

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

AT CLARKSBURG

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

Plaintiff,

v.

Civil Action No. 1:08-CV-00041
(Hon. John P. Bailey, District Judge)

RICHARD RODRIGUEZ,

Defendant and Third Party Plaintiff,

v.

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

Third Party Defendant.

DEFENDANT'S RESPONSE TO MOTION TO REMAND

Defendant, by counsel, hereby responds to the Motion to Remand of Plaintiff West Virginia University Board of Governors for and on behalf of West Virginia University ("Board").

Defendant was the head football coach at West Virginia University during the Fall Semester of 2007. In mid-December 2007, Defendant announced his intention to resign his position and take new employment at the University of Michigan. Remarkably, a mere eight (8) days following his formal resignation, the instant lawsuit for declaratory judgment was filed, nominally by the Board. Curiously, the members of the Board never met or voted to authorize the instant lawsuit before it was filed, instead apparently relying on some extra-legal authority they have announced to the media as

being based upon some past pattern and practice.¹

In its hastily prepared and premature Complaint,² Plaintiff admitted that it was “a resident of the State of West Virginia.” Complaint at paragraphs 1 and 3. Defendant removed this case to this Court on January 16, 2008, asserting this Court’s diversity jurisdiction, relying on Plaintiff’s admission that it is a West Virginia resident, and Defendant’s obvious Michigan residency since he resigned his position in West Virginia, accepted a new job in Michigan, and took numerous actions

¹ In an Associated press story dated February 1, 2008, Board “Chairman Steve Goodwin said the board, which is named as a plaintiff, ‘was intimately involved in the decision.’ A meeting was not required because of long-standing practice established under former President David C. Hardesty Jr., he said. The president is permitted to act on the board’s behalf in initiating or defending lawsuits. ‘An actual vote on this was not necessary,’ Goodwin said.” See <http://sports.espn.go.com/espn/wire?section=ncf&id=3226411>. These statements may clash with the Board’s own “Operating Procedures,” that state:

“1.11 Collective Authority and Action

The authority of the Governors is conferred upon them as a Board, and they can bind the Board and the University only by acting together through a majority vote of the Board as described in these operating procedures and applicable law.

Except as noted herein, permitted by act of the Board or otherwise provided by law, **no individual member may commit the Board to any policy, declaration, directive or action without prior approval of the Board.**”

(emphasis added).

² The lawyers who represent the Board in this matter are private attorneys, not lawyers regularly employed by the State of West Virginia. According to one published report, there was no agreement between the private lawyers and Board as to how the lawyers will be compensated at least as of January 11, 2008, two weeks after the case was filed. January 11, 2008, *West Virginia Record*, <http://www.wvrecord.com/news/206118-wvu-suspects-rodriquez-told-recruits-he-was-leaving> (WVU Vice President Alexander “Macia said he doesn't know how the university will compensate Flaherty and Fitzsimmon [*sic*]. ‘That is something we haven't gotten into yet,’ he said.”).

showing an intent to reside in Michigan by the time of the filing of this lawsuit, including: (1) accepting employment and establishing an office in Michigan, (2) signing a lease for a place to live in Michigan, (3) obtaining a Michigan driver's licence and (4) registering to vote in Michigan.³

I STANDARD

Diversity jurisdiction exists because “[t]he Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.” *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347 (1816). “The purpose of this jurisdictional grant was to avoid discrimination against nonresidents.” *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 65 (4th Cir. 1965).

On a motion to remand, the removing party (Defendant) bears the burden of proof in establishing jurisdiction. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). It is agreed that federal courts construe the removal statute narrowly, resolving doubts against removal. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). On the other hand, addressing a federal court’s diversity jurisdiction, “It is well-established federal courts have a ‘virtually unflagging obligation ... to exercise the jurisdiction given them,’” *Gum v. General Elec. Co.*, 5 F.Supp.2d 412, 415 (S.D.W.Va.1998) (citation omitted).

It is equally well-established, that the record and time for establishing jurisdiction is confined

³ Considering how quickly and prematurely Plaintiff filed the lawsuit, without communication with Defendant and before any breach of contract occurred, one could speculate that Plaintiff, who obviously knew Defendant intended to move to Michigan as soon as he accepted the position there, was hoping to get its Complaint on file for the very purpose of creating an argument against diversity. As shown below, if that was Plaintiff’s intent, it did not succeed.

to the time removal occurs. *Beasley v. Personal Fin. Corp.* 279 B.R. 523, 532 (S.D. Miss. 2002) (“It is a well established principal of removal jurisdiction that grounds for removal are determined at the time of removal.”) (citing *Walker v. FDIC*, 970 F.2d 114, 120 (5th Cir. 1992); *McCoy v. Erie Ins. Co.*, 147 F.Supp. 2d 481, 489 (S.D.W.Va. 2001) (“In addressing the propriety of federal jurisdiction in a removal action, courts base their decision on the record existing at the time the petition for removal was filed.”) (citation omitted).

II ARGUMENT

Plaintiff makes two arguments in support of remand. First, it now argues it is not a citizen of the State of West Virginia. Second, it argues Defendant is a citizen of the State of West Virginia. Since filing the motion, Plaintiff has implicitly admitted it did not have sufficient information to make the latter assertion by seeking “jurisdictional discovery.” As shown below, jurisdictional discovery of Defendant’s citizenship is unnecessary because the record is clear and Plaintiff’s assertions thereon were in error. As also shown below, in its Motion to Remand, Plaintiff mis-states the inquiry required to determine whether an entity like West Virginia University and its Athletic Department are alter egos of the State. As stated by the Court of Appeals for the Fourth Circuit, “[T]he question of whether an entity is an alter ego of the state is **a highly fact-intensive undertaking**[.]” (emphasis added). *Maryland Stadium Authority v. Ellerbe Becket Inc.*, 407 F.3d 255, 257 (4th Cir. 2005). Because Plaintiff has moved to remand without either addressing the proper jurisdictional test, nor offering sufficient facts to support its position under the correct test, the Court easily could find against Plaintiff on that basis alone. Alternatively, however, jurisdictional discovery on that issue may be necessary, including concerning Plaintiff’s financial ties to the private West Virginia University Foundation, Inc., to develop the record for the Court to determine whether

Plaintiff is in fact an alter ego of the state for diversity purposes.

A PLAINTIFF IS A CITIZEN OF THE STATE OF WEST VIRGINIA

In its Complaint instituting this action on December 27, 2007, Plaintiff pled that is “a resident of the State of West Virginia.” Complaint at paragraphs 1 and 3. Based in part on that representation of residency, Defendant removed this action to this Court on January 16, 2008. After removal, Plaintiff amended its Complaint, now alleging it is a resident of West Virginia, but not a citizen of West Virginia. Amended Complaint at ¶ 1 (deleting the sentence from the original Complaint that stated, “The West Virginia University Board of Governors is a resident of the State of West Virginia[]” and inserting instead the following new assertion: “While the University resides in the State of West Virginia, as the alter ego of the State, it is not a citizen for the purposes of diversity jurisdiction.”).

The new post-removal assertion is of little use to Plaintiff here, however, because the Court must look to the record at the time of removal, not thereafter.⁴ As stated in *Linville v. Price*, 572 F.Supp. 345, 347 (S.D.W.Va.1983):

“For diversity jurisdiction purposes citizenship is equated with domicile. *Webb v. Nolan*, 361 F.Supp. 418 (M.D.N.C.1972), *aff’d per curiam*, 484 F.2d 1049 (4th Cir.1973), *appeal dismissed* 415 U.S. 903, 94 S.Ct. 1397, 39 L.Ed.2d 461 (1974); *Jardine v. Intehar*, 213 F.Supp. 598 (S.D.W.Va.1963). And citizenship is determined as of the date the suit is instituted. *Kaiser v.*

⁴ The only claim made by the Plaintiff in its December 27, 2007 Complaint was one for a declaratory judgment. The Amended Complaint, filed after removal, added a claim for breach of contract, but the Complaint as filed and at the time of removal is the standard by which diversity jurisdiction is examined. In that regard, it is significant that the Supreme Court of Appeals of West Virginia differentiates declaratory judgment actions and has held that, “suits for declaratory judgment have been held not to be suits against the State,” *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W.Va. 743, 753, 310 S.E.2d 675, 686 (1983).

Loomis, 391 F.2d 1007 (6th Cir.1968); *Webb v. Nolan, supra.*”⁵

Therefore, based on the Complaint as it was pled at the time this suit was instituted, as well as at the time of removal, Plaintiff was a resident of the State of West Virginia. It is true, however, that residence is not necessarily synonymous with domicile, although there can be no doubt that if West Virginia University and its Athletic Department have a domicile, it is within the State of West Virginia.

