

**CIVIL CASE INFORMATION STATEMENT**  
(Civil Cases Other than Domestic Relations)

**I. CASE STYLE:**

Case No. 18-C-115

**Plaintiff(s)**

Judge: Bloom

WW CONSULTANTS, INC.

vs.

**Defendant(s)**

**Days to Answer**

**Type of Service**

Pocahontas County Public Service District

30

Secretary of State

Name

475 Cass Road

Street Address

Slatyfork, WV 26291

City, State, Zip Code

**II. TYPE OF CASE:**

- |  |   |
|--|---|
| <input checked="" type="checkbox"/> General Civil                        | <input type="checkbox"/> Adoption                           |
| <input type="checkbox"/> Mass Litigation [As defined in T.C.R. 26.04(a)] | <input type="checkbox"/> Administrative Agency Appeal       |
| <input type="checkbox"/> Asbestos  | <input type="checkbox"/> Civil Appeal from Magistrate Court |
| <input type="checkbox"/> FELA Asbestos                                   | <input type="checkbox"/> Miscellaneous Civil Petition       |
| <input type="checkbox"/> Other: _____                                    | <input type="checkbox"/> Mental Hygiene                     |
| <input type="checkbox"/> Habeas Corpus/Other Extraordinary Writ          | <input type="checkbox"/> Guardianship                       |
| <input type="checkbox"/> Other: _____                                    | <input type="checkbox"/> Medical Malpractice                |

**III. JURY DEMAND:**  Yes  No CASE WILL BE READY FOR TRIAL BY (Month/Year): 07 / 2019

**IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS?**

Yes  No

**IF YES, PLEASE SPECIFY:**

- Wheelchair accessible hearing room and other facilities
- Reader or other auxiliary aid for the visually impaired
- Interpreter or other auxiliary aid for the deaf and hard of hearing
- Spokesperson or other auxiliary aid for the speech impaired
- Foreign language interpreter-specify language: \_\_\_\_\_
- Other: \_\_\_\_\_

Attorney Name: Keith R. Hoover

Firm: Flaherty Sensabaugh Bonasso, PLLC

Address: 200 Capitol Street, Charleston WV 25301

Telephone: (304) 345-0200

**Representing:**

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> Plaintiff | <input type="checkbox"/> Defendant           |
| <input type="checkbox"/> Cross-Defendant      | <input type="checkbox"/> Cross-Complainant   |
| <input type="checkbox"/> 3rd-Party Plaintiff  | <input type="checkbox"/> 3rd-Party Defendant |

Proceeding Without an Attorney

Original and 2 copies of complaint enclosed/attached.

Dated: 02 / 06 / 2018

Signature: 

SCA-C-100: Civil Case Information Statement (Other than Domestic Relations)

PYMT Type B  
 Rept # 588713/588714  \$135  
 Iss Sum. + 9 cc  No Sum. Iss  
 Ret. to Atty. \$20 cm X  
 Mailed CM/RM \$5 clk X  
 Mailed to sos w/ck# \_\_\_\_\_  
 Sent to \_\_\_\_\_ w/ck# \_\_\_\_\_ \$15 mdf X

**FILED**  
 2018 FEB -6 P 3:16  
 CATHY S. GATSON, CLERK  
 KANAWHA COUNTY DISTRICT COURT

Plaintiff: WW CONSULTANTS, INC. , et al Case Number: \_\_\_\_\_

vs.

