

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FOOTHILLS RESOURCE GROUP, INC.,

Plaintiff,

v.

Civil Action No. CC-10-2024-C-74

DARTS RENTALS, LLC,

Defendant.

**MOTION TO INTERVENE, MEMORANDUM IN SUPPORT
OF INTERVENTION, AND RULE 24 STATEMENT OF INTEREST**

Thomas Broadcasting Co. (TBC) respectfully requests that this Court enter an order under Rule 24(a), W. Va. Rules of Civil Procedure allowing TBC to intervene, as a matter of right, as a Defendant in the underlying civil action, because the relief Plaintiff claims to seek will place TBC in violation of FCC orders needed to retain a license to operate as a television broadcaster under laws applicable to TBC. In support of its motion to intervene, TBC respectfully directs the Court's attention to the following memorandum, and the Answer and Counterclaim submitted herewith.

I. PARTIES

1. TBC is a West Virginia corporation and the operator of the broadcast television station known as WOAY-TV, an ABC affiliate operating in southern West Virginia.
2. Darts Rentals, LLC (Darts) is a West Virginia limited liability company and the defendant in the above-captioned proceeding.
3. TBC and Darts, the current defendant in the underlying litigation, are separate jural entities,

but have common ownership. Darts has asserted as an affirmative defense the Plaintiff's failure to join TBC as a necessary party because the actions complained of by Foothills were actions taken by TBC pursuant to mandatory REPACK orders of the Federal Communications Commission (FCC).

4. Foothills Resource Group, Inc. (Foothills) is a Tennessee corporation, and the plaintiff in the above-captioned cause of action. Foothills is the owner of WOAY-AM, a radio broadcast station, and a tenant of Darts pursuant to a 1990 lease of space on Darts' television broadcast tower.

II. RULE 24 GOVERNING MOTIONS TO INTERVENE

5. Rule 24 (a) of the West Virginia Rules of Procedure provide as follows:

RULE 24. Intervention

(a) Intervention of right.

On timely motion, the court shall permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

***.

(c) Notice and pleading required. A motion to intervene shall be served on the parties as provided in Rule 5. The motion shall state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Rule 24(a) - (c), W.Va. R. Civ. P. (emphasis added).

III. RULE 24 STATEMENT OF INTEREST

A. Facts Pertinent to TBC's Intervention in the Underlying Proceeding.

6. TBC attaches as **Exhibit 3** its proposed ANSWER to the July 2, 2024 Complaint filed by

Foothills.

7. The core of the underlying proceeding is a claim by Foothills against Darts for damages Foothills purports occurred, in either 2019 or 2021, as a result of Darts' compliance with the October 2017 **REPACK** order of the Federal Communications Commission (FCC) which, pursuant to Congressional mandate, required a new antenna to be installed on the television broadcast tower in Oak Hill, West Virginia, which has operated as WOAY-TV from 1954 forward.

8. The installation of a new antenna was a direct result of the FCC's reassignment of broadcast frequencies in the radio spectrum in order to accommodate the exponential growth of so-called "mobile users" of the radio spectrum. The commercial success of so-called "smart phones" from 2008 forward added additional functionality beyond mere telephone communication and, consequently, has demanded expanded bandwidth in the radio spectrum to accommodate those expanded uses.

9. The new antenna placed on WOAY-TV's tower, which Darts owns but TBC operates, in Oak Hill, West Virginia resulted in a decrease in overall height of approximately fifty feet, which Foothills has, intermittently, cited as the cause of its inability to reach audiences and consequently lost revenues. See Foothills' December 19, 2019 request to the FCC for Special Temporary Authority (STA).

10. In its Complaint against Darts, to date, Foothills has sought only monetary damages. The following prayer for monetary relief on page 7 of the Complaint constitutes Foothills' sole request for relief in this litigation:

WHEREFORE, Plaintiff requests that this Honorable Court enter an Order for compensatory damages resulting from defendant's contractual breach of its warranty of peaceful and quiet possession of the Leased Premise; an Order granting punitive damages for defendant's unlawful behavior towards Plaintiff; an Order directing defendant to compensate Plaintiff for the reasonable and necessary attorney's fees and court costs that Plaintiff was forced to expend in

bringing this action; and for such other relief as this Honorable Court may deem just and appropriate.

Complaint at p. 7.

11. However, in subsequent filings with the FCC to extend its STA, Foothills has stated that its lawsuit against Dart seeks to undo the changes required by the FCC Order of October 2017 and compel that the antenna which WOAY-TV broadcasts on be raised to its original height.