Plaintiff’s primary argument on remand (and as expressed belatedly after removal in its Amended Complaint), is that West Virginia University is “an arm of the State” and “is a [*sic*] not a citizen for purposes of diversity citizenship.” Plaintiff’s Memorandum at 3. While acknowledging federal law is used to determine citizenship, in a strikingly sparse argument, Plaintiff relies on a decision from the Court of Appeals for Sixth Circuit to contradictorily assert, without any explanation, that “whether the University is a citizen of West Virginia or an alter ego of West Virginia for purposes of diversity jurisdiction *is governed by the law of West Virginia.*” Plaintiff’s Memorandum at 4 (emphasis added). Revealingly, Plaintiff does not even attempt to argue that, if federal law is applied, that it is not a citizen of West Virginia for diversity jurisdiction purposes.⁶

⁵ See *Kessler v. Home Life Ins. Co.*, 965 F.Supp. 11, 12 (D.Md.1997):

“Ordinarily, the existence of subject matter jurisdiction based on diversity of citizenship is determined as of the filing of, and on the face of, the complaint in an original action, *see O'Brien v. Jansen*, 903 F.Supp. 903, 905 (D.Md.1995), and, in addition, at the time of the removal in an action filed in state court. *United Food Local 919 v. CenterMark Properties*, 30 F.3d 298, 301 (2d Cir.1994).”

⁶ This is not to suggest state law plays *no* role in determining the issue, but rather it clearly is not the only element examined to make the determination, as Plaintiff incorrectly suggests. In *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996) the Court of Appeals stated, “The

There are many instances where an entity created by a state legislature have been deemed to be a citizen of a state for diversity purposes. *See, e.g., Guaranty Trust Co. v. West Virginia Turnpike Comm'n*, 109 F.Supp. 286, 293 (S.D.W.Va. 1952) (state turnpike commission is a West Virginia citizen for diversity purposes); *Univ. of Rhode Island v. A. W. Chesterton Co.*, 2 F.3d 1200, 1217 (1st Cir. 1993) (state university system is a Rhode Island citizen); *Kirby Lumber v. Louisiana*, 293 F.2d 82, 83-84 (5th Cir. 1961) (state game and fish commission is a Louisiana citizen); *Dept. of Highways v. Morse Bros. & Assocs.*, 211 F.2d 140, 144-45 (5th Cir. 1954) (state department of highways is a Louisiana citizen); *Univ. System of New Hampshire*, 756 F.Supp. 640, 647 (state university system is a New Hampshire citizen); *Morrison-Knudsen Co. v. Massachusetts Bay Transp. Auth.*, 573 F.Supp. 698, 705 (D. Idaho 1983) (Massachusetts Bay Transportation Authority is a Massachusetts citizen).

In this Circuit, federal law determines whether a state agency is considered an alter ego of the State for the purposes of diversity jurisdiction. The Court of Appeals for the Fourth Circuit recently in *Maryland Stadium Authority v. Ellerbe Becket Inc.*, 407 F.3d 255, 260-61 (4th Cir. 2005) held that:

“In determining if a public entity is an alter ego of the state, and therefore not a “citizen” under § 1332, courts have generally looked to the standards announced in cases addressing whether governmental entities are entitled to Eleventh Amendment immunity as an arm of the state. *See, e.g., Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 412 (11th Cir.1999); *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1202 n. 4, 1203 (1st Cir.1993).”

(footnote omitted).

question of citizenship for purposes of diversity jurisdiction is ultimately one of federal law, *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir.1968), although federal courts may consult state law in making a decision, *Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1030 (1st Cir.1988).”

In contrast to Plaintiff's assertion that "the law of West Virginia" alone determines whether a government entity is an "arm of the State," the Fourth Circuit follows a four part test:

"Typically, we apply a four factor test, first announced in *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456 (4th Cir.1987), to determine whether a governmental entity is an "arm of the state" under the Eleventh Amendment. Accordingly, we will apply the same multi-factored test in this case to determine if the University is an alter ego of the state and therefore not a "citizen" under § 1332."

Maryland Stadium Authority, supra, 407 F.3d at 261.

The Court of Appeals went on to explain the applicable four part test as follows:

"[I]n determining an entity's status as an arm of the state, "the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded." [. . .]. After resolving this inquiry, we examine three other factors, "includ[ing], but ... not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law." *Ram Ditta*, 822 F.2d at 457-58 (footnotes omitted)[.]"

*Id.*⁷ The Court of Appeals explained the second and fourth parts of the test as follows:

"We analyze the second *Ram Ditta* factor, the operational autonomy of the entity, by considering whether the state retains a veto over the entity's actions, the origins of the entity's funding, and who appoints the entity's directors. *See*

⁷ The Court of Appeals made a distinction in the importance of the "state treasury" factor under the Eleventh Amendment as opposed to its lesser weight in determining an entity's status under § 1332:

"In the context of reviewing the status of an entity under § 1332, this concern with protecting the state treasury is not as relevant. Accordingly, we will apply, in cases addressing whether an entity is an alter ego of the state for purposes of diversity jurisdiction, the original *Ram Ditta* standard. Thus, in contrast to cases involving an entity's entitlement to Eleventh Amendment immunity, the effect of the action on the state treasury will not be controlling."

Maryland Stadium Authority, supra, 407 F.3d at 262, n. 11.

Ristow v. S.C. Ports Auth., 58 F.3d 1051, 1052 (4th Cir.1995). As to the fourth factor, although “[a] state court's view of the status of a state political entity is, of course, an important factor, ... questions of eleventh amendment immunity are ultimately governed by federal law.” *Ram Ditta*, 822 F.2d at 459-60. These factors elucidate whether the “relationship between the governmental entity and the State [is] sufficiently close to make the entity an arm of the State.” *Cash*, 242 F.3d at 224.

Id., 407 F.3d at 261-62.⁸

In the *Maryland Stadium Authority* case, an important factor was where any monetary recovery by the State would go. *Id.*, 407 F.3d at 264 (“[A]ny monetary recovery by the University would be reported to the Comptroller. The amount of the recovery would then be set off against any appropriations for the next fiscal year, resulting in a direct benefit to the state—the outlay of less appropriations to the University.”). By contrast, in the most similar circumstance involving Plaintiff and its Athletic Department, the “buy-out” owed by Plaintiff’s former basketball coach under his employment contract with Plaintiff actually is being paid, not to the University, but to Third party defendant West Virginia University Foundation, Inc.⁹ Additionally, it appears the obligations

⁸ While the four part test stated in *Maryland Stadium Authority, supra*, is not discussed at all in Plaintiff’s Motion to Remand, Defendant acknowledges the Court of Appeals for Fourth Circuit generally surveyed other cases where an argument was raised that a particular state university was or was not an arm of the state for diversity purposes, and found the precedent “overwhelming” holding most universities to be arms of the state. Nevertheless, the Court of Appeals held that, “[d]espite this overwhelming precedent, ‘each state university must be evaluated in light of its unique characteristics.’ *A.W. Chesterton*, 2 F.3d at 1204.” *Maryland Stadium Authority, supra*, 407 F.3d at 263. Thus, only by examining West Virginia University and its Athletic Department and football program, and the important financial role played by the West Virginia University Foundation, Inc. under the four part test, can a definitive and complete determination to the instant question be had. *See* Part II.B., *infra*.

⁹ *Charleston Gazette*, May 3, 2007, 2007 WLNR 8425419 (“West Virginia University's athletic department accepted a lesser payout than that called for in the contract of former basketball coach John Beilein. This past Thursday, WVU and Beilein announced the new Michigan coach would pay \$1.5 million **to the WVU Foundation instead of \$2.5 million as directed in the contract.**”) (emphasis added).

seemingly owed by the University under the employment contract at issue herein actually were to be paid by the Foundation, not the University.¹⁰ Thus, in these unique and rather unusual circumstances, the actual and past arrangements between the Plaintiff's Athletic Department and its football program with the Foundation, are such that in regard to the employment contract in issue, the Plaintiff should not be considered an alter ego of the State.

Another fact deemed important to the Court of Appeals in *Maryland Stadium Authority* was that the University of Maryland in that case was represented by the state Attorney General. *Id.*, 407 F.3d 264-65. In West Virginia, the law is clear that the state *Constitution* requires that when a state entity engages in litigation, the Attorney General must appear on the pleadings as counsel. *Syllabus* Point 7, in part, *State ex rel. McGraw v. Burton*, 212 W.Va. 23, 569 S.E.2d 99 (2002) ("In all instances when an executive branch or related State entity is represented by counsel before a tribunal, the Attorney General shall appear upon the pleadings as an attorney of record[.]").¹¹ In this case, the Plaintiff has chosen to proceed without the Attorney General appearing as counsel of record.¹²

¹⁰ See generally *4-H Road Community Ass'n v. West Virginia University Foundation, Inc.*, 182 W.Va. 434, 435, 388 S.E.2d 308, 309 (1989) (Foundation support for the University is extensive).

¹¹ In *West Virginia ex rel. McGraw v. Burton*, 569 S.E.2d 99 (W.Va. 2002), the court recognized that the Attorney General possesses certain "core functions" that the legislature may not limit. *Id.* at 107.

¹² In this regard, the fact that the Board did not vote to authorize this suit before it was filed, and the President of the University initiated this lawsuit based upon some past pattern and practice, *see* note 1, *supra*, also supports the conclusion that the Plaintiff should not be considered to be acting as an "arm of the State." Also significant is the fact that President and the faculties may make "rules and regulations . . . for the general government of the university" subject only to approval by the Board, not the legislature. *W.Va. Code* § 18-11-5.

