NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 4, 2016

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Re: *The Reading and Language Learning Center v. Charlotte Sturgill,* Case No. CL-2015-10699

Dear Counsel:

Plaintiff, The Reading and Language Learning Center ("RLLC"), sued Defendant, Charlotte Sturgill ("Sturgill"), under a two-count Second Amended Complaint ("SAC") alleging that (1) Sturgill breached a non-compete by accepting an offer of employment from one of RLLC's clients after leaving the company; and (2) Sturgill tortiously interfered with RLLC's contractual relationship and business expectancy with that same client.

Sturgill's Plea-in-Bar argues that the restrictive covenant is unenforceable as overly broad in scope and that the provision is void as the contract misclassifying Sturgill as an independent contractor violates Virginia public policy.

Sturgill's Demurrer contends primarily that the tortious interference claim fails to allege termination of a contract, the existence of a business expectancy, and an improper means.

These motions came before the Court on June 15, 2016 and continued to July 28, 2016 for an evidentiary hearing under the Plea-in-Bar and oral arguments on the Demurrer. As to the Plea-in-Bar, RLLC made an informal inquiry about a jury with my law clerk prior to the first hearing,

but made no demand, written or orally, to this Court.[1] The matter was then taken under advisement to allow the Court an opportunity to consider the testimony, exhibits, and arguments presented, as well as a supplemental opposition filed by RLLC after the close of evidence.

Additionally, the Court considered two discovery motions filed by RLLC. The first was a motion to compel discovery responses ("Motion to Compel"). The second was a motion to quash the subpoena duces tecum issued to RLLC's outside accountant, William Reagle ("Motion to Quash").

For the reasons stated below, RLLC's Motion to Compel and Motion to Quash are DENIED, and Sturgill's Plea-in-Bar and Demurrer are SUSTAINED.

I. BACKGROUND AND FINDINGS OF FACTS

This action centers around Defendant Sturgill's alleged breach of a non-compete contained in a written contract between the parties titled "Agreement between Private Practitioner and Independent Practitioner" ("Agreement"), which set forth a duration of employment from August 25, 2014 to June 25, 2015. The Agreement was subject to renewal with the execution of a written agreement under the same formalities, which did not occur.

RLLC[2] is a private speech therapy practice that services children (and adults) with speech, language, or reading disorders. In 2014, Sturgill was a recent graduate of a master's program in speech-language pathology who was unlicensed and uncertified in the District of Columbia. To obtain certification and licensure in her field, Sturgill had to complete a supervised clinical fellowship, which was the purpose of the Agreement.

The Agreement classified Sturgill as an "independent contractor" and contained the following non-compete clause:

> RLLC and the Consultant agree not to employ any contracted employee or contract with any current client of the Other for a period of two (2) years after the expiration of the contract between RLLC and the Consultant.

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[1] RLLC claims that the Court preemptively determined the matters herein and deprived RLLC of its right to a jury trial. Even if RLLC made a jury demand for the Plea-in-Bar pursuant to Va. Code Ann. § 8.01-336(B), a jury would have been inappropriate given the issues presented. A party may demand that a jury decide factual issues. *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010). However, the enforceability of a restrictive covenant is a matter of law, not fact. *Omniplex World Servs. Corp. v. US Investigations Servs.*, 270 Va. 246, 249 (2005). Also, whether a person is an independent contractor or an employee is a question of law when "the evidence admits of but one conclusion," which is the case here. *Atkinson v. Sachno*, 261 Va. 278, 284 (2001).

[2] RLLC is supposedly, and was identified in a discovery request as, a Virginia limited liability company. RLLC, however, failed to provide any corporate identification along with its name. Since RLLC holds itself out to be a Virginia corporation, it must use a corporate title in its pleadings. *See* VA. CODE ANN. § 13.1-1012.

During the 2014-2015 school year, RLLC was a subcontractor to another business known as End-to-End Solutions for Special Education ("ETES"). ETES provides special education assessments and intervention services and support to public charter schools in the District of Columbia. Pursuant to a one-year, non-renewable contract between RLLC and ETES, RLLC agreed to provide speech and language services to ETES's clients. Either as a matter of pure coincidence or through the sharing of information, the restrictive covenant in the RLLC-ETES contract contained the same language as the non-compete in the Agreement:

> ETES and the Consultant (RLLC) agree not to employ any contracted employee or contract with any current client of the Other for a period of one (1) year after the expiration of the contract between ETES and the Consultant[.]

The similarity of the language used explains why the Agreement's non-compete utilizes the term "Consultant", even though the document does not identify Sturgill as such in any other part. Throughout the Agreement, Sturgill is referred to as an "Independent Practitioner" or "independent contractor."

One of ETES's clients during the 2014-2015 school year was Ingenuity Prep Public Charter School ("Ingenuity Prep"). A written one-year contract existed between ETES and Ingenuity Prep. Under that agreement, dated August 24, 2014, ETES agreed to provide services to Ingenuity Prep, including speech-language therapy and a multi-disciplinary team to conduct evaluations or re-evaluations of Ingenuity Prep's students. The agreement between ETES and Ingenuity Prep became effective on September 1, 2014 and expired automatically on July 31, 2015. The agreement contained an option to renew the contract annually for up to three years with "services, fees and continuation to be negotiated and agreed upon in June of each year." Essentially, it was an option for an agreement to agree.