Defendant: Pocahontas County Public Service District , et al

**CIVIL CASE INFORMATION STATEMENT  
DEFENDANT(S) CONTINUATION PAGE**

Mark Smith  
Defendant's Name

\_\_\_\_\_

475 Cass Road  
Street Address

\_\_\_\_\_

Slatyfork, WV 26291  
City, State, Zip Code

\_\_\_\_\_

Days to Answer: 20

Type of Service: \_\_\_\_\_

David Gandee  
Defendant's Name

\_\_\_\_\_

475 Cass Road  
Street Address

\_\_\_\_\_

Slatyfork, WV 26291  
City, State, Zip Code

\_\_\_\_\_

Days to Answer: 20

Type of Service: \_\_\_\_\_

David Dragan  
Defendant's Name

\_\_\_\_\_

475 Cass Road  
Street Address

\_\_\_\_\_

Slatyfork, WV 26291  
City, State, Zip Code

\_\_\_\_\_

Days to Answer: 20

Type of Service: \_\_\_\_\_

West Virginia Dept. of Environmental Protection  
Defendant's Name

\_\_\_\_\_

57th Steet, SE  
Street Address

\_\_\_\_\_

Charleston, WV 25304  
City, State, Zip Code

\_\_\_\_\_

Days to Answer: 30

Type of Service: Secretary of State

West Virginia Water Development Authority  
Defendant's Name

\_\_\_\_\_

1009 Bullitt Street  
Street Address

\_\_\_\_\_

Charleston, WV 25301  
City, State, Zip Code

\_\_\_\_\_

Days to Answer: 30

Type of Service: Secretary of State

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Defendant's Name

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\_\_\_\_\_  
Street Address

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\_\_\_\_\_  
City, State, Zip Code

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Days to Answer: \_\_\_\_\_

Type of Service: \_\_\_\_\_

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Defendant's Name

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Street Address

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City, State, Zip Code

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Days to Answer: \_\_\_\_\_

Type of Service: \_\_\_\_\_

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WW CONSULTANTS, INC.,  
a Virginia Corporation

v.

POCAHONTAS COUNTY PUBLIC  
SERVICE DISTRICT, a public corporation  
and local political subdivision of the  
State of West Virginia, MARK SMITH,  
DAVID GANDEE, and DAVID DRAGAN,  
in their official capacity as board  
members of the Pocahontas County  
Public Service District, the WEST  
VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, a  
Department of the State of  
West Virginia, and the WEST VIRGINIA  
WATER DEVELOPMENT AUTHORITY  
an instrumentality of the State of  
West Virginia.

Civil Action No.: 18-C-115

Bloom

FILED  
2018 FEB -6 P 3:16  
CATHY S. PATTON, CLERK  
KANAWHA COUNTY, WEST VIRGINIA

COMPLAINT

Now comes Plaintiff, WW Consultants, Inc. ("WWC"), and pursuant to Rule 8(a) of the West Virginia Rules of Civil Procedure, allege as follows:

The Parties

1. Plaintiff WWC is a Virginia professional engineering corporation licensed to do business in West Virginia that provides engineering, consulting, and design services in the planning, design, construction, operation and financing of municipal, industrial and private water and wastewater piping, pumping and treatment systems. WWC is the successor-in-interest of Waste Water Management, Inc. following a corporate name change.

2. Defendant Pocahontas County Public Service District ("PSD") is a public corporation and local political subdivision of the State of West Virginia. It is authorized by W. Va. Code § 16-13A-3 to sue and be sued.

3. Defendants Mark Smith, David Gandee, and David Dragan ("the Board") are the current board members of the PSD appointed by the Pocahontas County Commission.

4. Defendant West Virginia Department of Environmental Protection (“WVDEP”) is a department of the State of West Virginia and is the administrator of the Clean Water State Revolving Fund (“CWSRF”).

5. Defendant West Virginia Water Development Authority (“WVWDA”) is a government instrumentality of the State of West Virginia and is the funding source for the CWSRF.

#### Venue

6. Venue is proper in the Circuit Court of Kanawha County, West Virginia because Defendants WVDEP and WVWDA are instrumentalities of the State of West Virginia, and as such must be sued in the Circuit Court of Kanawha County, West Virginia pursuant to W. Va. Code § 14-2-2.

#### Background

7. On or around January 6, 2011, WWC and the PSD entered into a Standard Form of Agreement Between Owner and Engineer for Professional Services (“Agreement”).

8. Under the Agreement, WWC was to provide certain design and consulting services during the design and construction of a new waste water treatment plant and related facilities in Pocahontas County, West Virginia (“the Project”), in exchange for payment.

9. WWC proposed a decentralized plan that would utilize multiple sewage plants. It was contemplated that WWC’s plan would be more efficient and far less costly than a competing plan.