Certainly Plaintiff may, if it is not a state entity, have private counsel.¹³ But if Plaintiff wants to take the position in this litigation that it is a state entity for the purposes of diversity jurisdiction, then it should have followed state law. The failure to include the Attorney General as counsel, as required by state law, strongly suggests in this case that Plaintiff should be deemed to be acting as a citizen of the State of West Virginia, and not an arm of the State.

The Court in the *Maryland Stadium Authority* case also addressed the operational autonomy of the entity by considering whether the state retains a veto over the entity's actions, the origins of the entity's funding, and who appoints the entity's directors. In this case, the State does not have a veto over actions of the Plaintiff.¹⁴ As for the origins of the Plaintiff's funding, obviously it receives funding through tuition and fees collected, and in the circumstances of the Athletic Department, to whom it appears to have delegated authority to enter into the contract at issue, substantial funding also comes from the West Virginia University Foundation, Inc., such that the Athletic Department in general, and the Plaintiff's football program in particular is "self-sufficient."¹⁵

The circumstances in the case at bar are more akin to the case of *University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200 (1st Cir. 1993), where the Court of Appeals for the First Circuit held that the University of Rhode Island was a citizen of Rhode Island, rather than an arm or alter

¹³ A state entity also may have private counsel in addition to the Attorney General, but nevertheless must have the Attorney General as counsel.

¹⁴ While it is clear the State does not have a veto over the actions of the Plaintiff, it is true also that twelve (12) of the eighteen (18) members of the Board are appointed by the Governor.

¹⁵ The *Times West Virginian*, January 27, 2008, http://www.timeswv.com/wvu_sports/local_story_027004648.html (Discussing Plaintiff's Athletic Director Ed Pastilong discussion of "his self-sufficient department's operating budget has skyrocketed from about \$12 million annually to in the area of \$40 million.").

ego of the state, for purposes of diversity jurisdiction.¹⁶ For example, the *Maryland Stadium Authority* court explained that some of the dispositive factors that supported the finding in the *University of Rhode Island* case was that the University of Rhode Island held full legal title to property and could enter into contracts without limitation. *Id.*, 407 F.3d at 265. Likewise, it is the Plaintiff, and not the State, in whom title to all the University's property is vested. *W.Va. Code* § 18-11-1a.¹⁷ The Board is a corporation. It also has the same power of a corporation, on its own, "to contract and be contracted with[.]" *W.Va. Code* § 18-11-1.¹⁸ It has the power to be sue, and also may be sued. *Id.* It may plead, and it may be impleaded. *Id.* In addition, it is Plaintiff, and not the State, who specifically must "fix the salaries of the president of the university, athletic director, head

¹⁶ "With sufficient autonomy from the state, especially with regard to financial matters, an agency, political subdivision, or state university is the real party in interest and is thus a 'citizen' for the purposes of diversity jurisdiction." *Univ. System of New Hampshire v. United States Gypsum Co.*, 756 F.Supp. 640, 645 (D.N.H. 1991).

¹⁷ In *obiter dicta* statements made in *City of Morgantown v. Ducker*, 153 W.Va. 121, 168 S.E.2d 298 (1969), a case where a proceeding for mandamus was brought to compel judges of Court of Claims to assume jurisdiction of claim against Board of Governors of West Virginia University, the Supreme Court of Appeals held that, "the board holds such property in trust for the State and not as a separate or independent corporate entity."

¹⁸ It is unclear whether Plaintiff takes the position that there are limitations on its power to contract. Certainly state law imposes some restrictions on state agencies right to contract, such as limiting state contracts to one year's appropriations. *W.Va. Code* 12-3-17. Under state law, approval as to the form of the contract by the Attorney General is required, as is filing with the State Auditor if the length of the contract exceeds six months, but from the copies of the contract and amendments attached to the Amended Complaint, Plaintiff does not appear to have complied with those restrictions in this case. (**§ 5A-3-13. Contracts to be approved as to form; filing:** Contracts shall be approved as to form by the attorney general. A contract that requires more than six months for its fulfillment shall be filed with the state auditor.")

football coach and all assistant football coaches at said university.” *W.Va. Code* § 18-11-20.¹⁹ On a matter deemed important in *Maryland Stadium Authority, supra*, unlike the University of Maryland, West Virginia University even has the power to issue revenue bonds without legislative approval. *W.Va. Code* § 18-11A-1.²⁰ The Board has the power to enter into “an agreement with any trust company, either within or outside the State, as trustee for the holders of bonds[.]” and “[a]ny such agreement entered into by the board shall be binding in all respects *on such board and its successors[.]*” *W.Va. Code* § 18-11A-4 (emphasis added). In fact, perhaps more importantly, when the Board so acts and issues revenue bonds, only the credit of Plaintiff, and not the credit of the State, is being pledged. *W.Va. Code* § 18-11A-6 (“No provisions of this article shall be construed to authorize the board at any time or in any manner to pledge the credit or taxing power of the State, nor shall any of the obligations or debts created by the board under the authority herein granted be deemed obligations of the State.”).²¹

As for the third and fourth factors under the *Maryland Stadium Authority/Ram Ditta* test, Defendant does not dispute that, like the University of Maryland, West Virginia University is engaged in educating the youth of West Virginia, and that such education is a state concern and a

¹⁹ Although the statute calls for the Board, not the State, to fix the salary of the head football coach, the contract and amendments thereto at issue in this case, attached to the Complaint and the Amended Complaint, are not signed by any member of the Board of Governors, but rather by Athletic Director Ed Pastilong. An examination of the minutes of the Board found online do not reveal any action taken by the Board in regard to the Second Amendment to the employment contract.

²⁰ However, the Governor must sign the bonds.

²¹ See also *W.Va. Code* § 18-11B-10.

traditional governmental function.²² Nevertheless, as shown above, under state law, at least in regard to substantial obligations and liabilities of Plaintiff for revenue bonds it issues, it is not treated as an alter ego of the State under State law.²³ Additionally, state law treats declaratory judgment claims different for the purpose of determining whether a claim is made against a state entity. As noted above, the Supreme Court of Appeals has differentiated declaratory judgment actions and has held that, “suits for declaratory judgment have been held not to be suits against the State,” *Pittsburgh*

²² Historically, perhaps important to the instant analysis under federal law, state courts on the one hand assert Plaintiff is “an arm of the state” but on the other hand admit Plaintiff exercises “wide discretion as to the expenditure of money” received for athletics:

“By legislative fiat, Code, 18-11-1, as amended by Chapter 73, Acts of the Legislature, 1947, and Section 1-a, Chapter 89, Acts of the Legislature, 1947, the board of governors of West Virginia University is a public and governmental body and as such is an arm of the State, vested with a wide discretion as to the expenditure of money derived under the provisions of Section 2, Article 1-a, Chapter 83, Acts of the Legislature, Regular Session, 1943, and deposited in the state treasury in the ‘State Special Athletic Receipts Fund.’”

Syllabus Point 2, *State ex rel. Board of Governors of W. Va. University v. Sims*, 134 W.Va. 428, 59 S.E.2d 705 (1950).

²³ Even where state entities have received significant state appropriations, courts have held that the entities are autonomous, and not alter egos of the state. *See, e.g., Univ. of Rhode Island*, 2 F.3d at 1215 (“[M]ere receipt of state appropriations is not conclusive evidence of the recipient’s ‘alter ego’ status. Many (if not most) political subdivisions routinely receive significant state appropriations, but are characterized as autonomous entities for immunity and diversity purposes.”); *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977) (board of education that received significant state funding not an alter ego); *Kovats v. Rugers*, 822 F.2d 1303, 1308 (3d Cir. 1987) (state university not an arm of the state despite state appropriations of 50-70% of its general operating account); *Univ. System of New Hampshire*, 756 F.Supp. at 646 (state university system that received 25% of its expenses paid for by the state not an alter ego); *Morrison-Knudsen*, 573 F.Supp. at 702 (state transportation authority not an arm of the State, even though the State paid a “relatively large percentage of the Authority’s financial budget”); *Fitchik*, 873 F.2d at 661 (“Although New Jersey might appropriate funds to [the state entity] to meet any shortfall caused by judgments against [the state entity], such voluntary payments by a state do not trigger sovereign immunity.”).

Elevator Co. v. West Virginia Bd. of Regents, 172 W.Va. 743, 753, 310 S.E.2d 675, 686 (1983).²⁴

B JURISDICTIONAL DISCOVERY

It must be noted again that Plaintiff did not invoke or address the proper *Maryland Stadium Authority/Ram Ditta* standard in its Motion for Remand. Therefore, it is possible that Plaintiff will attempt to correct its error in its reply brief and address the correct standard and perhaps raise factual issues that were not set forth in its Motion or supporting memoranda. Ordinarily, raising arguments for the first time in a reply brief should be disallowed because it prevents the opposing party from making a response to the moving party's bases for its motion, which of course is the purpose of a response brief. However, in this Circuit, "the question of whether an entity is an alter ego of the state is a highly fact-intensive undertaking[.]" *Maryland Stadium Authority, supra*, 407 F.3d at 257. Therefore, if the Court chooses to allow Plaintiff to address the proper standard for the first time in its reply brief, Defendant moves the Court to allow factual jurisdictional discovery of Plaintiff and Third Party Defendant in order to make a complete record to satisfy the "highly fact-intensive undertaking" of determining whether Plaintiff is an alter ego of the State in this case.

