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IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

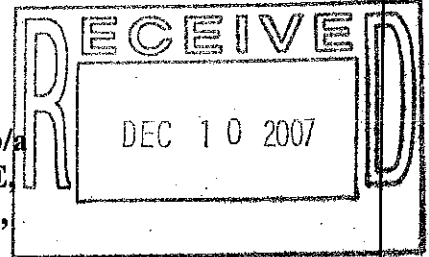
THE BOOK EXCHANGE, INC.,
a West Virginia Corporation,

Plaintiff,

v.

Civil Action No. 07-C-369

**WEST VIRGINIA UNIVERSITY, through the
WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS, a corporation;
NARVEL G. WEESE, JR., individually, and
BARNES AND NOBLE COLLEGE BOOKSELLERS, INC., d/b/a
WEST VIRGINIA UNIVERSITY/DOWNTOWN BOOKSTORE,
WEST VIRGINIA UNIVERSITY/EVANSDALE BOOKSTORE,
WEST VIRGINIA UNIVERSITY/LAW BOOKSTORE, and
WEST VIRGINIA UNIVERSITY/HEALTH SCIENCES BOOKSTORE,**



Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

On the 28th day of August 2007, before the undersigned came the Plaintiff, The Book Exchange, Inc., by counsel Bader C. Giggenbach, present with John F. Fleming, President of The Book Exchange, Inc., and came William E. Galeota and Gordon H. Copland as counsel for Defendant West Virginia University, through its Board of Governors, and as counsel for Defendant Narvel G. Weese, Jr., collectively, "WVU," and came Andrew G. Fusco and April Morgan Hincy as counsel for the Defendant Barnes & Noble College Booksellers, Inc., "Barnes & Noble," for the purposes of a hearing upon the Defendants' Motions to Dismiss Plaintiff's claims.

At the hearing of August 28, 2007, the Court heard the representations, proffers, and arguments of each of the parties. The Court has reviewed the pleadings contained within the Court's file and has examined Plaintiff's 18 page and 110 paragraph verified Complaint and

Application, WVU's Motion to Dismiss and Memorandum of Law In Support of Motion to Dismiss and Barnes & Noble's Motion to Dismiss and Memorandum of Law In Support of Motion to Dismiss.

After due consideration of the issues and the matters of record, the Court issued an Opinion Letter dated October 3, 2007, instructing counsel for the Defendants to prepare an Order reflective of the Court's determinations¹. Counsel for the Defendants submitted the Order to the Court and the Court having reviewed and amended the same hereby ORDERS that the Defendants' Motions to Dismiss are hereby GRANTED, and the complaint is DISMISSED with prejudice in its entirety. The Court further ORDERS that the Preliminary Injunction heretofore granted be, and the same is hereby, DISSOLVED.

I. STANDARD FOR THE MOTIONS

In evaluating a motion, the Court accepts as true all the well-pleaded allegations of the complaint. *John W. Lodge Distr. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). Although the plaintiff is entitled to all reasonable inferences from the allegations, the Court need not accept as true legal conclusions or opinions. *Kopelman and Associates, L.C. v. Collins*, 196 W. Va. 489, 494, 473 S.E.2d 910, 914 (1996). In other words, the Court must accept any well-pleaded facts or assertions, but need not accept conclusions by the pleader about the legal significance of the facts.

A Motion to Dismiss Under Rule 12(b)(6) enables a circuit court to "weed out unfounded suits." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va.770, 776, 461 S.E.2d 516, 523 (1995). The purpose of a 12(b)(6) motion is to test the formal sufficiency

¹ A copy of the Court's October 3, 2007 Opinion Letter is attached hereto.

of the complaint . . . essential material facts must appear on the face of the complaint . . . and the complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist.” *Fass v. Nowasco Well Service, Ltd.*, 177 W.Va. 50, 51, 360 S.E.2d 562, 563-64 (1986) (citations omitted). To withstand a 12(b)(6) motion, “more detail is required than the bald statement that the plaintiff has a valid claim of some type against the defendant . . . thus rules of civil procedure clearly contemplate some factual statement in support of the claim.” *Id.* (citations omitted). The West Virginia Supreme Court has further determined that:

Liberalization in the rules of pleading civil cases does not justify a . . . baseless pleading. As stated in *Lugar and Silverstein*, West Virginia Rules of Civil Procedure (1960 at 75): . . . (T)he plaintiff’s attorney must know every essential element of his cause of action and must state it in the complaint.

Par Mar v. City of Parkersburg, 183 W. Va. 706, 712, 398 S.E.2d 532, 537 (1990) (citing *Sticklon v. Kittle*, 168 W.Va. 147, 164, 287 S.E.2d 148, 157-58. (1981) (emphasis supplied).