10. Snowshoe Mountain Incorporated and five area landowners immediately filed a legal action at the West Virginia Public Service Commission (“PSC”) to stop the project, and to force construction of a previously designed single-plant system.

11. On May 10, 2011, the PSC ordered the PSD to seek approval from the West Virginia Department of Environmental Protection (“WVDEP”) as to whether a single “decentralized” alternative to the “centralized” plan was reasonable. In its Order, the PSC

established the fee for WWC's work (which consisted of a Preliminary Engineering Report, or "PER") at \$110,000.

12. In January, 2012, the WVDEP called for an "all hands on deck" meeting in Charleston, West Virginia for February 14, 2012. In that meeting, the State DEP stated that a 2009 Facilities Plan from a different engineer was invalid because it had never been adopted and certified.

13. Accordingly, WWC was ordered to develop a fully comprehensive Facilities Plan consisting of more than 20 fully developed alternatives, including consideration of decentralized vs. centralized alternatives.

14. This work was outside the scope-of-work defined by the parties' Agreement.

First Dispute: WWC Works for Three Years on the Project Without Receiving Payment

15. After Phase I of the Project was completed, on February 7, 2013, the PSD filed a petition for approval of a Phase II engineering contract. This petition included a Letter of Agreement (attached as "Exhibit B" to the original petition). Paragraph 1 of this letter stated that WWC and the PSD had agreed that "payment of Engineering Fees are contingent upon the receipt of funding, and Commission approval of the funding to construct the project which is the subject of the contract. However, nothing in this Letter of Agreement prohibits the PSD from funding the individual phases of the project . . . from PSD funds that are currently available rather than borrowed."

16. On February 28, 2013, the Utilities Division Staff at the West Virginia Public Service Commission filed an objection to the proposed contract, noting that the above language "subjects the District's customers to the financial risk if the project does not proceed to construction."

17. In response, WWC and the PSD's counsel agreed to modify the Letter of Agreement by expunging the language allowing the PSD to pay for portions of the project from existing funds.

18. On April 25, 2013, the PSC entered an order authorizing the PSD to enter into a contract with WWC for Phase II of the Project. This order stated that “all Phase II engineering fees are contingent on and deferred until this Commission grants the District a certificate of convenience and necessity to construct [the Project] and approves the project funding, and the District receipt of the Commission-approved funding.”

19. WWC only agreed that funding was “contingent” on project funding, i.e. if the Project was not ultimately approved, WWC would not get paid.

20. WWC never agreed to “defer” payment until the PSD actually received funds.

21. WWC’s position was consistent with the PSC staff’s ultimate concern, which was the PSD having to pay WWC to design a plan that was never actually built, thereby requiring the PSD to pay for designs it had no ability to recoup via payment by district ratepayers.

22. The PSC’s order also required the PSD to submit a complete certificate of conveyance and necessity within six months of the date of the order, which in turn required WWC to prepare detailed engineering plans and specifications in a greatly reduced timeframe.

23. Despite numerous delays beyond WWC’s control, WWC completed its design work by the December 18, 2013 deadline.

24. Included in this work were several out-of-scope additions requested by the various stakeholders.

25. At this time, a series of events occurred that ultimately delayed the project approximately 12 months.

26. In February 2014, the chairman of the West Virginia Infrastructure and Jobs Development Council funding committee, Chris Jarrett, refused to hear the case for an increase in project costs for unknown reasons, but which resulted in the project being delayed for another month.

27. In April 2014, the rate hearing before an Administrative Law Judge was advertised for June 2014, but was not held until July 11, 2014.

28. Throughout 2014, WWC pressed the PSD to obtain the final easements from the impacted landowners, but the PSD kept struggling to figure out how to get the work done and who should be the agent. WWC emphasized that State authorization to bid would be contingent on the PSD attorney issuing a title opinion confirming that all properties and easements necessary to construct the system were in-hand. While the ALJ issued the rate approval in August 2014, the easements were not secured until January 2015, and only after the PSD had to file condemnation suits to obtain all necessary access rights.