C COACH RODRIGUEZ WAS A CITIZEN OF THE STATE OF MICHIGAN WHEN THIS LAWSUIT WAS COMMENCED

Diversity jurisdiction is also present because Coach Rodriguez was a citizen of the State of Michigan at the time this action was commenced—December 27, 2007. The party asserting diversity jurisdiction bears the burden of proof. *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986). Because

²⁴ While the Complaint in the case at bar states a claim for declaratory judgment filed by an entity claiming to be a state agency, and not stating a claim against it, there is no logical reason for this rule to not apply to a claim for declaratory judgments brought by a putative state agency.

Coach Rodriguez was domiciled in and a citizen of West Virginia just shortly before this action was commenced, the Defendant must prove by clear and convincing evidence that he changed his domicile to the State of Michigan prior to the commencement of this action. *See generally, Brignoli v. Balch, Hardy & Scheinman, Inc.*, 696 F.Supp. 37, 40-41 (SDNY 1988) (citations omitted), 28 U.S.C. § 1332(a)(1).

For purposes of diversity jurisdiction, the terms “citizenship” and “domicile” are synonymous. *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990). The law is well established that a person is not necessarily a citizen of, or domiciled in, the state in which he resides at any given moment. *McDonald v. Equitable Life Insurance Co. of Iowa*, 13 F.Supp.2d 1279, 1280 (N.D. Ala. 1998); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 1608 (1989). Instead, “citizenship” or “domicile” is determined by two (2) elements:

- (1) Physical presence within a state; and
- (2) The mental intent to make a home there indefinitely. *McDonald v. Equitable Life Insurance Co.*, at 1281; *Mississippi Band of Choctaw Indians*, 490 U.S. at 48, 109 S.Ct. at 1608.

A citizen can change his domicile instantly by taking up residence at a new domicile with the intent to remain there indefinitely. *See, Bateman v. E.I. Dupont DeNemours & Co.*, 7 F.Supp.2d 910, 911 (E.D. Mich. 1998) (internal citation omitted). An individual’s statements of intent are also to be considered in determining domicile. *See, McDonald v. Equitable Life Insurance Co.*, at 1281.

To ascertain intent, a Court must examine the entire course of a person’s conduct in order to draw the necessary inferences as to the relevant intent. *See Balch, Halsey, Stuart, Inc. v. Namm*, 446 F.Supp. 692, 694 (SDNY 1978). Furthermore, a Court must look not only at a person’s intent

to be in a state at a certain time, but rather at his intent to stay there for an unspecified or indefinite period of time. See, *Townsend, Rabinowitz, Pantaleoni & Valente, P.C. v. Holland Industries, Inc.*, 109 F.R.D. 671, 672 citing *Prakash v. American University*, 727 F.2d 1174, 1180 (D.C. Cir. 1984).

Here, the factual record unequivocally establishes that Coach Rodriguez was a citizen of the State of Michigan when this lawsuit was commenced. First, on December 16, 2007, Coach Rodriguez publicly announced that he was leaving West Virginia University, and had accepted the head coaching position at the University of Michigan. On December 19, 2007 Coach formally submitted a letter of resignation to West Virginia University.

Approximately one week later, on December 26, 2007, the day **before** this suit was filed, the Coach and his wife were physically present in the State of Michigan, and executed a residential lease agreement for a townhouse in Ann Arbor, Michigan. (Redacted copy attached hereto as “Exhibit A”).²⁵ On December 27, 2007 while Plaintiff was filing this case in the State of West Virginia, Coach Rodriguez and his wife had registered to vote in the State of Michigan (redacted copy attached hereto as “Exhibit B”), and also obtained a State of Michigan driver’s license (redacted copy attached hereto as “Exhibit C”).

Accordingly, on the day this action was filed by Plaintiff, Coach Rodriguez’s Michigan citizenship is established by the following:

- (1) Physical presence in the State of Michigan;
- (2) Acceptance of the head coaching position at the University of Michigan, including establishment of a business office on the campus

²⁵ Given the public interest in this dispute, and the animosity of West Virginia residents against Defendant, redacted copies of the Coach’s Lease Agreement, Voting Registration, and driver’s license are attached hereto in an effort to keep some portions of the Coach’s personal information out of the public domain. Plaintiff has filed a Motion for Jurisdictional Discovery, and unredacted copies of these materials will be made available to Plaintiff’s counsel upon execution of an appropriate protective order.

- of the University of Michigan;
- (3) Establishment of a residence in Ann Arbor, Michigan;
- (4) Registering to vote in the State of Michigan; and
- (5) Obtaining a driver's license in the State of Michigan.

Thus, on the day this lawsuit was filed Coach Rodriguez was physically present in the State of Michigan and had the intent to make Michigan his home indefinitely. In short, Michigan is where Coach Rodriguez was hanging his hat when this lawsuit was filed.

When the Coach returned to the State of West Virginia on December 29, 2007 he was served with a copy of Plaintiff's Complaint. However, the question that must be asked is whether at that point in time the Coach had an intention to stay indefinitely in the State of West Virginia, or Michigan. Clearly, the Coach considered the State of Michigan his home at this point in time.

Plaintiff makes much of the fact that the Coach sent a supplemental resignation letter via Federal Express on January 10, 2008 which listed his West Virginia residence as the return address. However, this letter was sent from Ann Arbor, Michigan as evidenced by the Federal Express tracking record. (Copy attached as "Exhibit D"). The Coach listed the return address as his West Virginia address simply to avoid having his current Michigan address in the public domain given the public animosity, threats against him and his family, and property damage already done to his West Virginia residence.

III CONCLUSION

For all of the foregoing reasons, the Motion to Remand and for costs should be denied.²⁶ Alternatively, if in its reply Plaintiff raises new factual issues not addressed in its Motion to Remand and supporting Memoranda, Defendant moves the Court to allow jurisdictional discovery of Plaintiff and Third Party Defendant.

RICHARD RODRIGUEZ

-----By Counsel-----

/s Sean P. McGinley

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

DITRAPANO BARRETT & DIPIERO PLLC

604 Virginia Street East

Charleston, WV 25301

Phone: 304-342-0133

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²⁶ As far as Plaintiff's request for costs are concerned, costs can not be awarded if the motion to remand is denied. Moreover, to the extent the basis for the request for costs relies on an assertion that a motion to remand in *West Virginia ex rel. McGraw v. Minnesota Mining and Mfg. Co.*, 354 F.Supp.2d 660 (S.D.W.Va.2005) was made "on the same basis as the University in this case," that assertion is in error, as the issues involved were different and the ruling did not involve an "alter ego" analysis ("In any event, the court need not reach the alter ego analysis in light of its conclusion that the state is the real party in interest.") *West Virginia ex rel. McGraw, supra*, 354 F.Supp.2d 660 at 674 n.11. Curiously, while Plaintiff in its Motion mentioned the participation of the undersigned local counsel as counsel in that case, it for some reason omitted acknowledgment that the law firm representing it here, Flaherty, Sensabaugh & Bonasso, also was co-counsel for one of the defendants in that case, and that no costs were awarded even though the motion to remand was granted in that case.

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

Co-counsel for Defendant

EXHIBIT A

[Redacted] ANN ARBOR, MI 48108
(734) [Redacted]
(734) [Redacted] Fax
(800) [Redacted] TTY

RESIDENTIAL LEASE AGREEMENT • Page 1 of 5

1. This lease agreement ("lease") is made this 26 day of DEC. 20 07 between [Redacted] ("Lessor"), whose address for the purpose of notice under the Truth in Renting Act MCL 554.641, is [Redacted] Ann Arbor, Michigan, 48108 and Rich and Rita Rodriguez (Lessee).

2. Lessor leases to Lessee [Redacted] ("Premises") in the apartment complex commonly known as [Redacted]

3. **PURPOSE:** Lessee is to occupy the premises as a private dwelling only. Lessee shall not use the premises in violation of laws of the United States or of the State of Michigan or of the ordinances or other regulations of the local governmental unit or of any other lawful authority, and Lessee shall fully comply with all health and police regulations.

4. **OCCUPANCY:** The occupancy level shall be established by LESSOR and shall not exceed applicable housing codes, shall be limited to not more than persons, and shall further be limited to those who have signed this lease or are otherwise legally authorized occupants.

ONLY THOSE INDIVIDUALS SIGNING THE LEASE AND ONLY THOSE LISTED BELOW MAY OCCUPY THE PREMISES.

NAME	FAMILY RELATIONSHIP
<u>Rich Rodriguez</u>	<u>Husband</u>
<u>Rita Rodriguez</u>	<u>Wife</u>
_____	_____
_____	_____

5. **TERM:** The premises are rented to LESSEE commencing on 12/26/07 through 11:59 p.m. 12/31/08

6. **DELAY OF POSSESSION:** Possession of the premises is not guaranteed until LESSOR deems the apartment ready for occupancy. The LESSOR shall not be liable to LESSEE for any delay in possession of the premises due to causes beyond its direct control.