II. FINDINGS AND CONCLUSIONS

A. Factual Background – Allegations of Complaint

The pertinent facts pleaded in the complaint can be summarized briefly. The plaintiff alleges that WVU and Barnes & Noble have entered into a contract for Barnes & Noble to operate the WVU Bookstore. Complaint, ¶ 7. The contract provides for payment of a flat rent together with additional payments to WVU, in the event the sales by Barnes & Noble at the bookstore exceed specified thresholds (the “Contract”). Complaint, ¶¶ 32, 36. In addition, the contract provides for WVU to provide an “interface” with the Barnes & Noble computer system to streamline ordering books. Complaint, ¶¶ 10, 11. The focus of the complaint is on the

implementation of that process, referred to as a Reserve Convenience Account. Complaint, ¶¶ 13-32.

The Book Exchange asserts defendant WVU has entered into an arrangement with Barnes & Noble under which students receiving financial aid from WVU are given an incentive to order textbooks through the bookstore. Under the Reserve Convenience Account program, a student receiving financial aid was automatically given a credit account for a period of time, at the WVU Bookstore, based on the financial aid awarded the student. Complaint, ¶¶ 16, 30-1. The credit is from funds that were awarded to the student as financial aid and would be available for a limited period in the beginning of the semester, after which unused portions are paid to the student. Complaint, ¶¶ 16, 30, 31. Under the program, students were given notice that, in order to keep the account from being created, the student had to respond to e-mail notices that the program would be implemented and affirmatively “opt out” of the program. Complaint, ¶¶ 22, 24.

B. Plaintiff Fails to State a Claim Under the Various Statutory Claims

The plaintiff has alleged violation of the following statutes: W. Va. Code § 46A-6G-1 *et seq.* (West Virginia Electronic Mail Protection Act); W. Va. Code § 46A-1-101 *et seq.* (West Virginia Consumer Credit Protection Act); W. Va. Code § 47-11A-3 (West Virginia Unfair Trade Practices Act); W. Va. Code § 18B-10-14 (statutory provisions regarding college bookstores); W. Va. Code § 46-1-309 (good faith provision of the Uniform Commercial Code) and W. Va. Code § 47-18-3 *et seq.* (West Virginia Antitrust Act)².

² In its objections to Defendants’ proposed Order, the Plaintiff argues that one day prior to the Court issuing its opinion letter the Plaintiff stipulated that it lacked standing to assert four of the statutory claims and a voluntary dismissal order was generated reflecting the same. The Plaintiff asks the Court to delete any reference to the statutory claims in the instant Order, lest it appear that the Plaintiff “argued as opposed to stipulated.” Plaintiff’s Objections to Proposed Order, p. 11. The Court was unaware of the Plaintiff’s subsequent stipulation at the time it tendered the opinion letter, and thus relied upon the

Defendants have asserted a number of defenses to these claims. The first defense is that the Book Exchange does not have standing under these statutory claims.

The Court concludes that the Book Exchange does not have standing to bring the statutory claims under West Virginia Code § 18B-10-14 (the college bookstore statute), § 47-18-3 *et. seq.* (the West Virginia Anti-Trust Act), § 46A-6G-1 *et. seq.* (the West Virginia Electronic Mail Protection Act), § 46A-1-101 *et. seq.* (the West Virginia Consumer Protection Act), § 47-11A-3 (the West Virginia Unfair Trade Practices Act).

The Book Exchange is not a student, as would be necessary to sustain a claim under § 18B-10-14, or the WVEMPA, nor is it a consumer of goods sold by the WVU bookstores as would be necessary for it to sustain claims for price fixing or maintenance under the WVATA or the WVCCPA. The claims under the WVEMPA alleged that the e-mails violating the act were sent by WVU to students. Complaint, ¶¶ 19, 22, 32. The WVEMPA (W. Va. Code § 46A-6D-1) gives a cause of action only to the *recipient* of the e-mail. W. Va. Code §§ 46A-6G-5(b). The Consumer Credit Protection Act gives rights only to a consumer of goods or services. *See* W. Va. Code § 46A-6-106(a); *State ex rel. McGraw v. Telecheck Servs.*, 213 W. Va. 438, 448, 532 S.E.2d 885, 895 (2003) (purpose of the Act is to protect consumers). The West Virginia statute governing bookstores, § 18B-10-14, does not explicitly give a right of action to any party. Therefore, there may be no private right of action at all available, but if there is it is clearly limited to students, the class of persons the statute is designed to protect. *See Hurley v. Allied Chem. Corp.*, 164 W. Va. 268, 271, 262 S.E.2d 757, 759 (1980) (setting out elements necessary for an implied right of action, including that the plaintiff be a member of the

arguments of counsel at the August 28, 2007 hearing in rendering its decision. As the ultimate result is the same, namely dismissal of the claims with prejudice, the Court finds no reason to omit that portion of the Order dealing with the statutory claims, as it properly based its decision on the information presented in the pleadings and at the August 28, 2007 hearing, rather than on the subsequent position of the Plaintiff.

