VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF SUFFOLK

MARIA KATTMANN,

Plaintiff,

v. CASE NO.: CL08-412

CITY OF SUFFOLK,

Defendant.

DEMURRER

NOW COMES Defendant City of Suffolk (the "City"), by counsel, pursuant to § 8.01-273 of the Code of Virginia, and hereby demurs to the complaint filed herein against it, on the grounds that as a matter of law, the allegations therein fail to state a viable claim. In support of its demurrer, the City states as follows:

I. PLAINTIFF'S ALLEGATIONS

1. The City acknowledges that for purposes of this demurrer, the allegations in the complaint are accepted as true, along with all reasonable inferences drawn therefrom. A reviewing court is not, however, bound by the pleaded conclusions of law. See Fox v. Custis, 236 Va. 69, 71, 372 S.E. 2d 373, 374 (Va. 1988).

2. The Complaint avers that Plaintiff was employed by the City as the City Assessor from June 5, 1996 to May 7, 2008 (Compl. ¶ 6), pursuant to a Memorandum of Understanding (the "MOU")[1]. (Compl. 9).

3. Pursuant to the MOU, Plaintiff was an at will employee:

> **2. TERM**
>
> (a) The assessor shall serve at will, at the pleasure of Council. It is mutually agreed that the Council has the right to terminate the services of the Assessor at any time, subject only to the provisions set forth in this Memorandum of Understanding . . . .

[1] A copy of the MOU is attached to the Complaint as Exhibit 1.

> **13. TERMINATION**
>
> It is mutually agreed that the Council may at any time terminate the service of the Assessor even though the Assessor is willing and able to perform the duties of the City Assessor. . . .

(MOU pp. 1,4.) These terms of the MOU reflect the provisions of the City's Municipal Code, by which the City Assessor is appointed by and serves at the pleasure of the City Council:

> **1. Sec. 82-427. Appointment; term; duties generally.**
>
> Annual real estate assessments shall be made by a single assessor appointed by the city council for such purpose, who shall give his entire time to the duties of his office. He shall hold office during the pleasure of the council. He shall be known as the city real estate assessor, and he shall have all the powers and duties prescribed by laws of the state for assessors of real estate; and all the duties now or formerly devolved upon the commissioner of the revenue of the city with respect to the assessment of real estate for taxation are transferred to and devolve upon the city real estate assessor.

Suffolk Municipal Code § 82-427. As a political appointee, the terms of Plaintiff's employment are set only by formal act of the City Council.

4. Plaintiff's complaint includes no allegations that the MOU was adopted by Council or that the Mayor was authorized to sign it. A contract signed by an agent of government is void ab initio if not authorized. County of York v. King's Villa, Inc., 226 Va. 447, 309 S.E. 2d 332 (1983).

5. On May 7, 2008, the City Council voted to terminate Plaintiff's employment. (Compl. ¶ 59.) Plaintiff filed her complaint on May 15, 2008.

6. Plaintiff's complaint contains four counts: (1) breach of contract regarding compensation; (2) breach of contract regarding Defendant's 401(A) Plan; (3) breach of fiduciary duty to comply with regulation and other requirements regarding the City's 401(A) Plan; and (4) retaliatory discharge in violation of public policy. As a matter of law, however, the allegations in the complaint are insufficient to set forth a valid claim as to any of the causes of action, and all of these claims must be dismissed.

II. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT REGARDING COMPENSATION (COUNT I) MUST BE DISMISSED

A. Plaintiff Has Not Pleaded Authorization for the MOU

7. Plaintiff has not alleged that the MOU was formally adopted by City Council or that the Mayor was authorized to sign the MOU on behalf of Council. Private sector contractual concepts are not transferable to the public sector. The MOU in question is not a valid contract unless and until adopted or authorized by formal act of the City. County of York v. King's Villa, Inc., 226 Va. 447, 309 S.E. 2d 332 (1983); Suffolk City Code §82-427. See also, King George County Service Authority v. Presidential Serv. Co. Tier II, 267 Va. 498 (2004).

In light of Plaintiff's failure to allege a formal act of City Council, the Plaintiff has no employment contract and/or no protected property right in continued employment.