7. **RENT:** LESSEE agrees to pay LESSOR total rent of \$ 10,919, for the premises and term previously described. Rent shall be paid as follows: \$ 179.00 on 12/26/07 and subsequent equal installments of \$ 895.00, beginning 1/1/08 and continuing on the first day of each month thereafter, including the first day of DEC, 20 08 or as follows: _____

8. **PAYMENT:** All payments must be received by Lessor on or before the fifth (5th) day of the month or a Twenty Dollar (\$20.00) late charge will be due. In addition, a service charge of Ten Dollars (\$10), will be imposed for each check returned by Lessee's bank. All rental payments should be paid in cash, check, or money order. Please do not send cash. The rent includes the following utilities: **Water and Sewer**. All other utilities charges will be paid by the Lessee as set forth in paragraph 24.

9. **PLACE OF PAYMENT:** Rental payments to lessor may be mailed or hand delivered to the above address.

10. **CHRONIC LATE PAYMENTS:** Rent is due on the first of each month and notwithstanding any other provision in this Lease, the Lessor may terminate this Lease if Lessee is chronically late with rent payments. Chronic late payment is defined as paying rent after the due date on three or more occasions during this Lease or any extension thereof.

11. **APPLICATION OF PAYMENTS:** Money paid by LESSEE to LESSOR shall be applied to LESSEE'S account in the following manner: First, to outstanding late fees and dishonored check charges; second, to outstanding repair charges and lock-out charges, third, to trash removal charges, fourth, to legal fees and/or court costs legally chargeable to LESSEE; fifth, to outstanding utility bills; and sixth, to rent.

12. **SECURITY DEPOSIT:** At the same time this lease is signed, Lessee will deposit \$ 250.00 ("security deposit") (not to exceed 1.5 times the monthly rent) with Lessor which may be used only for the purposes permitted under the Landlord/Tenant Relationships Act MCL 554.601-554.616. The fact that Lessor holds the security deposit shall not affect its right to obtain possession of the premises for non-payment of rent or for any other reason permitted by law. To the extent that the security deposit is not applied in the manner permitted by the Landlord/Tenant Relationships Act, it shall be returned to Lessee. The holder/insurer of the security deposit is: **Bank of Ann Arbor, P.O. Box 8009, 125 South Fifth Avenue, Ann Arbor, Michigan 48107.**

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RESIDENTIAL LEASE AGREEMENT • Page 2 of 5

13. ALTERATIONS: LESSEE shall make no alterations, additions or improvements in or to the premises without LESSOR'S prior written consent, and then only by licensed contractors in accordance with workmanship and quality standards agreed to in writing in advance by LESSOR. All alterations, additions or improvements to the premises made by either party shall become the property of the LESSOR and shall remain upon and be surrendered with the premises at the end of the term. This includes, but shall not be limited to, additional locks, permitted types of hooks on walls, antennae, carpet, paint and other such improvements.

14. ACCESS TO PREMISES: Lessor shall have reasonable access to the premises to the extent permitted by law. Lessor or its agents shall have free access at all hours to the premises for the purpose of examining same or exhibiting them to prospective buyers, or for making necessary alterations or repairs subject to applicable local ordinances.

15. REPAIRS: Except as otherwise provided herein, Lessor agrees to make all necessary repairs to the premises within a reasonable time after receipt of written notice from Lessee of the need of such repairs, or in the event of emergency, after verbal notice. Repairs necessitated by negligence of the Lessees or Lessee's guests will be made by the Lessor but paid by the Lessee on demand. Whenever repairs are to be made by the Lessor but delayed because of factors beyond Lessor's control, the obligation of Lessee to pay rent hereunder shall not be affected thereby, nor shall any claim accrue to Lessee against Lessor or its assigns by reason thereof. Lessee shall keep the premises and any common areas inside and outside the building in which the unit is located, including parking areas, clean and refuse-free, and shall comply with all applicable health laws.

16. PETS: LESSEE SHALL NOT KEEP PETS ON THE PREMISES. Violation of this provision shall be deemed a material breach of the lease.

17. QUIET ENJOYMENT: The LESSOR covenants that the LESSEE, on paying the rent and performing under the terms of the Lease, shall and may peacefully and quietly have, hold and enjoy the premises for the term of the Lease or any extension thereof. Upon written notice from LESSEE, LESSOR shall enforce observance of the Lease on the part of residents of other units as allowed by law.

18. CONDUCT, COMPLIANCE WITH RULES AND REGULATIONS: Nothing shall be done by LESSEE in or about the leased premises which will disturb or interfere with the rights, comforts, convenience, health, safety or welfare of other LESSEES or the LESSOR, nor shall any unreasonable or disturbing noise or odors be allowed at any time in or about the leased premises. In the event LESSEE, any member of LESSEE'S household, or LESSEE'S guests or agents engage in any acts or behavior that is immoral, abusive, criminal or illegal in nature, whether such activity occurs on or about the leased premises or not, LESSOR may terminate this Lease upon 30 days written notice. Lessee agrees to comply with and observe all rules and regulations established by Lessor, governing the premises and the apartment complex together with all of Lessor's changes and additions to the rules and regulations that are permitted under MCL 554.631 to 554.641, the Truth in Renting Act, as amended. Breach of any rules and regulations shall be deemed a material breach of this lease.

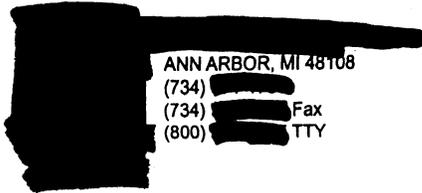
19. LEASE BINDING: The provisions of this lease shall be binding upon and shall be for the benefit of Lessor and Lessee and their successors in interest.

20. NO HOLD-OVER OCCUPANCY: No hold-over occupancy is permitted without the advance written permission of LESSOR. Any person who refuses to vacate the premises at the expiration of the Lease term as specified herein shall be deemed to be a trespasser without color of title or other possessor interest and shall be subject to immediate eviction as provided by law. In the event Lessee holds over without Lessor's consent, Lessee agrees to pay rent at the rate of 150% of the last agreed upon rental amount.

21. HOLD-OVER TENANCY: It is agreed that if the LESSEE continues in possession of the leased premises with the LESSOR'S consent, as previously provided, then such hold-over shall operate as an extension of the Lease from month to month only. In such event, all of the terms and conditions of this Lease Agreement, except for those pertaining to the term of the Lease and the monthly rental rate shall remain in effect.

22. CONDITION OF PREMISES: Lessee will not cause, allow or permit any waste, misuse or neglect of the premises or of any furnishings therein. At the expiration of the term, the Lessee shall yield and deliver up the premises in the condition as when taken, reasonable use and wear thereof accepted. Lessee's obligations under this paragraph are contractual only and the Security Deposit shall not be used to enforce this provision.

23. DAMAGE TO LESSEE'S PROPERTY AND INSURANCE: Unless caused by the Lessor, its agents' or employees' negligence and/or failure to maintain the premises as required by law, Lessor, its agents and/or employees shall not be responsible for any theft, damage, loss or destruction of personal property of Lessee or Lessee's guest due to fire, water or other casualty or cause. Lessees are encouraged to insure their personal property and belongings.



RESIDENTIAL LEASE AGREEMENT • Page 3 of 5

24. UTILITIES: Lessee shall pay for electricity and gas supplied to the premises, shall place those utilities in Lessee's name and shall arrange for commencement and termination of these utilities so as to coincide with the term of this Lease. Resident shall not allow termination of any water, gas, heat, electricity, or telephone service to the premises during the term hereof. Lessor shall not be liable in damages or otherwise for any failure or interruption of utility services beyond the control of Lessor or due to necessary repairs, replacements or alterations to the premises.

25. COST OF UTILITIES: In the event the cost of utilities, taxes, operating costs, or city services are increased, the Lessor has the option to pass such increases along to the Lessee upon thirty (30) days written notice.

26. EMINENT DOMAIN: If any part of the premises is condemned by any governmental authority, then this Lease shall terminate as of the date that possession is taken by the government authority.

27. ACTS OR OMISSIONS OF OTHERS: Lessor shall not be responsible or liable to the Lessee for any loss or damage occasioned through the acts or omissions of others, or from bursting, stoppage, backing up or leaking of water, gas, electricity or sewers, or from causes in any other manner whatsoever. Nothing herein shall relieve the Lessor from liability for its failure to perform or negligent performance of, any duty imposed by law, except to the extent of the waiver of subrogation.

28. DAMAGE BY FIRE OR OTHER CASUALTY: If the premises are partially damaged by fire or other casualty but can be restored to tenable condition, Lessor shall repair the premises with reasonable dispatch. The Lessee's obligation to pay rent shall be suspended during the time that the premises remain untenable. If the premises are destroyed by fire or other casualty or if the premises cannot be restored to tenable condition within a reasonable time, either party shall have the right to terminate this Lease by written notice to the other party.

29. LESSEE'S LIABILITY: The LESSEE shall be fully liable in contract and in tort to the LESSOR or LESSOR'S subrogee for damages to the leased premises and adjoining areas resulting from the LESSEE'S negligence or willful acts, or the negligence or willful acts of anyone on the premises by reason of association with LESSEE, including but not limited to fire damage, regardless of whether LESSOR has casualty or fire insurance. This enforcement of this provision shall survive in the event the lease is terminated or held void and it is immaterial whether the negligently or willfully caused damage renders the premises wholly or partially un-tenantable.

