and/or earned amounts to Coach on or before thirty (30) days after

the date of execution of this agreement.

(3) The date of termination of employment of Coach shall be April 3, 2007.

(4) Coach shall pay the sum of One Million, Five Hundred Thousand Dollars (\$1,500,000.00) to the West Virginia University Foundation for the use of the Mountaineer Athletic Club payable in five (5) annual payments of Three Hundred Thousand Dollars (\$300,000.00) each. The parties agree that payments due and owing under this Paragraph 4 may be made through Coach's assignee; provided, however, that any such assignment shall not relieve Coach of his personal and contractual obligations under this Agreement. The first annual payment is due on April 3, 2008, and subsequent payments shall be due and payable each year thereafter on the third day of April until paid in full, with the final payment due on April 3, 2012.

(5) The parties hereto mutually release each other from any and all claims, causes of action or damages, known and unknown, to the parties.

(6) Neither the University nor the Foundation guarantees, warrants or makes any representations concerning the tax treatment of any payments made pursuant to this Agreement.

(7) There are no other agreements or understandings by and between the parties other than those set forth in this agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals by their fully authorized representatives.

WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS

JOHN P. BEILEIN

By: _____

John P. Beilein 4-26-07

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS for and on behalf of
WEST VIRGINIA UNIVERSITY,

Plaintiff,

v.

Civil Action No. 07-C-851
(Hon. Robert B. Stone, Judge)

RICHARD RODRIGUEZ,

Defendant and Third Party Plaintiff,

v.

WEST VIRGINIA UNIVERSITY
FOUNDATION, INC., a West Virginia corporation,

Third Party Defendant.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, hereby certify that **DEFENDANT/THIRD PARTY**

PLAINTIFF'S RESPONSE TO THIRD PARTY DEFENDANT'S MOTION TO DISMISS

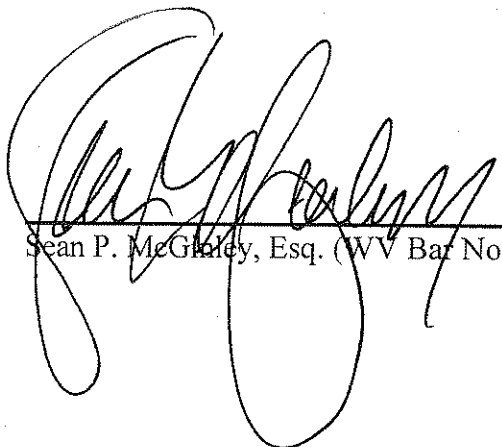
was served on the following by hand delivery on this 1st day of April 2008:

Thomas V. Flaherty, Esq.
Jeffrey M. Wakefield, Esq.
Jaclyn A. Bryk, Esq.
FLAHERTY SENSABAUGH & BONASSO, PLLC
P.O. Box 3843
Charleston, WV 25338-3843

Stephen R. Crislip, Esq.
A. L. Emch, Esq.
S. Ryan White, Esq.
JACKSON KELLY PLLC
1600 Laidley Tower
PO Box 553
Charleston, WV 25322

and via facsimile to:

Robert P. Fitzsimmons, Esq.
Robert J. Fitzsimmons, Esq.
FITZSIMMONS LAW OFFICES
1609 Warwood Avenue
Wheeling, WV 26003

A large, stylized handwritten signature in black ink, appearing to read 'Sean P. McGlady', is written over a horizontal line.

Sean P. McGlady, Esq. (WV Bar No. 5836)