B. Plaintiff's Claims Under the Compensation Plan Contradict the MOU.

8. Plaintiff's first claim avers breach of contract as to the City's "Compensation Plan." Specifically, Plaintiff claims that the City breached the MOU by not including her in the 2006-2007 and 2007-2008 Compensation Plans the City adopted.[2] Interestingly, Plaintiff only alleges she should have been included in the compensation plans for in 2006 and 2007, but not in the previous compensation plans, despite the City apparently having "compensation plans" in which she was not included since she signed the MOU in 1996. In fact, however, as established in the MOU, the City Council has always determined Plaintiff's salary, including any increases, independent of any such plan, as it does with all City Council appointees.

9. In her complaint, Plaintiff only partially quotes the MOU regarding her compensation and neglects the critical provision that her future compensation increases are based on the City Council's evaluations and determined solely by the Council: "The City Assessor position will be included in the City's compensation plan, and any future increases in

[2] In addition to this demurrer, the City has also filed a motion craving oyer because Plaintiff failed to attach to her complaint the alleged compensation plans at issue.

compensation will be based on the performance evaluation of the Assessor by the Council." (MOU ¶ 4 (emphasis added))[3] The plain language of the MOU does not include the alleged 2006-2007 Compensation Plan or the 2007-2008 Compensation Plan, but indicates Plaintiff's future compensation is based on the City Council's performance evaluations. Critically, the complaint alleges no amendment to the MOU indicating Council agreed to a different method of determining Plaintiff's salary. Accordingly, Plaintiff's claims for breach of contract based on the 2006-07 or 2007-08 Compensation Plans are refuted by the terms of her MOU. Dowling v. Rowan, 270 Va. 510, 516, 621 S.E. 2d 397, 399 (Va. 2005) ("Where contracts are plain upon their face, they are to be construed as written, and the language used is to be taken in its ordinary significance unless it appears from the context it was not so intended. They are to be construed as a whole. . . . This court is duty bound to construe a contract as a whole, considering every word and every paragraph, if there is a sensible construction that can be given.") In sum, Plaintiff's claims in Count I based on the City's 2006-2007 Compensation Plan and the 2007-2008 Compensation Plan must be dismissed because they are contrary to the terms of the MOU.

C. Plaintiff's Claim for Attorneys' Fees Must Be Dismissed.

10. Plaintiff's claim for attorney's fees and costs in Count I must be dismissed as there is no legal basis for the granting of attorneys' fees absent any statutory or contractual authority. See Gilmore v. Basic Industries, Inc., 233 Va. 485, 357 S.E. 2d 514 (Va. 1987).

III. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT REGARDING THE CITY'S 401(A) PLAN (COUNT II) MUST BE DISMISSED

A. Plaintiff Was Not Eligible for the 401(A) Plan

11. Plaintiff alleges that on July 1, 2001, the City adopted a 401(A) Executive Staff Plan (the "401(A) Plan") for the City's "department heads" and/or "department directors".

[3] The MOU further states: "Increases in compensation to the Assessor will be based on the annual performance evaluation of the Assessor by the Council." (MOU ¶11)

(Compl. ¶¶ 21-22.) She alleges that the City failed and/or refused to notify her of her eligibility for enrollment in the 401(A) Plan, (Compl. ¶ 25), which she claims is a breach of the "Plan Agreement for Defendant City's 401(A) Plan" (the "Plan Agreement")[4]. (Compl. ¶ 42).

12. The 401(A) Plan, however, was originally established only for "department heads" reporting directly to the City Manager, as an employment incentive for City Manager department employees. Critically, Plaintiff is not a "department head" and/or "department director," as that term is defined in the City's municipal code; she is a City Council appointee who does not report to the City Manager. See City of Suffolk Municipal Code § 82-427; compare City Charter § 7.02[5]. Therefore, as a matter of law, as Plaintiff was a City Council appointee and not a "department head" and/or "department director," she was not automatically eligible for the 401(A) Plan.[6] (Compl. ¶ 23). Therefore, she has no actionable claim regarding her alleged exclusion from that Plan.

B. As Plaintiff Was Not a Party to the 401(A) Plan Document No Breach of Contract Occurred

13. Plaintiff fails to allege any duty and/or provision of the Plan Agreement by which the City had to offer her the opportunity to participate in the Plan since its inception in 2001. In fact, as alleged, Plaintiff was not a party to the 401(A) Plan (i.e. the contract), so there could not be any duty owed to her under that Plan. Indeed, as Plaintiff acknowledges, her employment

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[4] The City has filed a motion craving oyer of this document as well, as Plaintiff failed to attach a copy of the Plan Agreement for Defendant City's 401(A) Plan to the complaint, but the document is an integral part of her contract claims.