class for whose benefit the statute was enacted). As to the UCC claims, the complaint does not allege that the contracts, as to which the good faith duties apply, are made with the Book Exchange. The complaint alleges that they are made with students. Complaint, ¶ 82. Absent some pertinent factual allegation by the Book Exchange, the Court cannot find that the Book Exchange is in privity with students of WVU receiving financial aid such that the claims under the UCC might be asserted by it on the student's behalf.

The price fixing claim under the West Virginia Antitrust Act also suffers a standing defect. The complaint does not claim that the Book Exchange is a purchaser of books from the WVU Bookstore. If the prices of textbooks were fixed, there is still no allegation that would give standing to the Bookstore. In addition, the recent decision in *Kessel v. Monongalia County General Hospital Co.*, ____ W. Va. ____, 648 S.E.2d 366 (2007) establishes that "price fixing" is an antitrust term of art, with a specific meaning. In *Kessel*, a reference in a contract between two *non-competitors* to price was held insufficient to create "price fixing." There is not even an allegation that the contract between WVU and Barnes & Noble refers to price, but certainly no allegation that they are competitors who agreed upon a specific price. While WVU and Barnes & Noble may share profits generated from the WVU bookstores, they are not competitors as required in order to maintain the various claims for market allocation, monopoly, and the WVUTPA asserted by the Book Exchange. *Kessel, supra*, at 384. Regardless of how prices are set at the WVU Bookstore, they are either set by WVU itself, or its contracted agent; the prices are not alleged to be set as a result of agreement with *competitors* in the market.

Moreover, all of the antitrust claims suffer the defect of being made against WVU, which is an arm of the state. *City of Morgantown v. Ducker*, 153 W. Va. 121, 125, 168 S.E.2d. 298, 301 (1969). The pre-existing "state action immunity" under Federal antitrust law

was adopted by our Legislature, which did not include the state within the definition of "persons" capable of violating the act, W. Va. Code § 47-18-2(a), but did include the state and political subdivisions within the special definition of "persons" entitled to sue under the act. W. Va. Code § 47-18-9.

Accordingly, the Court concludes that the Motions to Dismiss should be GRANTED as to all of the foregoing statutory claims.

C. Plaintiff's Failure to State a Claim for Tortious Interference

In conceding that it might not have standing to bring many of the statutory claims asserted in its complaint, the Book Exchange nonetheless asks the Court to find that the Defendants have engaged in conduct harmful to WVU students receiving financial aid, and further, seeks to use that finding as a basis to hold the Defendants liable for the alleged damages suffered by the Book Exchange. However, the Book Exchange cannot "coattail" or "boot strap" its claims to perceived wrongs committed against WVU students receiving financial aid. As no party with standing is before the Court requesting that such a determination be made, this Court cannot go forward with litigation seeking a finding that the reserve program harms financial aid students at WVU, when those students, the only parties with standing, have made no claim.

Plaintiff alleges that Defendants have interfered with "past, present, and prospective business expectancies and relations." There is no allegation by Plaintiff that a specific contractual relationship, either past or present, has been interfered with. At most, liberally construed, Plaintiff's claim can be treated as one for interference with business expectancies with regard to future contractual relationships with financial aid students.

Under West Virginia law, in order to establish a prima facie case of tortious interference with prospective business relationships, a plaintiff must show: 1) the existence of a

contractual or business relationship or expectancy; 2) an intentional act of interference by a party outside that relationship or expectancy; 3) proof that the interference caused the harm sustained; and, 4) damages. Syl. pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 200, 314 S.E.2d 166 (1983).