29. Construction bids were advertised in February 2014, which was 5 months after the target date.

30. Bids were taken in mid-March 2015 and were within budget. The closing was set for Friday, April 24, 2015, but was delayed until April 29, 2015.

31. In all, there were numerous delays caused by others that were out of the control of WWC. As a result, the project was delayed substantially.

32. During this entire time, from 2011 to 2013, WWC was not paid for the Facilities Plan or for its Phase II engineering work. In some cases, certain amounts were not paid until April 2015.

33. Because of this significant delay in payment, WWC incurred significant interest costs to perform its services without being paid.

Second Dispute: WWC Performed Engineering Work to Address Deficiencies in Pre-Cast Concrete Without Receiving Payment

34. On July 8, 2015, the PSD approved Change Order 1 for Orders Construction Company (OCC) to replace portions of the designed cast-in-place concrete building structure with post-tensioned, precast concrete panels. The PSD-approved change order resulted in a decrease of \$103,000.00 in the Contract 3 price.

35. According to the Contract entered into by PSD and Orders ("Orders Contract"), the latter was to install precast concrete panels for the structural precast concrete tank system per the specifications provided by WWC.

36. In a related but separate issue, upon delivery of the precast concrete products to the project site, it became apparent that the surface quality of the precast panels did not meet either industry standards or the requirements of the Contract Documents.

37. Beginning in early August 2015, and continuing through the end of September 2015, the precast concrete panels were delivered and erected on the site. WWC and the PSD found the panels were of varying quality, many of which did not meet the surface quality and alignment requirements of the Specifications.

38. WWC did not reject the precast products because there was no evidence of any structural damage or issues. It was only the surface finish quality that was in question at the time.

39. However, as the precast concrete panel work continued, other issues and problems were discovered including tension cable holes that did not align, missing cables, cables that could not be pulled to the specified tension stress, under strength grout, and concrete cracks.

40. The structural engineer hired by the precast supplier and WWC's structural sub consultant both investigated the work and deemed the panels to be structurally sound.

41. WWC then continued to work with OCC and the PSD as OCC worked to develop an acceptable plan to address and mitigate the remaining issues and problems with surface quality, tension cable holes that did not align, missing cables, cables that could not be pulled to the specified tension stress, under strength grout and concrete cracks.

42. During this process OCC discussed and proposed ways and means to mitigate the surface quality issues and began filling the tanks with water. Immediately leaks began to appear in a few of the concrete precast panels and further investigative work was performed to again assure the structural integrity of the panels.

43. In August 2015, Orders permitted Mack Industries, its subcontractor, to deliver and erect precast concrete panels which Orders admitted were "defective and unacceptable."

Following discussions between PSD, WWC, and Orders, Orders was given the opportunity to present an acceptable plan for the Correction of Defective Work in lieu of requiring complete removal and replacement of the precast concrete.

44. In February 2016, Orders proposed the use of a Raven Lining system to address the problems with the defective concrete surface conditions; however, after WWC and PSD requested additional information on the proposal, Orders instead retracted its proposal and presented a Change Proposal on March, 2, 2016.

45. In a letter dated March 10, 2016, WWC informed Orders that its Change Proposal was being rejected.

46. On March 23, 2016, WWC sent another letter to Orders rejecting its supplemental Supporting Data.

47. Later, in a March 31, 2016 letter, WWC informed Orders of the minimum requirements it must meet, according to the project's contract and specifications, before it proposed a mitigation plan. Despite these repeated opportunities to cure its defective work, Orders failed to correct those issues.

48. As a result, WWC presented and discussed with PSD additional work that it proposed to perform to correct the deficiencies with the precast concrete panel system.

49. As all this unanticipated work and additional services were being performed, WWC billed it's time to the "Engineering During Construction" task of the Agreement.

50. Subsequently, WWC expended significant time and effort to make the system work and presented the additional costs in a Sixth Amended Letter of Agreement.

51. The PSD Board voted to deny the Sixth Amended Letter of Agreement at its August 29, 2017 meeting.

Third Dispute: WWC Performed Additional Engineering During Construction Due to Contractors Failure to Complete the Project On Time

52. The original contract completion date was anticipated to be October 1, 2016.

53. However, the actual work on the project lasted up until at least May 31, 2017.

54. During this additional time period, WWC performed "Engineering During Construction" work for an extra and unanticipated period of approximately eight months.