[5] Sec. 7.02. Department heads.

There shall be a director at the head of each department, and the same person may be the director of several departments. The director of each department, except the departments of law and education, shall be appointed by the city manager and may be removed by him at any time provided, however, that the council may designate the city manager or assistant city manager to be director of one or more departments. The director of each department shall be chosen on the basis of his general executive and administrative ability and experience and his education, training and experience in the class of work which he is to administer.

City of Suffolk Charter § 7.02

was controlled by the MOU. (Compl. ¶ 9). The MOU, however, makes no reference to the 401(A) Plan or any other retirement plan. Nothing in the MOU required the City to offer and/or include Plaintiff in the limited 401(A) Plan. In the end, Plaintiff has not alleged any agreement to which she is a party which creates a duty by the City to enroll her in the 401(A) Plan. As a matter of law, therefore, her claim for breach of a contract to which she was not a party has no legal basis, and the City had no obligation of enrollment under the MOU.

C. Plaintiff's Claim for Attorneys' Fees Must Be Dismissed.

14. As is true with Count I, Plaintiff's claim for attorneys' fees and costs in Count II must be dismissed, as there is no legal basis for the granting of attorneys' fees without any statutory or contractual authority. See Gilmore v. Basic Industries, Inc., 233 Va. 485, 357 S.E. 2d 514 (Va. 1987).

IV. PLAINTIFF'S CLAIM FOR BREACH OF FIDUCIARY DUTY (COUNT III) MUST BE DISMISSED

15. In Count III, Plaintiff claims the City had a duty to go beyond the terms of the MOU and offer her the additional benefits of the 401(A) Plan, which it allegedly failed to do. (Compl. ¶¶ 50-51) Plaintiff makes this claim under the guise that the City breached a fiduciary duty to her. Id. It must be noted that Plaintiff's claim cannot be premised on the Employee Retirement Income Security Act ("ERISA"), as the 401(A) Plan at issue is an exempt non-ERISA plan, being for the benefit of municipal employees. See 29 USCS § 1003, et seq.

16. "The essential elements of a cause of action . . . based on a tortious act . . . are (1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that duty or right, and (3) harm or damage to the plaintiff as a proximate consequence of the violation or breach. . . . A cause of action does not evolve unless all of these factors are present." Austin v. Consolidation Coal Co., 256 Va. 78, 82, 501 S.E. 2d 161, 163 (Va. 1998) (employer had no fiduciary duty to hold evidence for employee's claim against third-party).

17. Plaintiff's claim for breach of fiduciary duty is apparently premised on her being a participant in the 401(A) Plan; however, it is undisputed Plaintiff never was a participant in the Plan. If Plaintiff was not a member of the Plan, even if she was eligible, there could not be any fiduciary duty owed her by the Plan administrator. In Count III, Plaintiff is attempting to create a fiduciary duty for the City as a Plan administrator, for someone who was never a participant in the Plan. As a matter of law, there is no legal basis for that duty. At most, any duty the City owed Plaintiff as to her possible Plan participation is contractual, not fiduciary. A potential fiduciary duty to the Plaintiff would only arise once she enrolled in the Plan.

18. Moreover, as a matter of law, the City does not owe Plaintiff a fiduciary duty regarding the Plan simply by being her employer. In Virginia, under certain circumstances there is a common law fiduciary duty that an employee owes to the employer. See e.g. Williams v. Dominion Tech. Partners, L.L.C., 265 Va. 280, 289, 576 S.E. 2d 952, 757 (Va. 2003).[7] There is, however, no recognized common law fiduciary duty owed by an employer to its employee. Starks v. McCabe, 49 Va. Cir. 554, 560 (Va. Cir. Ct. 1998) ("The defendants demur to this count because they claim there is no general fiduciary duty from employer to employee. I agree. If the employer owed a fiduciary duty to the employee, it would be extraordinarily difficult, if not impossible, to terminate the employee, and this would be inconsistent with Virginia's historic policy of employment at will.")