30. WAIVER OF SUBROGATION: Each party releases the other party from any liability for loss, damage or injury caused by fire or other casualty for which insurance (permitting waiver of liability and waiver of insurer's rights of subrogation) is carried by the insured party to the extent of any recovery by the insured party under such insurance.

31. REMEDIES NOT EXCLUSIVE: The rights, remedies and benefits provided by this Lease shall be cumulative, and shall not be exclusive of any other right, remedy and benefit provided by this Lease or by applicable law.

32. SEVERABILITY: Invalidation of any of the provisions herein contained by judgment or court order shall in no way affect any of the other lawful provisions hereof which shall remain in full force and effect.

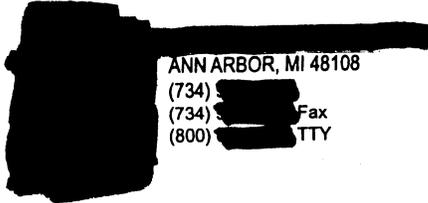
33. CAPTIONS: The captions to the paragraphs of this Lease are for convenience and reference only and shall not in anyway modify or control the meaning of the provisions to which they relate.

34. ASSIGNMENT AND SUBLEASE: Lessee shall not assign this lease nor sublet the premises without first obtaining Lessor's written permission which will not be unreasonably withheld.

35. RIGHT TO MORTGAGE: Lessor has the right to subordinate this Lease to any mortgage now or hereafter placed on the premises or on the apartment complex. At Lessor's request, Lessee shall execute and deliver such documents as may be required in order to accomplish the purpose of this paragraph.

36. TRUTH IN RENTING ACT (MCL 554.631 TO 554.641) PROVISIONS: Lessor and Lessee specifically agree that this Lease shall not, is not intended, nor shall it be construed, to violate any of the provisions of the Truth in Renting Act. If, however, any provision of this Lease does in fact reach any such result, then such provision shall be null and void but other provisions of this Lease shall continue to remain in full force and effect.

37. TERMINATION AND RE-ENTRY: In the event the Lessee violates any of the terms and conditions contained in this Lease, Lessor shall have the option of terminating said tenancy upon thirty (30) days' written notice to Lessee. Such termination shall not release or discharge Lessee from any additional rental obligation which may arise after said notice provided that Lessor shall use its best efforts to mitigate its damages and re-lease the premise as soon thereafter as possible.


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RESIDENTIAL LEASE AGREEMENT • Page 4 of 5

38. JOINT AND SEVERAL RESPONSIBILITY: The undersigned Lessees jointly and severally co-sign and assume the obligations for payments of all monies owing under this Lease as well as any other obligations contained herein as demonstrated by their signatures set forth below.

39. LEAD-BASED PAINT: LESSEE acknowledges that prior to signing this Lease, LESSEE received, reviewed and signed a copy of the Lead-Based Paint Disclosure form completed by the LESSOR, the terms of which are incorporated herein by reference and that LESSEE received and reviewed a lead hazard information pamphlet approved by EPA titled "Protect Your Family From Lead In Your Home."

40. CONTROLLED SUBSTANCE: The LESSOR may terminate this Lease upon twenty-four hours written notice if a LESSEE, member of LESSEE'S household or other person under the LESSEE'S control, has unlawfully manufactured, delivered, possessed with intent to deliver, or possessed a controlled substance on the premises. This provision shall apply only if a formal police report has been filed by the LESSOR alleging that the LESSEE, member of LESSEE'S household, or other persons under LESSEE'S control, has unlawfully manufactured, delivered, possessed with intent to deliver, or possessed a controlled substance on the leased premises. For purposes of this provision, "controlled substance" means a substance or counterfeit substance classified in Schedule 1, 2, or 3 pursuant to Sections 333.7111, 333.7212, 333.7213, 333.7214, 333.7215 and 333.7216 of the Michigan Compiled Laws.

41. TERMINATION PURSUANT TO MCL 554.601a: If LESSEE has occupied the leased premises for more than thirteen (13) months, he may terminate the Lease by a sixty (60) day written notice to the LESSOR if either of the following occurs: (a) LESSEE has become eligible during the lease term to take possession of a subsidized rental unit in senior citizen housing and provides the LESSOR with written proof of that eligibility, or (b) LESSEE has become incapable during the lease term of living independently as certified by a physician in a notarized statement.

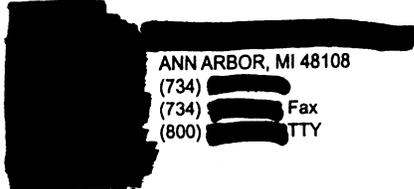
42. WAIVER: No waiver by any party to this Lease Agreement of a breach or default hereunder will be deemed a waiver of any subsequent breach or default of a similar nature by the other party.

43. SERVICEMEMBERS CIVIL RELIEF ACT: If, during the term of this lease, LESSEE enters military service or, if while in military service lessee receives military orders for a permanent change of station or to deploy with a military unit for a period of not less than 90 days, LESSEE may terminate this lease by delivery of a written notice and a copy of the military orders to LESSOR. The termination will be effective 30 days after the first date on which the next rental payment is due and payable after the notice is delivered. LESSOR may not evict a service member or dependents of a service member during a period of military service from premises that are occupied primarily as a residence and for which monthly rent does not exceed \$2400 per month. This paragraph is intended to comply with the Servicemembers Civil Relief Act (SCRA). In the event of a conflict between this paragraph and the SCRA, the SCRA shall prevail. In the event modifications to the SCRA invalidate portions of this lease, the lease shall be interpreted so as to be in compliance with the SCRA.

44. ABANDONMENT: If at any time during the term of this Lease, LESSOR believes in good faith that LESSEE has abandoned the premises, and the current rent is unpaid, LESSOR may re-enter the premises and put out the remaining possessions of LESSEE without liability therefore. Abandonment shall be conclusively presumed if rent is unpaid for fifteen (15) days following the due date, and either (1) a substantial portion of LESSEE'S possessions have been removed, or (2) acquaintances of LESSEE or other reliable sources indicate to LESSOR that LESSEE has left without the intention of reoccupying the premises. In the event of abandonment by the LESSEE, and in the event the LESSEE has left personal property on the premises, LESSOR may dispose of said personal property in any way LESSOR chooses. This provision shall apply to all items of personal property, except those for which the LESSOR and LESSEE have made specific written agreement. No oral agreement may alter this provision. Any cost incurred by LESSOR in removing the personal property described herein shall be reimbursed to LESSOR by LESSEE.

45. NOTICES: All notices to be given hereunder by either party shall be in writing and given by personal delivery to the LESSOR or the LESSEE, or shall be sent by the United States Post Office, addressed to the party intended to be notified, at the post office address last known to the party giving notice, and notice given as aforesaid shall be sufficient service thereof, and shall be deemed given as of the date when deposited in any post office or in any post office box regularly maintained by the United States Postal Service, with full address properly placed thereon, and with postage prepaid.

46. WASHTENAW COUNTY CLEAN INDOOR AIR REGULATIONS: LESSEE(S) shall comply with all requirements of The Washtenaw County Clean Indoor Air Regulation and ensure compliance on the part of members of LESSEE'S household or LESSEE'S guests or agents. This Washtenaw County Regulation was approved by the Washtenaw County Board of Commissioners to "Protect the public from the harmful effects of secondhand smoke exposure by substantially prohibiting smoking in public and private worksites and public places." LESSOR may terminate the Lease Agreement if chronic violations of the Washtenaw County Clean Indoor Air Regulation occur by LESSEE, members of LESSEE'S household or



ANN ARBOR, MI 48108
(734) [Redacted]
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(800) [Redacted] TTY

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other persons under LESSEE'S control. Chronic violations are defined as three or more of either Washtenaw County Clean Indoor Air Regulation violations and/or written notices by LESSOR. To access the Regulation in full text, visit website www.eWashtenaw.org or call 734.484.7200.

47. MISREPRESENTATION: LESSEE hereby certifies that all statements made on the "Application For Rental" are true and no misrepresentation has been made. In the event LESSOR discovers any misrepresentation or untrue statement during the term herein specified, or any extension thereof, LESSOR may void and nullify this Lease upon fifteen (15) days written notice.

48. ENTIRE AGREEMENT: It is agreed that this Lease, the attached Rules and Regulations (if any), and the application for rental (if any) constitute the entire agreement between LESSOR and LESSEE and may not be altered, amended or changed in any manner unless in writing, signed by the undersigned parties. The undersigned parties further acknowledge and agree that no additional verbal promises, representations or agreements have been made other than are contained in this lease.

NOTICE: Michigan law establishes rights and obligations for parties to rental agreements. This agreement is required to comply with the Truth In Renting Act. If you have a question about the interpretation or legality of a provision of this agreement, you may want to seek assistance from a lawyer or other qualified person.

You must notify your landlord in writing within 4 days after you move of a forwarding address where you can be reached and where you will receive mail; otherwise you landlord shall be relieved of sending you an itemized list of damages and the penalties adherent to that failure.