12. Specifically, in its August 2024 request for an STA extension with the FCC, Plaintiff stated to the FCC that, in the litigation with Darts Rentals, LLC, Foothills sought non-monetary relief in the form of “restoration of the original tower height,” which statement was repeated in Plaintiff Foothills’ February 2025 request for an extension of the STA, as follows:

The underlying reasoning for the STA, as described in BSTA-20191118AAS remains unchanged, and licensee is continuing pending litigation with co-tenant licensee who shortened the tower as part of the TV Repack without consulting with WOAY; that litigation was originally pending in state court, but co-tenant licensee had filed a motion to remove the matter to federal court, which WOAY had opposed. That litigation seeks, inter alia, restoration of the original tower height. A decision granting the remand from US District Court (Southern District of West Virginia) to Fayette County, WV state court was granted on 10/7/2024, the case now remains pending in state court awaiting trial on the issues, and WOAY as well is continuing to investigate alternate options to return to licensed power levels.

EXHIBIT 1 - Foothills February, 2025 Request for Extension of STA (emphasis added).

13. As an FCC licensed television broadcaster, TBC is not at liberty to comply with, or alternatively ignore, FCC orders. TBC must comply with all FCC orders in order to retain its television broadcast license, without which it must cease operations. To be sure, as part of the national reallocation of radio spectrum frequencies within the United States, on February 8, 2017, the FCC directed a letter to Thomas Broadcasting Co./WOAY-TV (**EXHIBIT 2**) advising that WOAY-TV “**had been reassigned to a new channel.**” (bold in original) and described the “steps you must take in order to implement his channel”

change.” (underscore and bold added). Specifically, the FCC ordered Thomas Broadcasting Co/WOAY-TV to cooperate with the **REPACK** by moving its broadcast frequency from channel 50 to channel 31, and making all necessary modifications to its broadcast equipment to continue operations in the newly-assigned frequency.

14. To implement the channel change, the FCC ordered TBC to install a new antenna on its now 70-year old television broadcast tower. Importantly, the FCC -- not TBC -- determined all of the specifications of the new antenna, including height. The new antenna appeared at TBC’s Oak Hill, West Virginia broadcast facility on an eighteen-wheel, flat-bed truck and was installed atop the 700’ +/- tower by helicopter. TBC’s role in this enterprise was to watch, respectfully.

15. TBC had no authority in 2019, and has none now, to disregard the orders of the FCC, if it wants to remain in the television broadcast business.

16. Additionally, as will be explained elsewhere, TBC respectfully suggests that the FCC has exclusive authority, to the exclusion of this or any other Court, to specify the parameters, including height, of the towers and antennas employed to broadcast telecommunications across the radio spectrum. See The Radio Act of 1927, 47 U.S.C. Chapter 4, §§81 – 121; The Communications Act of 1934, 47 U.S.C. § 151 et seq.

17. In short, this is a classic example of mandatory intervention on the basis of the fact that TBC is asserting an interest relating to the transaction that is the subject of the action, and is so situated that disposing of the action not only may, but certainly will, as a practical matter, impair or impede the movant's ability to protect its interest.

18. Darts cannot adequately represent TBC’s interest for the patent reason that Darts is not an FCC licensed television broadcaster, and may not have standing to appeal from an order directing it to ignore FCC orders, and rescind the installation of the FCC specified antenna.

19. TBC's motion to intervene is consistent with the decision of the West Virginia Supreme Court of Appeals in *S.E.R. ex rel. Ball Cummins*, 208 W. Va. 393, 540 S.E.2d 917 (1999), in which the Court ruled that:

West Virginia Rule of Civil Procedure 24(a)(2) allows intervention of right in an action if an applicant meets four conditions: (1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant must show that the interest will not be adequately represented by existing parties.

540 S.E.2d 922.

20. TBC's motion is timely as it has only learned of Foothills' professed intention to seek relief reinstating the pre-existing antenna/tower height since the filing of the STA extensions referenced above, and intervention at the relatively early stage of the current proceeding will not compromise any scheduled matters. Further, it is manifest that TBC has an interest in the subject of the pending action, particularly if as Foothills has represented to the FCC, Foothills seeks to undo the antenna installed to permit TBC to comply with FCC's REPACK of the radio spectrum, and the outcome of any such claim clearly – as a practical matter – would impair TBC's interest in continuing to operate as an FCC licensed television broadcaster. Moreover, notwithstanding any commonality of interest with Darts, TBC alone is the FCC licensed broadcaster and must be in a position to protect that license on its own.

21. For all of the foregoing reasons, TBC respectfully suggests that intervention is mandatory under the decisions of the Supreme Court of Appeals interpreting Rule 24(a).

B. Facts Pertinent to TBC's Counterclaim Against Foothills.

22. TBC attaches as **Exhibit 4**, its proposed COUNTERCLAIM against Foothills.

23. On Friday, July 12, 2025, TBC discovered that Foothills had -- without TBC's

knowledge or consent -- misappropriated its identity for commercial purposes. The misappropriation commenced at a time unknown to TBC and is continuing to this day at <https://woayradio.com/resources/ministry-partners/> where Foothills, falsely and with corrupt motive, in a web-page titled “Ministry Partners,” under the heading of Get to Know AM 860” states that:

WOAY AM 860 is a prominent Christian talk and teaching radio station based in Oak Hill, West Virginia, broadcasting on 860 AM. It is owned and operated by Foothills Broadcasting, led by Thomas Moffit, Jr.