While the interface and automatic withholding program of WVU has made it easier for financial aid students to purchase supplies at the WVU bookstores than at other businesses, the Court find that the facts alleged suffice to show “preventing” or “unlawfully interfering” with the prospective business relationships between the Book Exchange and the students. The Book Exchange has characterized its own allegations as being tortious interference, but has not provided any allegations of fact that, if proved, are actually “tortious.” As such, the Court finds that the Complaint does not set forth a sufficient basis for the Book Exchange’s claim for tortious interference with business relationships. In addition, the Book Exchange and Defendants are in legal competition with one another, and thus Defendants have the privilege of using lawful means to gain business, even to the detriment of competitors such as the Plaintiff. Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. and Trust Co.*, 173 W. Va. 200, 314 S.E.2d 166 (1983). Moreover, the Complaint fails to allege any facts beyond speculation that it should be enjoying more contracts with students receiving financial aid. In order to support such a contention, the Plaintiff must allege facts sufficient to establish “a probability of future economic benefit, not a mere possibility” *Southprint, Inc. v. H3, Inc.*, 208 Fed. Appx. 249 (4th Cir. 2006) (unpub.) or “mere wishful thinking” *Beydoun v. Clark Constr. Int’l*, 72 Fed. Appx. 907 (4th Cir. 2003) (unpub.). Plaintiff’s allegations, even if true, do not establish an “anticipated business relationship with an identifiable class of third parties” *Lucas v. Monroe County*, 203 F.3d 964 (6th Cir. 2000) and thus their claim fails.

Accordingly the Court concludes that the Defendants' Motions to Dismiss on the tortious interference claim should be GRANTED.

D. Plaintiff Fails to State a Claim for Civil Conspiracy

Likewise, the Book Exchange has failed to allege facts showing that either the means or the end result of the Defendants' financial reserve program is unlawful. The characterization or label placed on the actions alleged is irrelevant. The acts alleged must be unlawful or improper to support the Book Exchange's claim for civil conspiracy, as the same must consist of "a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." *Dixon v. American Industrial Leasing Company*, 162 W. Va. 832, 256 S.E.2d 150 (1979). "The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff." *Kessel v. Leavitt*, 204 W. Va. 95, 129, 511 S.E.2d 720, 754 (1998). "At its most fundamental level, a civil conspiracy is a combination to commit a tort." *Id.* at 128, 753 (citations omitted.) For the reasons set forth above, neither the end nor the means of the Defendants' activities are unlawful or tortious, and the tortious interference claim fails as a matter of law.

Accordingly, since there is no viable cause of action alleging a tort (or any other unlawful purpose) in Plaintiff's complaint, and since Plaintiff's civil conspiracy claim relies upon the allegations within the Complaint, Plaintiff cannot successfully assert a claim for civil conspiracy between or among the Defendants.

E. Injunction

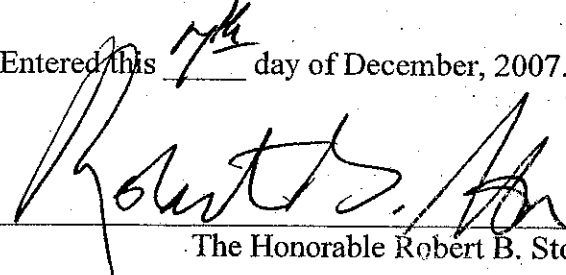
By order dated July 25, 2007, the Court previously granted a motion for a preliminary injunction in favor of the Book Exchange, limited to the planned Reserve

Convenience Account and implementation of it for the Fall, 2007 college semester. Because the Court has concluded that the Plaintiff has failed to state a claim upon which relief can be granted, there is no basis on which to consider renewal or extension of the injunction. The Court hereby ORDERS that the injunction is DISSOLVED, VACATED and LIFTED, without prejudice to the rights of the Defendants to seek relief under the bond that was previously granted.

Having concluded that the complaint fails to state a claim upon which relief can be granted, the Court ORDERS that the complaint be DISMISSED, with prejudice, and stricken from the docket of the Court. The Court notes the exceptions and objections of the Plaintiff³ to the findings and conclusions herein that are adverse to it.

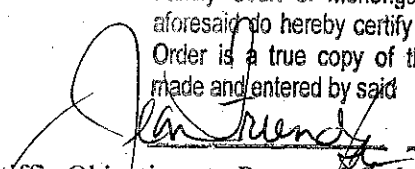
The Circuit Clerk shall provide a copy of this Order to all counsel of record.

Entered this 17th day of December, 2007.


The Honorable Robert B. Stone, Judge

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.


Circuit Clerk

³ The Court notes the receipt of Plaintiff's Objections to Proposed Order Granting Defendant's Motions to Dismiss, or in the Alternative, Plaintiff's Motion to Permit Discovery to Proceed, Motion to Amend the Complaint, and Motion to Enforce Settlement Agreement, as well as a Response submitted on behalf of the Defendants in opposition thereto. Having considered the same, the Court has edited the proposed order submitted by the Defendants, and Plaintiff's alternative motions are therefore denied. The Court would further note that as no formal settlement was presented to the Court prior to its dismissal of the suit, the issue of whether any enforceable settlement exists between the parties in this case is not properly before the Court at this time.