UPON THE EXECUTION OF THIS LEASE, A LESSEE IS ENTITLED TO RECEIVE A COPY OF THE BOOKLET PROVIDED BY THE CITY CLERK OF ANN ARBOR CONCERNING THE LEGAL RIGHTS OF LESSEES. BY EXECUTING THIS LEASE, THE LESSEE ACKNOWLEDGES RECEIPT OF SUCH A BOOKLET PRIOR TO EXECUTION OF THE LEASE.

IN WITNESS WHEREOF, THE LESSOR AND THE LESSEE HAVE EXECUTED THIS LEASE AS OF THE DAY AND YEAR FIRST ABOVE WRITTEN.

LESSOR:

Authorized Signature Theresa Neely

Lessee Signature

Date 12/26/07

MOLD ADDENDUM TO THE [REDACTED] LEASE

Mold – Mold is a type of fungus that is part of a group of living organisms that have existed from the beginning of time and are very common and serve an important role in the environment. For example, Penicillin is a type of mold. Mold seeks moisture, warmth, and food in order to grow. Mold spores are too small to be detected by the human eye. They are found everywhere around us and the spores travel in the air entering our homes through open doors and windows, attached to our skin, clothing, shoes, and on the fur of our pets. Once the spores enter, they settle on surfaces throughout the home. There is no way to keep the mold spores out of the home, but regular cleaning and preventative maintenance will help to prevent mold problems.

Mold Prevention – It is the responsibility of the resident to minimize the potential for mold growth in the townhouse/ apartment, by doing the following:

- Clean and vacuum your townhouse/apartment on a regular basis to remove possible sources of mold.
- Remove moisture that accumulates on windows, walls, ceilings, floors and other surfaces when first noticed.
- Turn on fans in the bathroom or kitchen before you begin showering or cooking with open pots.
- Wipe off moisture from the shower walls, bathtub, and the bathroom floor. Hang up wet towels, bath mats, and clothing so they dry out. Leave the bathroom door open until all the moisture has dissipated.
- Check washer hoses for leaks; make sure the dryer is vented to the outdoors to prevent moisture buildup.
- Promptly notify the management office of any leaks in the basement, or any problems with the water heater, heating system or the air conditioning.
- If small areas of mold have occurred on non-porous surfaces, the Federal Environmental Protection Agency recommends that you first clean the area with soap and water, let the surface dry, and then after 24 hours use a spray-on type of biocide, such as Tilex Mildew Remover. Follow the directions on the container for usage
- Do not use biocides on porous surfaces such as ceilings or drywall. Notify the management office instead to take care of the problem.

Responsibility:

It is the Resident's responsibility to notify the [REDACTED] office in writing of any water leaks, excessive moisture, or standing water inside the leased premises.

It is the responsibility of the Resident to notify the [REDACTED] office in writing of any malfunction with the heating, air-conditioning, or ventilation system.

It is responsibility of the Resident to notify the [REDACTED] office of mold growth after trying several times to remove mold with household cleaning solutions.

Failure to notify the Management, the Resident can be held responsible for property damage to the townhouse/ apartment and any health issue that may result.

Once the Management office is made aware of a persistent mold growth, the [REDACTED] will take appropriate action to eliminate persistent mold found to be part of the Management's responsibility.

LESSOR:

Authorized Signature Theresa Neely

Lessee Signature

Lessee Signature

Lessee Signature

Lessee Signature

Date 12/26/07

By execution of this lease, resident acknowledges receipt of "Rights and Duties of Tenants", a booklet provided by the City of Ann Arbor.

"Some things your landlord writes in the lease or says to you may not be correct representation of your rights."

"Also you may have rights and duties not mentioned in your lease. Such rights may include rights to repairs, rights to withhold rent to get repairs done, and rights to join a tenants union or form our own union. Such duties may include the duty to pay rent and the duty not to cause a serious health hazard or damage beyond reasonable wear and tear."

"Additionally some lease clauses may be subject to differing legal interpretations. If you think that a clause in your lease or something your landlord says to you is unfair, you may contact your own lawyer, legal aid society, or tenants union lawyer for their opinions."

This lessor has neither told you nor written anything in your lease that is known to be deceptive or a misrepresentation of your rights, however the statement contained in the outline above is required by City charter.

YOU HAVE THE RIGHT TO PRIVACY IN YOUR RENTAL HOME. CITY LAW ESTABLISHES GUIDELINES THAT THE OWNER AND HER/HIS AGENTS MUST FOLLOW BEFORE ENTERING YOU HOME. YOU MAY INITIATE ADDITIONAL ENTRY RESTRICTIONS BY GIVING WRITTEN NOTICE TO YOUR LANDLORD. COPIES OF THESE GUIDELINES (HOUSING CODE 8:529) ARE AVAILABLE AT THE BUILDING DEPARTMENT, CITY HALL 100 N. FIFTH AVE.

Mill Creek Townhouses

By Theresa Neely 12/26/07
Date

Lessee Date

Lessee Date

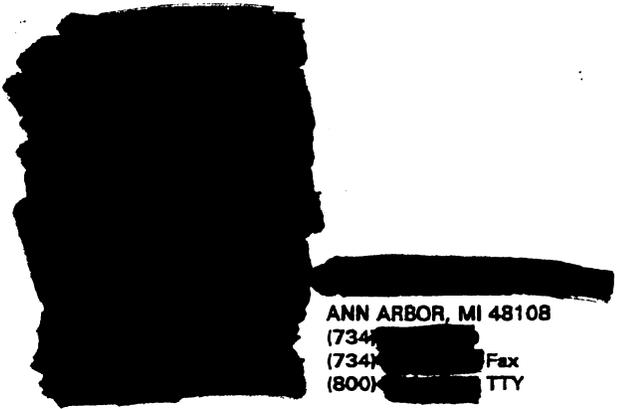
T. Neely
12/26/07

**TOWNHOUSES
RULES AND REGULATIONS**

1. **CONDUCT:** Nothing shall be done in or about the premises which shall interfere with the rights, comforts, or convenience of other LESSEES. No musical instrument, radio, television, phonograph, vacuum cleaner or other device shall be operated in a manner that is disturbing or annoying to other LESSEES of the building(s), nor shall any disturbing noise be made at any time.
2. **CLEANING:** LESSEE shall at all times keep the demised premises and fixtures therein in a clean and sanitary condition. The common areas of the building shall be cleaned as necessary. LESSEE is expected to cooperate in this respect and shall immediately clean anything which LESSEE or LESSEES' guests spill or drop in common areas.
3. **WINDOWS:** LESSEE shall not place anything, whatsoever, upon the inner or outer sills of the windows of said buildings so that the same may be exposed through said windows to a view from the street. No shade, awnings, guards, drapes, or screens shall be used except those provided by the LESSOR or approved in writing by LESSOR. Rags, rugs, dust mops, carpets, or clothing must not be shaken, dusted or hung from windows or balconies, nor shall any sweepings, rags, rubbish, etc. be thrown on the front, side or rear lawn areas or parking areas.
4. **PETS:** The LESSEE or his guests shall not harbor, keep, or bring into the demised premises or building, dogs, cats, reptiles, fish, or other animals unless an agreement has been made in writing with the LESSOR. The LESSOR as a result of the LESSEES violation of this rule may declare the Lease null and void and order LESSEE to vacate the premises in thirty (30) days.
5. **FLAMMABLES:** The LESSEE shall not use or keep flammable or explosive materials in the demised premises, public areas, furnace and utility closets, storage lockers, or storage rooms, nor use any method of heating other than that supplied by LESSOR.
6. **LOCKING APARTMENT:** Anytime LESSOR is in the LESSEE'S apartment, he will lock all door locks when leaving. LESSEE should, when leaving the apartment, lock all door locks. If LESSEE is locked out of his apartment, the LESSOR'S lockout service will only unlock the door after the appropriate fee has been paid and proper identification has been provided. Locked out service is not a right, but a service provided by the LESSOR for an additional fee and is subject to the availability of staff. Additional keys may be obtained from LESSOR'S office during normal business hours. After hours "locked out" fees are \$ 10-.
7. **PASS KEY:** Unless specifically addressed by a local ordinance, the LESSOR and his agents may retain a pass key to the premises. Subject to local ordinance, no LESSEE shall alter any lock or install any locking devise on any door of the demised premises without the written consent of the LESSOR. In cases where such consent is given, the LESSEE shall provide the LESSOR an additional key for the use of the LESSOR, pursuant to the LESSOR'S right to access to the leased premises. Tenant will be charged up to \$25 for each "lock out" and up to \$5 for extra keys.
8. **RADIO TRANSMISSIONS:** LESSEE shall not use any radio transmitters on the premises; shall at no time erect any type of antenna in any location; nor shall LESSEE broadcast from any transmitter on the premises.
9. **EQUIPMENT:** No equipment may be removed from any part of the leased premises or building by the LESSEE. All equipment must be permanently retained in its original location. Any equipment removed from the premises or building will be the responsibility of the LESSEE and charged to the LESSEE at replacement cost upon vacating if the equipment is not in the apartment.
10. **PARKING:** Unless otherwise provided in writing, parking is not included in the monthly rental payment. LESSEE shall be allowed to park not more than one (1) vehicle in those parking areas designated for LESSEE parking, as otherwise described in this Agreement. Even if parking is provided, LESSOR does not guarantee the availability of parking for the LESSEE or his or her guest. LESSEE shall not park vehicles or allow any member of his or her household or any guest to park vehicles in any restricted areas or driveways. Only two and four wheel motorized vehicles are permitted. Trucks, trailers and boats are expressly prohibited. No car repairs or washing of cars shall be permitted at any time. The parking areas are intended for parking only. Storage of vehicles, or disuse of them is prohibited and can result in LESSOR towing vehicles away with LESSEE paying for all resulting charges. **GUESTS MAY ONLY PARK IN THE OUTER PARKING LOTS**
11. **FACILITIES:** It is expressly understood and agreed by the LESSEE that if the LESSOR shall provide parking space, laundry facility, children's play area, or any other facilities outside of the demised premises, same shall be deemed gratuitously provided by LESSOR, and that if any person shall use the same, such person does so at his own risk and upon the expressed understanding and stipulation that LESSOR shall not be liable for any loss of property through theft, casualty, or otherwise, or for any damage or injury whatsoever to person or property unless directly caused by LESSOR'S negligence.
12. **CHILDREN:** Children will not be allowed to play in the laundry rooms. Bicycles, tricycles and other toys shall not be used or stored on the front walks, and will be removed and disposed of by the LESSOR.
13. **EQUIPMENT:** LESSEE shall not interfere in anyway with any part of the heating, lighting, refrigerating, or laundry apparatus, or controls in or about the leased premises or the building.
14. **PERSONAL PROPERTY:** No personal property of any kind shall be placed or kept in or on, lawn, sidewalks, parking area, sideyards, grounds or other common areas, nor shall such areas be used for lounging, playing or any other activities without the written permission of the LESSOR.
15. **PATIOS:** LESSEE shall not use the patios, if any, for storage of any sort, nor shall he remove any furniture from the apartment and place or store on the patio.
16. **SMOKE DETECTORS:** LESSEE agrees not to disarm or remove batteries from smoke detectors. LESSEE further agrees to replace batteries as necessary and to leave a working battery in the smoke detector at the end of the Lease term.
17. **LIGHT BULBS:** LESSEE agrees to change light bulbs in all lighting fixtures in the demised premises during the Lease term, and to leave working light bulbs in all lighting fixtures at the end of the Lease term.
18. **INTERIOR:** No water filled furniture is allowed. Painting/staining any area of the apartment, use of adhesive hangers and use of wallpaper/contact paper/ decals is prohibited.
19. **BASEMENT USE:** Basements are to be used for storage, laundry and recreation, only. **BASEMENT SLEEPING ROOMS ARE PROHIBITED.**
20. **FIREARMS:** The use or possession of firearms on the premises is prohibited.