The station serves Oak Hill and Beckley. **WOAY also has a sister television station, WOAY-TV, which is a local ABC affiliate**

<https://woayradio.com/resources/ministry-partners/> (last visited 7-12-2025)(emphasis added)

24. As stated in the Counterclaim submitted herewith, Foothills’ actions constitute an invasion of Plaintiff’s privacy under the decisions of the West Virginia Supreme Court of Appeals adopting Prosser’s torts of privacy, including appropriation of name or likeness, actionable when use occurs without consent which protects against unauthorized use irrespective of commercial value, and provides remedies for emotional harm. *See Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983)(affirming both privacy-appropriation and economic-based publicity claims), Additionally, Third Party Defendant’s actions violated Third Party Plaintiff’s right of publicity which protects the commercial value of one’s identity, and has enriched Defendant in an amount to be proved at trial. *See Curran v. Amazon.com*, 86 U.S.P.Q.2d 1784 (S.D. W. Va. 2008)(U.S. District Court construing West Virginia law to recognize a right of publicity claim.

25. TBC’s motion to intervene is timely, as Foothills actions have only recently been discovered, and this litigation is still in a preliminary phase. Adjudication of these claims cannot be sustained by any party other than TBC, the broadcaster at WOAY-TV whose identity has been misappropriated.

WHEREFORE, TBC submits that it satisfies the criteria for mandatory intervention under Rule 24(a) and respectfully requests that the motion to intervene be granted.

Respectfully submitted,
THOMAS BROADCASTING CO.
By Counsel

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IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FOOTHILLS RESOURCE GROUP, INC.,

Plaintiff,

v.

Civil Action No. CC-10-2024-C-74

DARTS RENTALS, LLC,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene was filed electronically with the Clerk of the Court, this 18th day of July, 2025, and thereby served on Counsel for the Plaintiff as follows:

Evan Dove, Esq. #13196
Clay Law Firm, PLLC
204 AW Maple Ave
P. O. Box 746
Fayetteville, WV 25840
Tel: 304-574-2182
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s/William V. DePaulo
William V. DePaulo

WOAY- STA Extension February 2025

WOAY was previously operating at reduced power on its primary transmitter pursuant to BSTA-20191118AAS, as extended by LMS#0000219211, with the following parameters: 7000 watts daytime, 5000 watts critical hours and 11 watts nighttime using a non-directional pattern. However, the primary transmitter experienced a circuit board failure on 11/27/2023 and WOAY filed a replacement STA request (LMS#0000231267 to operate using the emergency antenna authorized by BSTA-20191118AAS, but at 1000 watts daytime, 1000 watts critical hours and 11 watts nighttime, again using a non-directional pattern and using the WOAY backup transmitter, which was granted on 12/13/2023.

WOAY prior to the last STA extension made the repairs to permit resumption of STA operations under the original BSTA-20191118AAS parameters, as last extended by LMS#0000219211 at **7000 watts daytime, 5000 watts critical hours and 11 watts nighttime using a non-directional pattern.** WOAY seeks further extension of such STA parameters.

The underlying reasoning for the STA, as described in BSTA-20191118AAS remains unchanged, and licensee is continuing pending litigation with co-tenant licensee who shortened the tower as part of the TV Repack without consulting with WOAY; that litigation was originally pending in state court, but co-tenant licensee had filed a motion to remove the matter to federal court, which WOAY had opposed. **That litigation seeks, inter alia, restoration of the original tower height.** A decision granting the remand from US District Court (Southern District of West Virginia) to Fayette County, WV state court was granted on 10/7/2024, the case now remains pending in state court awaiting trial on the issues, and WOAY as well is continuing to investigate alternate options to return to licensed power levels.



FEDERAL COMMUNICATIONS
445 12th Street, SW
Washington, DC 20554

February 8, 2017

IMPORTANT CHANNEL ASSIGNMENT INFORMATION

THOMAS BROADCASTING COMPANY
GERALD A DIBARTOLOMEO
7113 LEGENDS HIGHWAY
OAK HILL, WV 25901

This letter provides advance notice that the station referenced below **has been reassigned to a new channel** in the repacking process associated with the broadcast television spectrum incentive auction. The Congressionally-mandated auction involves a repacking or reorganization of the television bands. As part of the repacking, some stations are being reassigned to new post-auction channels. Although the repacking is not yet effective, its final results have been determined and will be announced publicly as soon as the auction closes. Reassigned stations will then be required to transition to their post-auction channels. Please carefully review the information in the Broadcast Transition Procedures Public Notice that describes the steps that you must take in order to implement this channel change. *See Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, Public Notice, DA 17-106 (rel. Jan. 27, 2017) (https://apps.fcc.gov/edocs_public/attachmatch/DA-17-106A1.pdf) (Broadcast Transition Procedures Public Notice).