55. WWC tracked this additional time and submitted a Proposed Eighth Amended Letter of Agreement in the amount of \$149,063.90 on June 12, 2017.

56. By this time, the original Engineering During Construction budget had been depleted, however, additional funds remained in the Resident Project Representative ("RPR") budget due to WWC's efficient use of two project representatives instead of the three that were planned.

57. To fairly compensate WWC for its additional engineering work, WWC proposed that \$150,000 be transferred from the RPR budget to the Engineering During Construction budget.

58. Following this submission, WWC received mixed signals from both the WVDEP and the PSD regarding whether this transfer was possible and whether the parties intended to honor this reasonable request.

59. To date, the PSD has not formally acted on the Proposed Eighth Amended Letter of Agreement.

**COUNT I: BREACH OF CONTRACT – EQUITABLE ADJUSTMENT**

60. WWC re-alleges the above allegations as if included herein, and further alleges the following:

61. Section 3.02 of the Agreement provides for an equitable adjustment where:

B. If, through no fault of Engineer, such periods of time or dates are changed [as provided by the Agreement], or the orderly and continuous progress of Engineer's services is impaired, or Engineer's services are delayed or suspended, then the time for completion of Engineer's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.

C. If Owner authorizes changes in the scope, extent, or character of the Project, then the time for completion of Engineer's services,

and the rates and amounts of Engineer's compensation, shall be adjusted equitably.

- D. Owner shall make decisions and carry out its other responsibilities in a timely manner so as not to delay the Engineer's performance of its services.

62. On or around November 28, 2016, WWC submitted its Request for Equitable Adjustment ("REA") to the PSD.

63. The REA requested \$460,339.49 to compensate WWC for the costs incurred in preparing the Facilities Plan and the Phase II design services.

64. The PSD has not acted on this request.

65. WWC's work on the Project was significantly delayed, and the continuous progress was impaired at no fault of WWC.

66. WWC incurred additional costs during these delays.

67. WWC has not been compensated for its increased costs due to these delays.

68. WWC also performed work at the PSD's request beyond the scope of the original Agreement.

69. WWC has not been compensated for the increased cost for the work that was beyond the scope of the original Agreement.

70. WWC and PSD entered into a valid and binding agreement for WWC's professional services.

71. PSD had a contractual duty to adjust the amount owed to WWC to compensate WWC for additional costs incurred because of the delays that were not the fault of WWC.

72. PSD is in breach of its Agreement with WWC for failing to equitably adjust the amount of payment due to WWC for its services.

73. The PSD is further in breach of its Agreement with WWC by not acting on the REA in a timely manner.

74. WWC seeks damages based on the above breach of \$460,339.49.

## COUNT II: BREACH OF CONTRACT – PRE-CAST CONCRETE

75. WWC re-alleges the above allegations as if included herein, and further alleges the following:

76. According to the WWC Contract, WWC is entitled to be paid for its additional services regarding the deficient the pre-cast panels.

77. Although WWC discussed with PSD the need for the additional services, the contract permits WWC to commence such work without prior written authorization in certain circumstances:

*B101. Engineer shall advise Owner that Engineer is commencing to perform or furnish the Additional Services of the types listed below. For such Additional Services, Engineer need not request or obtain specific advance written authorization from Owner. Engineer shall cease performing or furnishing such Additional Services upon receipt of written notice from Owner.*

\* \* \*

- b. Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitute materials or equipment other than "or-equal" items; and services after the award of the Construction Contract in evaluating and determining the acceptability of a substitution which is found to be inappropriate for the Project or an excessive number of substitutions.
- c. Services resulting from significant delays, changes, or price increases occurring as a direct or indirect result of materials, equipment, or energy shortages.
- d. Additional or extended services during construction made necessary by . . . (4) a significant amount of defective, neglected, or delayed work by Contractor. . .