19. Finally, any alleged duties owed to Plaintiff with regards to any aspect of compensation or benefits must stem from the MOU, assuming for the purpose of this demurrer that it constitutes the Plaintiff's employment agreement. Therefore, the only possible breach of a duty as to the 401(A) Plan is contractually based; for the reasons stated above, though, no such breach could have occurred. See Augusta Mut. Ins. Co. v. Mason, 274 Va. 199, 204, 645

[7] "We have long recognized that under the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment. . . . Principally, an employee must not have "misappropriated trade secrets, misused confidential information, [or] solicited an employer's clients or other employees prior to termination of employment." Id.

S.E. 2d 290, 293 (Va. 2007); O'Connell v. Bean, 263 Va. 176, 180, 556 S.E. 2d 741, 743 (Va. 2002).

V. PLAINTIFF HAS NO CLAIM FOR RETALIATORY DISCHARGE IN VIOLATION OF PUBLIC POLICY (COUNT IV)

20. In Count IV, Plaintiff attempts to plead two separate claims for retaliatory discharge. First, Plaintiff claims that she was discharged in retaliation for questioning the administration of the 401(A) Plan (Compl. ¶¶ 58-64), and the City's alleged non-compliance "with federal and state taxation statutes, regulations and other rules with respect to employee retirement or pensions plans". (Compl. ¶ 61) Notably, Plaintiff does not identify any specific statutes, rules and/or regulations that were allegedly violated, but just generally cites to tax statutes and pension statutes "designed to protect the property rights of people in general." See (Compl. ¶ 62.) Plaintiff also does not identify any specific violations of the noted rules and regulations, nor does she specify what she disclosed regarding the alleged non-compliance and to whom. Finally, it must be noted this claim is not covered by ERISA, as the 401(A) Plan is an exempt plan and Plaintiff does not allege an ERISA violation. Accordingly, Plaintiff's conclusory references to the City's alleged lack of compliance with unspecified statutes, rules and regulations does not plead a valid cause of action for retaliatory discharge, particularly as the Plan at issue is limited to City department heads and not subject to federal regulation.

21. Second, Plaintiff claims she was terminated in retaliation for complaints received by the City Council about her tax assessments. (Compl. ¶¶ 65-68.) She contends this constitutes a claim for retaliatory discharge for performance of her statutory duties and is in contradiction to the public policies underlying the local and state tax statutes, regulations and other rules with respect to annual real estate assessments and the collections thereon. (Compl. ¶ 68.) Again, Plaintiff does not specify the statutory language and the exact public policy that is allegedly being violated. More important, the terms of her MOU and the City Code indicate Plaintiff can be terminated at any time, as she serves at the pleasure of City Council.

22. Both of Plaintiff's claims for retaliatory discharge must be dismissed as Plaintiff fails to identify any actionable public policy that is allegedly violated and she is not in the class of individuals any such public policies are intended to benefit.

a. Retaliatory Discharge in Violation of Public Policy

23. In Bowman v. State Bank of Keysville, 229 Va. 534, 539, 331 S.E.2d 797, 800 (Va. 1985), the Supreme Court of Virginia carved out a narrow exception to the at-will employment doctrine. See id. As the Supreme Court of Virginia stated in Miller v. SEVAMP, Inc., 234 Va. 462, 468, 362 S.E. 2d 915, 918 (Va. 1987):

> Bowman applied a "narrow exception to the employment-at-will rule," id., but it fell far short of recognizing a generalized cause of action for the tort of "retaliatory discharge." Declining to follow sweeping adoption of such a cause of action in other jurisdictions, Bowman recognized an exception to the employment-at-will doctrine limited to discharges which violate public policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general. Each of the illustrative cases from other jurisdictions cited in Bowman involved violations of public policies of that character. 229 Va. at 539-40, 331 S.E.2d at 801. The exception we recognized was not so broad as to make actionable those discharges of at-will employees which violate only private rights or interests.

Id.; (quoting Bowman) (emphasis added) see also Haigh v. Matsushita Electric Corp., 676 F. Supp. 1332, 1351 (E.D. Va. 1987) ("It seems clear that Bowman, upon amplification by Miller, established a narrow public policy exception to the employment-at-will doctrine. That exception is, in this Court's estimation, triggered only when the discharge is in response to the employee's refusal to commit an unlawful act or in the employee's exercise of a statutory right."); Luckett v. City of Harrisonburg Sch. Bd., 14 Va. Cir. 76, 82 (Va. Cir. Ct. 1988) (sustaining demurrer on basis teacher grievance procedure is private remedy, involving relationship between employer, a governmental entity, and its employee).