Below is technical information about the station's post-auction channel and the transition phase the station has been assigned:

Facility ID:	66804
Community of License:	OAK HILL, WV
Call Sign:	WOAY-TV
Service:	DT
Pre-Auction Channel:	50
Post-Auction Channel:	31
Antenna Coordinates (NAD83):	37° 57' 26.4" N 81° 9' 2.37" W
ERP (kW):	418
HAAT (m):	200.1
RCAMSL (m):	781.8
Antenna ID:	N/A
Antenna Pattern Type:	ND
Reference Azimuth (DEG):	N/A
Transition Phase:	7

The purpose of this letter is to provide you with information as early as possible concerning your channel assignment and transition phase assignment so that you can begin planning for the channel change now, even though Auction 1000 has not closed, and so that you are able to meet the construction deadline for your station's transition phase listed above. The station's construction deadline will be the phase completion date for the station's assigned phase and will be included in the Auction 1000 Closing and Channel Reassignment Public Notice (Closing and Reassignment Public Notice) that will be released to announce the close of the auction. Although the auction has met the final stage rule and the Commission's systems have identified final station

channel assignments and transition phase assignments, the auction will not officially close until after the forward auction assignment rounds are complete and the Closing and Reassignment Public Notice is released. Stations may not apply for a construction permit for their post-auction facilities described above until the Closing and Reassignment Public Notice is released. Nevertheless, they may begin the process of planning for construction of a facility on their post-auction channel. Some preliminary activities include but are not limited to: retaining a technical or zoning specialist, conducting tower structural analysis, planning construction, installing a new power line, selecting equipment, and placing orders. The Commission has found that these types of actions conducted in advance of the grant of a construction permit, do not constitute unauthorized construction. *See Wendell & Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679-80, para. 24 (1998).

In addition, it is important that each transitioning station timely file an estimate of the costs it expects to reasonably incur to construct facilities on its post-auction channel. Your station must file its cost estimates so that an allocated amount from the \$1.75 billion dollar TV Broadcast Relocation Fund is reserved for the station's channel transition. The deadline for filing estimates is three months from release of the Closing and Reassignment Public Notice. Information about how to file cost estimates using the online Reimbursement Form (FCC Form 399) will be forthcoming. Although many stations will incur most expenses during the transition period, the Commission has determined that channel transition expenses incurred before and during the auction by stations reassigned to a post-auction channel are eligible for reimbursement as long as they were "reasonably incurred ... in order for the licensee to relocate its television service from one channel to the other." *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Declaratory Ruling, 31 FCC Rcd 4246 (2016).

We remind stations that a Public Notice has announced a limited waiver of Commission rules prohibiting parties covered by the relevant rules from communicating an incentive auction applicant's bids or bidding strategies to other covered parties. *See The Incentive Auction Task Force, With The Media And Wireless Telecommunications Bureaus, Releases A Public Notice Concerning: Confidential Letters Regarding Post-Incentive Auction Channel Assignments; Limited Waiver Of Prohibited Communications Rules; And Broadcast Station Sales And Transfers*, Public Notice, DA 17-134 (rel. Feb. 6, 2017) (https://apps.fcc.gov/edocs_public/attachmatch/DA-17-134A1.pdf). The waiver helps stations begin planning for the post-auction transition.

If you have questions concerning the channel reassignment process, please contact Shaun Maher (legal) at Shaun.Maher@fcc.gov or 202-418-2324 or Kevin Harding (technical) at Kevin.Harding@fcc.gov or 202-418-7077. If you have questions about the prohibited communications rule, please contact Erik Salovaara at Erik.Salovaara@fcc.gov or 202-418-7582.

FOOTHILLS RESOURCE GROUP, INC.,

Plaintiff,

v.

Civil Action No. CC-10-2024-C-74

DARTS RENTALS, LLC,

Defendant,

and

THOMAS BROADCASTING CO.,

Intervening Defendant.

ANSWER OF THOMAS BROADCASTING CO.

For its Answer in this matter, Thomas Broadcasting Co., by its Counsel, William V. DePaulo, Esq., states as follows:

First Defense

Plaintiffs Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense

The Plaintiff's causes of action stated in the Complaint are barred by federal preemption.

Third Defense

To the extent that evidence hereafter adduced in this matter supports any of the following affirmative defenses, Defendant invokes the following affirmative defenses: accord and satisfaction; arbitration and award; contributory negligence; comparative negligence; assumption of the risk,

discharge in bankruptcy; duress; waiver; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; acquiescence; running of the statute of limitations; lack of personal jurisdiction; lack of service of process; improper service of process; improper venue, and any other matter constituting an avoidance or affirmative defense.

Fourth Defense

The Plaintiffs causes of action stated in the Complaint are barred by the statute of limitations.

Fifth Defense

The Plaintiffs causes of action stated in the Complaint are barred by the doctrine of clean hands.

Sixth Defense

The Plaintiffs causes of action stated in the Complaint are barred by the doctrines of contributory negligence and comparative negligence

Seventh Defense

The Plaintiff's causes of action stated in the Complaint are barred by the doctrines of waiver and estoppel.