78. Furthermore, for Additional Services provided by WWC, PSD is to pay "[a]n amount equal to the cumulative hours charged to the Project by each class of Engineer's employees times Standard Hourly Rates for each applicable billing class for all services performed on the Project, plus Reimbursable Expenses and Engineer's Surveyor's and Consultant's charges, if any."

79. That amount is reflected in the Sixth Amended Letter of Agreement.

80. The PSD does not dispute that additional services were performed by WWC for the defective work, that PSD was advised by WWC that it would be performing the additional services, and that PSD did not provide any notice, written or otherwise, directing WWC to cease performing those services.

81. PSD clearly has remedies under its contract with OCC that it can pursue to fulfill its contractual obligations to WWC.

82. In the Orders Contract, WWC “has the authority to determine whether Work is defective, and to reject defective Work.”

83. OCC is then obligated to correct the defective work and “pay all claims, costs, losses, and damages arising out of or relating to defective Work . . .” and, “[p]rior to final payment, . . . Owner may impose a reasonable set-off against payments due under [Article 15 of the Orders Contract].”

84. Furthermore, even if the defective work is accepted, OCC shall still “pay all claims, costs, losses, and damages attributable to Owner’s evaluation of and determination to accept such defective Work (such costs to be approved by Engineer as to reasonableness), and for the diminished value of the Work to the extent not otherwise paid by Contractor.”

85. If the defective work is accepted prior to the final payment, PSD may impose a reasonable set-off against payments due. If the acceptance occurs after the final payment, Orders is obligated “to pay an appropriate amount to Owner.”

86. WWC submitted the Sixth Amended Letter of Agreement on September 7, 2016.

87. The PSD did not formally act on the Sixth Amended Letter of Agreement until almost one year later on August 29, 2017 when it finally denied the request.

88. The PSD has breached its contractual duty to WWC by failing to compensate it for additional services related to the concrete pre-cast issues.

89. The PSD breached its contractual duties to WWC by failing to timely act on the requested Sixth Amended Letter of Agreement until a period of almost one year.

90. WWC has been damaged due to PSD's failure to pay the amount of approximately \$104,342.04.

91. The Agreement further provides that WWC is entitled to seek reimbursement for the costs of Consultants required to furnish services with respect to the Project as WWC's professional associates, consultants, subcontractors, or vendors.

92. Because of the PSD's failures abide by its contractual obligations, WWC has incurred significant legal costs and expenses, including mediation costs and expenses, in an amount of at least \$76,964.

93. WWC is entitled to collect a multiplier of 1.05 on compensation for charges of its Consultants.

94. Therefore, the PSD further owes at least \$80,812.20 in additional Consultant costs arising out of this dispute, and the other disputes raised in this Complaint.

95. Because of the PSD's failures to abide by its contractual obligations, WWC also had to perform additional services related to its multiple attempts to resolve the dispute that resulting from the PSD's breach of its contractual obligations.

96. Because of the PSD's failures abide by its contractual obligations, WWC has incurred \$80,812.20 in project administration and project management costs directly related to its efforts to resolve this dispute, and it is entitled to compensation for these services.

**COUNT III: BREACH OF CONTRACT – EIGHTH LETTER OF AGREEMENT**

97. WWC re-alleges the above allegations as if included herein, and further alleges the following:

98. Section 3.02 of the Agreement provides for an equitable adjustment where:

- B. If, through no fault of Engineer, such periods of time or dates are changed [as provided by the Agreement], or the orderly and continuous progress of Engineer's services is impaired, or Engineer's services are delayed or suspended, then the time for completion of Engineer's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.

99. Delays by the contractors that were not the fault of WWC resulted in additional engineering work for a period of almost eight months that was not anticipated by WWC.

100. WWC submitted a Proposed Eighth Amended Letter in the amount of \$149,063.90 to fairly compensate it for the additional period of work.

101. The PSD has not acted on this request.

102. WWC's work on the Project was significantly delayed, and the continuous progress was impaired at no fault of WWC.

103. WWC incurred additional costs during these delays.

104. WWC has not been compensated for its increased costs due to these delays.

105. WWC also performed work at the PSD's request beyond the scope of the original Agreement.

106. WWC has not been compensated for the increased cost for the work that was beyond the scope of the original Agreement.