These rules and regulations are made a part of the Lease Agreement as provided for in paragraphs 18 and 48 of the Lease Agreement.

Lessee's Initials _____ Lessor's Initials T.A. Dated 12/26/07



ORDINANCE NO. 7-06

HOUSING CODE
(ENTRY TO SHOW PREMISES AND TIME FOR RENTAL
AGREEMENTS)

AN ORDINANCE TO AMEND CHAPTER 105 OF TITLE VIII OF THE
CODE OF THE CITY OF ANN ARBOR BY ADDING A NEW SECTION
8:530.

The City of Ann Arbor ordains:
Section 1. That Section 8:530 be added to Chapter VIII of the Code of the
City of Ann Arbor to read as follows:

8:530. Entry to Show Premises and Time for Rental Agreements.

- (1) Notwithstanding any other provisions of this Chapter, a landlord of a residential premises shall not:
 - (a) enter the leased premises for the purpose of showing the premises to prospective tenants until 90 days of the current lease period has passed; or
 - (b) enter into an agreement to rent the leased premises to another tenant for a subsequent lease period until 90 days of the current lease period has passed.
- (2) This section does not apply under any of the following conditions:
 - (a) the entry is for the purpose of subletting;
 - (b) the current lease period is less than nine (9) months in its entirety;
 - (c) a summons and complaint to recover possession of the premises has been filed and served on the current tenant in accordance with all the



laws and rules applicable to summary proceedings to recover possession of premises;

- (d) the tenant has given notice in writing to the landlord that the tenant does not seek renewal of the lease for a subsequent lease period;
 - (e) the tenant, of his or her own will, has terminated his or her occupancy of the leased premises and his or her right under the lease to possession of the premises.
- (3) Except as otherwise provided in this section, at the time of entering into a written lease agreement, a landlord shall provide to each tenant a copy of this entire code section separate from the written base agreement, until such time that this ordinance is incorporated into the Rights and Duties of Tenants' booklet.
 - (4) If there is no written lease, then the landlord shall provide a copy of this entire code section, upon which is written the term of the current unwritten lease, to each tenant, until such time that this ordinance is incorporated into the Rights and Duties of Tenants' booklet.
 - (5) A violation of this section shall be a civil infraction punishable by a civil fine of up to \$1,000.00, plus costs and all other remedies available by statute.
 - (6) The City Council shall review the operation of the provisions of this section and recommend changes that council deems appropriate, if any, before the first meeting in April 2007.

Section 2. That is ordinance shall take effect on the tenth day after legal publication. As Amended by City Council on February 21, 2006 and approved on March 20, 2006. Effective: April 5, 2006

I acknowledge that I have received from [REDACTED]
[REDACTED] a copy of the City of Ann Arbor
Ordinance NO. 7-06.

Resident's Name

Date

EXHIBIT B



Secretary of State
Terril Lynn Land

www.Michigan.gov/sos

MICHIGAN VOTER REGISTRATION APPLICATION

SAVE THIS RECEIPT.

12/27/2007 D6V361109 0533

RICHARD ALAN RODRIGUEZ

MI 48108

ANN ARBOR

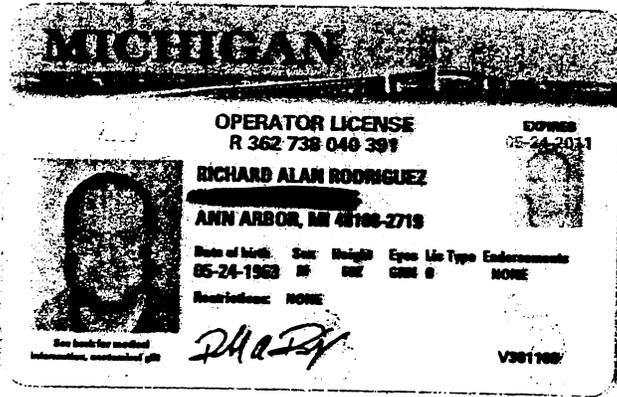
City

Voter Jurisdiction ANN ARBOR

- IMPORTANT NOTICES -

TO REGISTER TO VOTE YOU MUST BE: A United States citizen; at least 18 years of age (by election day); and a resident of Michigan and the city or township where you are applying to register to vote.
VOTER I.D.: Your application is not valid until accepted by the clerk of the city or township in which you reside. If you do not receive a Voter I. D. card within three weeks, contact your clerk. Save your receipt until you receive your Voter I.D. card.
NOTE: If you register to vote, the office where you submit your registration application will remain confidential and will be used only for voter registration purposes. If you do not wish to register to vote, your decision not to register will remain confidential and will be used only for voter registration purposes.

EXHIBIT C



Track Shipments/FedEx Kinko's Orders
 Detailed Results

EXHIBIT D

Tracking number	864021900750	Delivered to Service type	Receptionist/Front Desk
Signed for by	G.BOWERS		Priority Envelope -
Ship date	Jan 10, 2008		Direct Signature
Delivery date	Jan 11, 2008 9:39 AM		Required
Status	Delivered		
Signature image available	Yes		

Date/Time	Activity	Location	Details
Jan 11, 2008	9:39 AM	Delivered	
	8:47 AM	On FedEx vehicle for delivery	MORGANTOWN, WV
	8:01 AM	At local FedEx facility	MORGANTOWN, WV
	5:05 AM	At dest sort facility	PITTSBURGH, PA
	2:24 AM	Departed FedEx location	NEWARK, NJ
Jan 10, 2008	12:30 AM	Arrived at FedEx location	NEWARK, NJ
	9:01 PM	Left origin	ANN ARBOR, MI
	3:35 PM	Picked up	ANN ARBOR, MI

Subscribe to tracking updates (optional)

Your name:

Your e-mail address:

E-mail address	Language	Exception updates	Delivery updates
	English	<input type="checkbox"/>	<input type="checkbox"/>
	English	<input type="checkbox"/>	<input type="checkbox"/>
	English	<input type="checkbox"/>	<input type="checkbox"/>
	English	<input type="checkbox"/>	<input type="checkbox"/>

Select format: HTML Text Wireless

Add personal message:

Not available for Wireless or non-English characters.

By selecting this check box and the Submit button, I agree to these Terms and Conditions

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT CLARKSBURG**

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

Plaintiff,

v.

Civil Action No. 1:08-CV-00041
(Hon. John P. Bailey, District 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 the foregoing was served to the following through the Court's ECF system on this 4th day of February 2008:

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

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

/s Sean P. McGinley, Esq.
Sean P. McGinley, Esq. (WV Bar No. 5836)