Eighth Defense

The Plaintiffs causes of action stated in the Complaint are barred by the doctrines of acquiescence and consent.

Ninth Defense

The Plaintiff's causes of action stated in the Complaint are barred by the Plaintiff's failure to mitigate

damages.

Tenth Defense

This Court lacks jurisdiction to enter an order directing Darts and/or TBC to take, or abstain from taking, any action inconsistent with the lawful orders of the FCC, including without limitation, the FCC's REPACK orders.

Eleventh Defense

The Plaintiffs causes of action stated in the Complaint must be dismissed for failure to join necessary Parties, including, but not limited to, the Federal Communications commission.

Twelfth Defense

The Defendant **DENIES** any allegation in the Complaint not explicitly admitted in the following paragraphs of this ANSWER.

Thirteenth Defense

1. Defendant admits that Plaintiff does business in Fayette County, West Virginia as WOAY-AM but has insufficient information from which to admit or deny the remaining allegations of ¶1 of the Complaint, and accordingly **DENIES** same and demand strict proof thereof.
2. Defendant has insufficient information from which to admit or deny the allegations of ¶2 of the Complaint that Plaintiff is the lawful assignee of a 1990 lease of Adventure Communications, Inc., and accordingly **DENIES** same and demand strict proof thereof.
3. Defendant **ADMITS** the allegations of ¶3 of the Complaint pertaining to Darts Rentals,

LLC organization as an LLC and its addresses. Defendant **DENIES** that Plaintiff has paid it rent in the amount required by the lease.

4. Defendant states that the lease is the best evidence of the topics it covers, and specifically **DENIES** that the lease in any way required this Defendant to insure Plaintiff's broadcast signal at any strength. Plaintiff made all decisions regarding the installation of its own equipment. Plaintiff agreed in ¶4 of the Lease "**at its own expense,**" to construct an adequate building and improvements upon the Permanent Transmitter Site for use in its radio business." The terms of the parties' 1990 lease also provided in ¶4 that "Tenant may, **at its own expense,** either at the commencement of or during the term of this lease, make such alterations in and/or to the Leased Premises **as may be necessary to fit the same for its business.**" Defendant **DENIES** ¶4 of the Complaint to the extent that it alleges that Defendant engaged in any action in contravention of the parties' lease.

5. Defendant states that the lease is the best evidence of its term and **DENIES** that it is still in full force and effect. Defendant further **DENIES** ¶5 of the Complaint to the extent that it alleges that the lease is still in effect; the lease was lawfully terminated in the summer of 2023 for non- payment of rent due.

6. Defendant states that the lease is the best evidence of its term and **DENIES** the allegation of ¶6 of the Complaint that it is still in full force and effect. Plaintiff has been in default of its rent obligation, without cause, which default has not been cured within 30 days as required by the Lease.

7. Defendant **DENIES** the allegations of ¶7 of the Complaint pertaining to diligence. Plaintiff is in arrears for rent due in excess of \$6,000 which default has not been cured within 30 days as required by the Lease.

8. Defendant **DENIES** the allegations of ¶8 to the extent that it alleges that Defendant's actions constituted a voluntary action initiated by Defendant. Defendant's actions were mandated by orders of the Federal Communications Commission (FCC) implementing a nation-wide reallocation of the radio spectrum

to accommodate the greatly increased world-wide demand for the radio spectrum of mobile telephone users, which was, in the judgment of the FCC, critical to sustaining the economy of the United States.

9. Defendant **DENIES** the allegations of ¶9.

10. Defendant **DENIES** the allegations of ¶10. Any damage incurred by Plaintiff was a result of Defendant's compliance with lawful orders of the FCC, were a result of Plaintiff's own actions and inactions, including negligence and lack of diligence, and were further a result of a failure on Plaintiff's part to take minimal timely actions to mitigate damages.

11. Defendant **ADMITS** that Plaintiff communicated with Defendant incident to FCC compelled upgrades, and **DENIES** the balance of ¶11.

12. Defendant **DENIES** the allegations of ¶12. Defendant specifically **DENIES** that it acknowledged any damage caused by Defendant and/or Thomas Broadcasting (WOAY-TV).

13. Defendant **DENIES** the allegations of ¶13. Specifically, Plaintiff did not work with Defendant or Thomas Broadcasting (WOAY-TV) on a timely basis -- or diligently -- to minimize and/or avoid the totally foreseeable consequences of the FCC mandated changes.

14. Defendant **DENIES** the allegations of ¶14.

15. Defendant states that the lease is the best evidence of its terms, and **DENIES** the allegations of ¶15 to the extent that they allege any violation of the lease by Defendant. Specifically, no portion of the parties lease warranted, guaranteed or otherwise represented to Plaintiff that its AM radio broadcast signal would be at any specified signal strength. Plaintiff made all decisions regarding the installation of its own equipment. Plaintiff agreed in the Lease "at its own expense, to construct an adequate building and improvements upon the Permanent Transmitter Site for use in its radio business." The terms of the parties' 1990 lease also provided in ¶ 4 that "Tenant may, at its own expense, either at the commencement of or during the term of this lease, make such alterations in and/or to the Leased Premises as may be necessary

to fit the same for its business." Defendant **DENIES** that it engaged in any action in contravention of the parties' lease.