24. In order to plead a valid Bowman claim, Plaintiff must allege certain elements:

> Under the Bowman exception to the employment at will doctrine, a plaintiff has essentially three broad tasks: (1) he must show a violation of laws containing an explicit public policy, (2) if there is no explicit public policy he must show a violation of law that is designed to protect property rights, personal freedoms, health, safety, or welfare of people generally, and (3) he must show his membership in a class of individuals that the public policy is specifically designed to benefit.

Coley v. Historic Hotels, Inc., 60 Va. Cir. 466, 467 (Va. Cir. Ct. 2000); see also Dray v. New Mkt. Poultry Prods., Inc., 258 Va. 187, 190, 518 S.E. 2d 312, 313 (Va. 1999) (holding that the Bowman exception does not create a "whistle blower" type claim). Additionally, "the Bowman exception to the at-will employment doctrine is predicated on public policies derived from Virginia statutes, not federal laws." Oakley v. May Dep't Stores Co., 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (citations omitted).

b. No Actionable Contract is Alleged

25. In light of the Plaintiff's failure to allege a formal act by City Council in approving or adopting the MOU, for reasons previously stated, the Plaintiff has no employment contract and/or no protected property right in continued employment.

c. No Actionable Public Policy is Allegedly Violated

26. In Virginia Beach v. Harris, 259 Va. 220, 233, 523 S.E.2d 239, 245 (2000), the Supreme Court of Virginia held that in order to have a viable claim under Bowman, there must be a specific public policy violated:

> While all statutes of the Commonwealth reflect public policy to some extent, since otherwise they presumably would not have been enacted by our General Assembly, termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a common law cause of action for wrongful discharge.

Id.; see also Rowan v. Tractor Supply Co., 263 Va. 209, 214, 263 S.E.2d 709, 710-711 (Va. 2002) (holding an employee's termination for pressing charges against a superior for assault and battery is not a valid Bowman claim under the obstruction of justice statute); Humphrey v. Columbia/HCA John Randolph, Inc., 46 Va. Cir. 109, 110 (Va. Cir. Ct. 1998) (sustaining

defendant's demurrer and holding an employee's discharge for complaining to a doctor that the doctor misbranded a prescription is not actionable Bowman claim); Carr v. Bus. Sys. Mgmt., 73 Va. Cir. 459, 460 (Va. Cir. Ct. 2007) (sustaining defendant's demurrer and holding an employee's discharge for refusing to send a false letter to superior's probation officer is not actionable Bowman claim).

27. Critically, in this case, Plaintiff has not cited any specific statutory language identifying a public policy that the City allegedly violated. Plaintiff also cannot identify any actionable public policy violation. Indeed, Plaintiff makes only general allegations and attempts to shoehorn a specialized employee benefit program, which her employer has no legal obligation to offer, into a public policy protection under Bowman. Plaintiff also tries to transform a general claim for termination for doing her job as tax assessor into a retaliatory discharge; even if true, that contention also does not violate any Bowman public policy, particularly given the terms of the MOU and City Code. In fact the City's alleged actions do not violate any public policies for the general public for which a statute was created, or a policy exists.

28. Plaintiff's claim that she was discharged in retaliation to her complaints regarding an employee benefits plan fails as it implicates not a public, but a private right. In Miller, supra, the Supreme Court of Virginia affirmed the trial court's sustaining of a demurrer for a claim of retaliatory termination in violation of a public policy. 234 Va. at 467-469, 362 S.E. 2d at 918-919. Plaintiff, director of defendant's Retired Senior Volunteer Program, was terminated two weeks after she testified in a grievance hearing on behalf of another employee. See id. The Court held that the alleged retaliation for a right conferred in defendant's employee manual was a private right and therefore not actionable as retaliatory. Even more so than in Miller, the 401(A) Plan here is a not a public right, but a private benefit, as it is a benefit plan offered by an employer to only certain of its employees. Indeed, as there is no statutory or public policy right to a pension plan, this claim must be dismissed. See id.; compare Roland v. Bon Air Cleaners, Inc., 19 Va. Cir. 184 (Va. Cir. Ct. 1990) (employee cannot be terminated for seeking

underemployment compensation as the unemployment statute establishes public right to receive unemployment benefits).

d. Plaintiff Is Not a Member of a Public Class Intended to be Benefited By the Alleged Public Policies.