107. WWC and PSD entered into a valid and binding agreement for WWC's professional services.

108. PSD had a contractual duty to adjust the amount owed to WWC to compensate WWC for additional costs incurred because of the delays that were not the fault of WWC.

109. PSD is in breach of its Agreement with WWC for failing to approve the Proposed Eighth Amended Letter of Agreement.

110. The PSD is further in breach of its Agreement with WWC by not acting on the Proposed Eighth Amended Letter of Agreement in a timely manner.

111. WWC seeks damages based on the above breach of \$149,063.90.

#### **COUNT IV: BREACH OF CONTRACT – BREACH OF MEDIATION AGREEMENT**

112. WWC re-alleges the above allegations as if included herein, and further alleges the following:

113. WWC and PSD mediated the issues raised in this Complaint on March 24, 2017.

114. At this mediation, WWC and the PSD agreed that WWC would recommend the funds to compensate WWC for the issues raised in the Sixth Amended Letter of Agreement be deducted from the contractor and paid to WWC.

115. PSD agreed to accept this recommendation, and assuming proper paperwork was submitted, recommend that \$104,342.04 be paid to WWC.

116. WWC has submitted all necessary paperwork.

117. PSD breached the mediation agreement by failing to accept the Sixth Amended Letter of Agreement.

118. WWC has been damaged due to PSD's failure to pay the amount of \$104,342.04.

**COUNT V: PERSONAL LIABILITY OF DEFENDANTS SMITH, GANDEE, AND DRAGAN**

119. WWC re-alleges the above allegations as if included herein, and further alleges the following:

120. W. Va. Code § 16-13A-4(f) provides that members of a public service district board may be personally liable for the obligations of the PSD in the event of willful misconduct in the performance of their duties.

121. Board members Mark Smith, David Gandee, and David Dragan have willfully and purposely disregarded the clear contractual obligations of the PSD out of a personal vendetta against WWC and David Rigby.

122. The actions of the Board have no reasonable justification under the terms of the contract between the PSD and WWC.

123. The Board breached its duty of good faith and fair dealing with WWC by refusing to timely consider the Request for Equitable Adjustment, Sixth Amended Letter of Agreement, and Eighth Amended Letter of Agreement.

124. The Board's failure to timely consider these requests results in a scenario where existing excess construction funds that are currently available to pay WWC could be returned to

the funding agencies prior to the resolution of the contract dispute leaving WWC unable to fully collect on money owed by the PSD.

125. The Board and WVDEP employee Robert Coontz have conspired to avoid paying WWC what is fairly owed under clear contractual obligations.

126. The Board's failures and willful misconduct have placed the Pocahontas Public Service District and its rate payers in the troublesome position of possibly owing WWC significant amounts of money without funds to pay WWC because the Board and Robert Coontz have denied WWC the right to seek the funds under existing funds remaining in the project's construction budget.

127. The Board should be personally liable in the event WWC prevails on Counts (1) through (4) and insufficient funds are available from the PSD's accounts to satisfy the judgment.

#### **COUNT VI: SPECIAL RECEIVERSHIP AGAINST THE WVDEP, WVVDA, AND PSD**

128. WWC re-alleges the above allegations as if included herein, and further alleges the following:

129. W. Va. Code § 53-6-1 authorizes a court to appoint a special receiver when funds used to satisfy a claim are in danger of loss.

130. WWC has a clear right to the funds currently available to the PSD.

131. WWC has a right to resort to these funds for the satisfaction of its outstanding breach of contract claims against the PSD.

132. The PSD is in danger of losing access to these funds due to the Board's failure to timely act on claims submitted by WWC and the pending completion of the project.

133. Funding for the Project "costs" came from the WVVDA (West Virginia Water Development Authority), the CWSRF (Clean Water State Revolving Fund)(administrated by the WVDEP), and from the WVIJDC (West Virginia Infrastructure and Jobs Development Council).