16. Defendant **ADMITS** ¶16 to the extent that it acknowledges that the parties' lease agreement in ¶18 (c) explicitly requires Defendant to "maintain and repair the Tower in compliance with all governmental requirements and regulations" and that those regulations specifically authorized and compelled Defendant to comply with the mandatory FCC upgrades to which Plaintiff now complains. Defendant **DENIES** the remaining allegations of ¶16. Further, the lease explicitly places the obligation of all repairs of Plaintiff's equipment on Plaintiff alone.

17. The requirement in the lease that the Tenant, Foothills, be responsible for all repairs is not merely a matter of the Landlord exercising bargaining power to allocate costs to the Tenant, although it in fact does shift those costs to the Tenant AM broadcaster. The requirement that the Tenant – an AM radio broadcaster – be responsible for all repairs recognizes the reality that the engineering requirements of an AM broadcasting operation are fundamentally different from the engineering requirements of a television broadcast operation, and appropriately places the responsibility for maintaining and repairing AM broadcast equipment on the AM broadcaster, pursuant to the orders of the FCC applicable to that AM broadcaster.

18. Defendant **DENIES** ¶17 of the Complaint to the extent that it suggests that Defendant was obligated by the prospective terms of a 1990 lease between ADVENTURE COMMUNICATIONS, INC. and Defendant's predecessors in interest -- executed more than two decades before its assignment to Plaintiff -- to take actions in violation of mandatory FCC orders that would terminate the seven-decade long 1954 license from the FCC with Thomas Broadcasting Company (WOAY-TV).

19. ADVENTURE COMMUNICATIONS, INC, Plaintiff's predecessor in interest, was in 1990 fully aware of and fully consented to, the existence of a then nearly 40-year use of the broadcast tower by Thomas Broadcasting Company (WOAY-TV). At the time of the assignment of the lease to it in November,

2012, Plaintiff too was fully aware of, acquiesced in and consented to, to the preexisting 40-year use of the broadcast tower by Thomas Broadcasting Company (WOAY-TV), and further accepted and waived any objection to the fact that the parties' lease was subject to and would be subordinate to, the Landlord's operation of the television broadcast equipment, in place for decades, and that Darts and/or TBC would take any and all actions, or forebear from any actions, as required to remain in compliance with all FCC regulations, then current or to be handed down in the future.

20. Defendant **DENIES** ¶18 of the Complaint. Defendant was never responsible for compensating Plaintiff for any impact Defendant's compliance with mandatory FCC regulations, but in good faith and gratuitously made every effort to lawfully and openly obtain compensation for Plaintiff's AM radio broadcast facility, even though from day-one of the FCC compelled REPACK upgrades Plaintiff was fully aware that compensation was limited to TV and FM broadcast facilities, and explicitly excluded AM broadcasts.

21. In an email chain beginning December 15, 2021 and ending April 28, 2022, Defendant repeatedly advised Plaintiff that submission of appropriate documentation, **on a timely basis,** was required if there was any possibility of obtaining compensation for Plaintiff's AM radio broadcast facility. Despite being advised that **"time was of the essence,"** suggesting that Plaintiff comply **"asap,"** and that specific formatting was required, Plaintiff never got beyond submitting email **"guesses"** as to its costs, which were in any event not compensable under FCC regulations.

22. Plaintiff's inaction and lack of due diligence constituted contributory negligence, a breach of Plaintiff's own duty to repair under the lease, and a failure to mitigate damages on a timely basis. Indeed, Plaintiff has failed to take any action to mitigate its damages since becoming aware of broadcast problems in or around October, 2019, and has only in the month of July, 2025 – nearly six years later – begun to gather the technical information to commence its own repairs.

23. Foothills' gross delay in the minimal steps needed to mitigate its damages forecloses, on grounds of proximate cause, any award to Plaintiff against any Defendants for monetary damages for lost

revenues in the six-year period in which Plaintiff, fully aware of its problems, did nothing, other than “escrow” money due to Defendant Darts and commence the current litigation.

24. Foothills is itself responsible for any lost revenues for the last six years because it terminated its principal marketing operations in the West Virginia market, an act which constitutes an independent cause, wholly and apart from any action or inaction by Defendants, for economic losses incurred by Foothills.

25. Defendant **DENIES** ¶19 of the Complaint. It is not retaliation to demand that Plaintiff pay the rent due on a timely basis.

26. Defendant **ADMITS** ¶20 of the Complaint to the extent that it admits that Plaintiff has not paid the rent due of \$500 (reflecting an increase in the amount of \$150 per month over the prior rent of \$375/mo), and **DENIES** the balance of ¶20.