29. Plaintiff claims that she was terminated as a result of properly performing her job as a tax assessor, which she claims is against public policy. In Harris, 259 Va. at 224-227, 523 S.E.2d at 240-242, the Supreme Court of Virginia rejected this argument, noting it would take all municipal employees out of the at-will doctrine. In Harris, a police officer brought a Bowman action against Virginia Beach for being discharged for filing a warrant against his supervisor who allegedly interfered with a warrant on a citizen. Id. 259 Va. at 224-227, 523 S.E.2d at 240-242 The police officer alleged the city violated the public policies of the Virginia statute for obstruction of justice, Va Code § 18.2-460, and the Virginia statute providing a police officer "shall endeavor to prevent the commission . . . of offenses against the law of the commonwealth...; shall observe and enforce all such laws...; [and] shall detect and arrest offenders . . . . ", Va. Code § 15.1-138. Id. 259 Va. at 234, 523 S.E.2d at 246. The Court held that the police officer was not a member of the class of individuals that the specific public policies were intended to benefit. Id. Instead, the Court stated the police officer was using the statutes as a "shield to protect himself, not the public, from the consequences of his decision." Id. The Court held that allowing Harris to use the criminal statutes in this manner would allow wrongful discharge lawsuits to be pursued by any officer that believed a personnel decision obstructed his enforcement of the law. See id. Harris makes clear that the limited Bowman exception does not permit a municipal employee to escape the at-will doctrine for what she claims was her proper job performance.

30. Similar to Harris, Plaintiff is seeking to use the city assessor statutes as a shield from termination. Indeed, not only is there not a public policy in the statutes for assessing property values, but Plaintiff is not a member of the class of individuals the statutes are intended

to benefit. See Va. Code §58.1-3200, et seq. Any such benefits are for the property owners having their property assessed, not the assessor of the property.

31. Plaintiff's claim that she cannot be terminated because the public and/or City Council disagree with her assessments is not actionable under Bowman, and would take her completely out of the "at will" employee context – contrary to the express terms of the MOU and the City Code.

32. As is true with Counts I and II, Plaintiff's claim for attorney's fees and costs in Counts III or IV must be dismissed, as there is no legal basis for the granting of attorney's fees without any statutory or contractual authority. See Gilmore v. Basic Industries, Inc., 233 Va. 485 (Va. 1987).

V. CONCLUSION

33. By the terms of the only document before this Court, and the City of Suffolk Municipal Code, Plaintiff was an at-will employee who was properly terminated on or about May 7, 2008. As a matter of law, her claims for retaliatory discharge and breach of a non-existent fiduciary duty fail, as do her claims for breaches of contracts that contradict her employment agreement and/or to which she was not a party. The City's demurrer should be sustained as to all four counts of the complaint.

WHEREFORE, Defendant City of Suffolk, by counsel, moves this Court for entry of an Order sustaining its demurrer to all claims contained in the Complaint filed herein, dismissing the Complaint with prejudice, and awarding the City its attorney's fees and costs incurred in the defense of this action.

Respectfully submitted,

CITY OF SUFFOLK

By Counsel

Counsel:

Robert W. McFarland (VSB No. 24021)
Keith P. Zanni (VSB No. 46021)
McGuireWoods LLP
9000 World Trade Center
Norfolk, VA 23510
757/640-3719

John A. Conrad, (VSB No. 17640)
The Conrad Firm
1520 West Main Street #204
Richmond, VA 23220
804/359-6062 x 205

Robert W. McFarland

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via mail and facsimile this 20th day of June, 2008 to:

Lisa A. Bertini, Esq.
Vivile R. Dietrich, Esq.
Bertini O'Donnell & Jochens, PC
999 Waterside Drive #1010
Norfolk, VA 23510

Mark J. Krudys, Esquire
Mark J. Krudys, PLC
1011 East Main Street, Suite 204
Richmond, VA 23219

Robert W. McFarland

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