134. The WVDEP and the WVVDA are the state government entities responsible for managing and administering the CWSRF.

135. Specifically, the CWSRF funding included \$1,182,345.00 for “Construction Contingency.”

136. Upon information and belief, the loan agreement between the WVDEP/WWDA requires the PSD to provide and maintain adequate engineering services and provides that portions of the loan shall compensate the consulting engineers for their services.

137. WWC is a third-party beneficiary to the loan agreement between the WVDEP/WWDA and the PSD.

138. Construction contingency funds are a predetermined sum of money designated for a yet to be determined issue that can change the scope of work during the project.

139. The project, despite its significant delays and infighting, has come in under budget.

140. There are ample funds available to pay WWC for the increased costs described above on the Complaint.

141. Per W. Va. Code § 22C-2-1, costs eligible for the revolving fund include “all costs incurred by a local entity that are reasonable and necessary for carrying out all works and undertakings necessary or incident to the accomplishment of any project including . . . (2) Architectural, engineering, financial, legal or other special services . . . .”

142. Paying WWC per the terms of the Agreement is an eligible project cost.

143. Had the PSD not breached its contractual obligations to WWC, WWC would have received payment derived from WVDEP and WWDA funding.

144. The Project is currently in its final phases.

145. Based on the underlying contract dispute and interest, the PSD owes WWC at least \$956,856.13.

146. This \$956,856.13 is broken down as follows:

- a. \$460,339.49 for the Equitable Adjustment Claim
- b. \$104,342.04 for the Sixth Amended Letter of Agreement

- c. \$44,789.85 in legal costs and expenses, including mediation costs and expenses
- d. \$80,812.20 in additional project administration and project management costs by WWC
- e. \$149,063.90 for the Eighth Amended Letter of Agreement
- f. \$117,508.65 for 24 months of pre- and post-judgment interest at 7% simple interest. This amount reflects the amount that WWC would be entitled to recover based between the times the claims were first submitted to the PSD and the anticipated trial date of September 2018.

147. At the completion of the Project, unused funds are not kept by the PSD, but instead are transferred back to the WVDEP, WWCDA, and WVIJDC.

148. If these funds are released back to the funding agencies, WWC will be irreparably harmed in that the PSD would likely lack sufficient funds to compensate WWC per the terms of the Agreement.

149. The agencies will not suffer harm as the funds requested by WWC constitute a very small percentage of the total funds available by these agencies to distribute on other projects.

150. The agencies will further not suffer harm as these funds should have already been paid to WWC and should not be available for return to the WVDEP and the WWCDA.

151. WWC can and will clearly demonstrate that the PSD is in breach of its contractual obligations.

152. The rate payers of the Pocahontas County Public Service District's interest are that these funds remain in place pending the resolution of this contract dispute to avoid the PSD suffering a judgment wherein it lacks sufficient funds to pay.

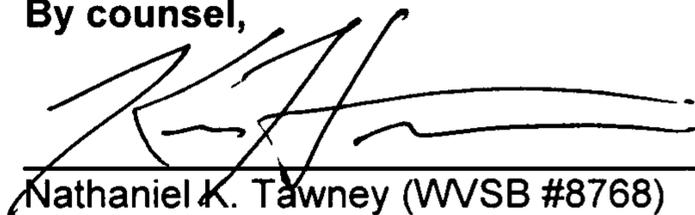
153. WWC therefore seeks an order compelling the WVDEP, WWCDA, and PSD to transfer the remaining contingency balance to a special receiver from the project funds separate from its other funds and available to the PSD for payment to WWC pending the resolution of this litigation against the PSD.

154. WWC requests that the Court appoint a special receiver and that the remaining contingency balance of the CWSRF be transferred to this receiver pending the outcome of the underlying breach of contract litigation between the PSD and WWC.

*WHEREFORE*, WWC requests judgment in the amount of at least \$956,856.13, plus pre-and post-judgment interest to the extent provided under West Virginia law, along with costs, fees, and any other damage deemed appropriate by the Court. WWC further requests that the Court appoint a special receiver and that the remaining balance of the contingency fund be transferred to this receiver pending the resolution of this litigation.

**WW Consultants, Inc.**

**By counsel,**

A handwritten signature in black ink, appearing to read 'N. Tawney', is written over a horizontal line.

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