27. Defendant **ADMITS** ¶21 of the Complaint to the extent that Plaintiff has not paid rent, but has no knowledge of the balance of ¶21, and therefore **DENIES** the balance of the paragraph and demands strict proof that Plaintiff has placed said sums due in an undisclosed "escrow" account.

28. Defendant **DENIES** ¶22 of the Complaint.

29. In 2025, Foothills represented to the FCC that it would seek, in this litigation, an order requiring Darts and/or TBC to alter the installation of the FCC specified antenna, on top of Defendant’s television broadcast tower, to its pre-REPACK height. Defendant TBC denies that Foothills has any grounds for requesting, or that this Court has jurisdiction to enter, an order of equitable relief requiring TBC to alter, in any way including but not limited to an increase in height, the installation of a new television broadcast antenna at the express direction of the FCC as part of the REPACK program.

WHEREFORE, Defendant respectfully requests this Court to enter an order awarding judgment in favor of Defendants Darts and TBC, against Foothills, and ordering that Plaintiff's Complaint be dismissed with prejudice, award Defendant TBC its court costs and attorney fees, and such other relief as may be lawful and equitable.

Respectfully submitted,

THOMAS BROADCASTING CO.

By Counsel

s/William V. DePaulo

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IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FOOTHILLS RESOURCE GROUP, INC.,

Plaintiff,

v.

Civil Action No. CC-10-2024-C-74

DARTS RENTALS, LLC,

Defendant,

and

THOMAS BROADCASTING CO.,

Intervening Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER OF THOMAS BROADCASTING CO. was filed electronically with the Clerk of the Court, this 18th day of July, 2025, and thereby served on Counsel for the Plaintiff as follows:

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William V. DePaulo

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

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Defendant,

and

THOMAS BROADCASTING CO.,

Defendant.

COUNTERCLAIM OF INTERVENING DEFENDANT
THOMAS BROADCASTING CO.

For its Counterclaim in this matter, Plaintiff Thomas Broadcasting Co. (TBC) states as follows:

I. PARTIES

1. TBC is a West Virginia corporation and the operator of the broadcast television station known as WOAY-TV, an ABC affiliate operating in southern West Virginia.
2. Darts Rentals, LLC (Darts) is a West Virginia limited liability company and the defendant in the above-captioned proceeding.
3. TBC and Darts, the current defendant in the underlying litigation, are separate jural entities, but have common ownership. Darts has asserted as an affirmative defense the Plaintiff's failure to join TBC as a necessary party because the actions complained of by Foothills were actions TBC was ordered to take by

the Federal Communications Commission.

4. Foothills Resource Group, Inc. (Foothills) is a Tennessee corporation, the plaintiff in the above-captioned cause of action, and the Third Party Defendant in the proposed Third Party Complaint submitted herewith.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction under W.Va. Code §51-2-2 (b) because the amount in controversy exceeds \$7,500 exclusive of interest.

6. Venue properly lies in Fayette County, West Virginia under W. Va. Code § 56-1-1 (a)(1) because the cause of action arose there, and under W. Va. Code § 56-1-1 (a)(2) because Foothills does business in Fayette County.

III. STATEMENT OF FACTS

7. On Friday, July 12, 2025, TBC discovered that Foothills had -- without TBC's knowledge or consent -- misappropriated its identity for commercial purposes.

8. The misappropriation commenced at a time unknown to TBC and is continuing to this day at <https://woayradio.com/resources/ministry-partners/> where Foothills, falsely and with corrupt motive, in a web-page titled "Ministry Partners," under the heading of "Get to Know AM 860" states that:

WOAY AM 860 is a prominent Christian talk and teaching radio station based in Oak Hill, West Virginia, broadcasting on 860 AM. It is owned and operated by Foothills Broadcasting, led by Thomas Moffit, Jr.

The station serves Oak Hill and Beckley. **WOAY also has a sister television station, WOAY-TV, which is a local ABC affiliate**

<https://woayradio.com/resources/ministry-partners/> (last visited 7-12,2025)(emphasis added).

9. Thomas Broadcasting Co., the owner of WOAY-TV, is neither a “Ministry Partner” nor a “sister television station” of WOAY-AM, and has no relationship whatsoever with WOAY-AM, or its owner, Foothills Resource Group, Inc., beyond the landlord-tenant relationship which is the subject of this litigation. Foothills Resource Group, Inc. knew the statement made on its Ministry Partners was false when it made it, and did so intending to profit from it commercially.

IV. CAUSES OF ACTION

A. Misappropriation of Identity – Invasion of Privacy

10. TBC incorporates all prior paragraphs of this Counterclaim.

11. Foothills Resource Group, Inc.’s actions constitute an invasion of Plaintiff’s privacy under the decisions of the West Virginia Supreme Court of Appeals adopting Prosser’s torts of privacy, including appropriation of name or likeness, actionable when use occurs without consent which protects against unauthorized use irrespective of commercial value, and provides remedies for economic and emotional harm.

12. Foothills’ action appropriated TBC’s identity, without TBC’s consent, and unreasonably placed TBC falsely before the public. *Curran v. Amazon.com, Inc.*, Civ. Act. No. 2:07-0354, 2008 WL 472433, at *8 (S.D. W. Va. Feb. 19, 2008) (citing *Benson v. AJR, Inc.*, 599 S.E.2d 747, 752 (W. Va. 2004) (per curiam); 3 *Crump*, 320 S.E.2d at 87-88; *Davis v. Monsanto Co.*, 627 F. Supp. 418, 421 (S.D. W. Va. 1986); *Restatement (Second) of Torts* § 652D (1977)). See also: *Duncan v. Gilead Scis. Inc.*, CIVIL ACTION NO. 3:10-1421 (S.D. W.Va. May 09, 2011)

13. Foothills Resource Group, Inc.’s actions were not privileged and were not merely negligent but were knowing and intentional acts, committed with actual malice, entitling TBC to punitive damages in an amount to be determined by a jury after trial.

14. TBC is entitled to temporary and permanent injunctive relief barring Foothills Resource Group, Inc. from continued misappropriation of TBC’s identity and invasion of privacy.

15. TBC is entitled to an order of not less than 24 months duration compelling Foothills Resource Group, Inc. to explicitly retract its misappropriation of TBC's identity on the same web-page where it was originally misappropriated, in a form at least as conspicuous as the type and font used to misappropriate it, and requiring Foothills Resource Group, Inc. to state unambiguously that the prior claim that Foothills Resource Group, Inc. was a "Ministry Partner" and/or "sister" broadcaster of WOAY-AM was false at the time it was made, and was known to be false by Foothills Resource Group, Inc. at the time the statement was made.

B. Misappropriation of Identity – Right of Publicity – Unjust Enrichment

16. TBC incorporates all prior paragraphs of this Counterclaim.

17. Foothills Resource Group, Inc.'s actions misappropriated TBC's identity and violated TBC's right of publicity which protects the commercial value of one's identity. *Crumpp v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983)("[T]o constitute an appropriation ... the defendant must take for his own use or benefit the reputation, prestige or commercial standing, public interest or other value associated with the name or likeness published"). Foothills Resource Group, Inc.'s actions have enriched Foothills Resource Group, Inc. in an amount to be proved at trial. See ("Publicity which unreasonably places another in a false light before the public is an actionable invasion of privacy").

18. Foothills Resource Group, Inc.'s actions were not privileged and were not merely negligent but were knowing and intentional acts, committed with actual malice, entitling Plaintiff to punitive damages.

19. TBC is entitled to temporary and permanent injunctive relief barring Foothills Resource Group, Inc. from continued violation of TBC's right of publicity and continued unjust enrichment.

20. TBC is entitled to an order for not less than 24 months duration compelling Foothills Resource Group, Inc.'s actions to explicitly retract its misappropriation of TBC's identity on the same web-page where it was originally misappropriated in a form at least as conspicuous as the type and font used to misappropriate it, and to state unambiguously that the prior claim that Foothills Resource Group, Inc.'s actions was a "sister"

broadcaster was false at the time it was made, and was known to be false by Foothills Resource Group, Inc.'s actions at the time the statement was made.

WHEREFORE, Thomas Broadcasting Co. respectfully requests that this Court enter an order awarding a monetary judgment against Foothills Resource Group, Inc. in an amount determined by a jury to compensate TBC for the intentional, corruptly motivated misappropriation of TBC's identity and violation of TBC's right of publicity and unjust enrichment, and in an amount determined by a jury to deter future misconduct by Foothills Resource Group, Inc. plus interest at the maximum amount permitted by law, its costs and reasonable attorneys fees.

In addition to a monetary judgment, Thomas Broadcasting Co. respectfully requests that this Court enter an order awarding judgment against Foothills Resource Group, Inc. in the form of equitable relief:

(a) temporarily and permanently enjoining Foothills Resource Group, Inc. from continued misappropriation of Thomas Broadcasting Co.'s identity, and violation of Thomas Broadcasting Co.'s right of publicity and unjust enrichment, and

(b) compelling Foothills Resource Group, Inc. to publish, for not less than 24 months duration, explicitly retracting its misappropriation of TBC's identity on the same web-page where it was originally misappropriated, in a form at least as conspicuous as the type and font used to misappropriate it, and to state unambiguously that the prior claim that Foothills Resource Group, Inc. was a "Minister Partner" or "sister" broadcaster was false at the time it was made, and was known to be false by Foothills Resource Group, Inc. at the time the statement was made.

Thomas Broadcasting Co. seeks such further and additional relief as the facts and law warrant, and the interests of justice demand.

THOMAS BROADCASTING CO. DEMANDS A TRIAL BY JURY.

Respectfully submitted,

THOMAS BROADCASTING CO.

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COUNTERCLAIM was filed electronically with the Clerk of the Court, this 18th day of July, 2025, and thereby served on Counsel for the Plaintiff as follows:

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