As an aside and for purposes of the Demurrer, the Court accepts as true the allegation under the SAC that RLLC provided services to Ingenuity Prep for three uninterrupted years by virtue of RLLC being a subcontractor to ETES. This allegation is, however, inconsistent with the one-year contract between ETES and Ingenuity Prep that covered 2014-2015 with an option to renew for three years. In 2015, Ingenuity Prep did not renew the ETES agreement and chose instead to employ Sturgill as an "in-house" speech-language pathologist. Consequently, the documents conflict with the allegation that RLLC had serviced Ingenuity Prep for three years.

Another inconsistency, as a matter of fact and of law, is RLLC's allegation that Ingenuity Prep is RLLC's client for purposes of the governing contracts. Ingenuity Prep is clearly a client of ETES, who RLLC serviced under a contract containing a restrictive covenant in favor of ETES.

Regardless of these inconsistencies, such facts are separated in considering the Demurrer as opposed to the Plea-in-Bar. What is undisputed, however, is the fact that there is no contract between Ingenuity Prep and RLLC and that, at all times material to this lawsuit, RLLC provided services to ETES's clients as a subcontractor.

As part of the RLLC-ETES Contract, RLLC assigned Sturgill to provide services to the students at Ingenuity Prep. On June 25, 2015, the Agreement between Sturgill and RLLC expired under its own terms because the parties had not formally renewed the contract as the Agreement expressly required. However, Sturgill continued to work for RLLC without a written renewal agreement.

A few weeks prior to the expiration of the parties' Agreement, Sturgill reached out to Aaron Cuny, the head and co-founder of Ingenuity Prep, in response to an online job posting for a speech-language pathologist. According to interrogatories submitted, Sturgill had been previously alerted that Ingenuity Prep would be looking for a full-time employee to fill the increasing need to provide speech pathology services to its students. By June 28, 2015, Sturgill had received an offer of employment from Ingenuity Prep but told Cuny that she wanted to speak first to her "supervisors" at RLLC to inform them of the offer.

On June 29, 2015, Sturgill notified RLLC that Ingenuity Prep offered her an in-house position and that she "planned to take the position." SAC ¶27. After being reminded of the non-compete, "[Sturgill] insisted that she could take the job with [Ingenuity Prep] and that she was going to leave her job at RLLC." SAC ¶29.

RLLC terminated Sturgill on July 2, 2015 "[u]pon reliance of [her] statement that she intended to breach the non-compete," SAC ¶31, and brought this lawsuit seeking damages well in excess of Sturgill's salary, including punitive damages under both the breach of contract and tortious interference counts, and attorney's fees without stating the basis for such a recovery pursuant to Rule 3:25.

II. STANDARDS OF REVIEW

A. Plea-in-Bar

A plea-in-bar reduces litigation to a single, distinct issue of fact, which, if proven, creates a bar to a plaintiff's recovery. *Smith v. McLaughlin*, 289 Va. 241, 252 (2015). A plea-in-bar can be sustained even if it presents a bar to recovery to only some, but not all, of the claims. *Id.* At this stage, the court's decision may be based on the facts identified in the pleadings or evidence presented. *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010). If any facts are disputed and no demand for a jury is made, the "whole matter of law and fact" may be decided by the court. *Id.*

B. Demurrer

At the demurrer stage, a trial court does not decide the merits of the claim but determines whether, when accepted as true, the facts pled and the reasonable inferences drawn therefrom are sufficient to state a cause of action. *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013). A demurrer does not admit the correctness of any stated conclusions of law. *Harris v. Kreutzer*, 271 Va. 188, 195 (2006). Further, "[a] court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are part of the pleadings." *Schaecher v. Bouffault*, 772 S.E.2d 589, 602 (Va. 2015).

"[U]nlike a motion for summary judgment, a demurrer 'does not allow the court to evaluate and decide the merits of a claim.'" *Assurance Data*, 286 Va. at 143 (quoting *Fun v. Virginia Military Inst.*, 245 Va. 249, 252 (1993)). However, to survive demurrer, the pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment. *Id.* Where it is plain on the record that there is no basis for the requested relief, a demurrer should be sustained. *See id.*

III. ANALYSIS

This letter opinion addresses in order the discovery motions filed by RLLC, followed by Sturgill's Plea-in-Bar, and lastly her Demurrer. Although the Court's decision on the dispositive motions renders the discovery motions moot, an analysis is nevertheless appropriate to determine whether attorney's fees should be awarded pursuant to Rule 4:12(a)(4).

A. RLLC's Discovery Motions Are Denied.

Virginia's discovery rules require a party seeking discovery to issue concise, intelligible, and relevant requests. *See* VA. SUP. CT. R. 4:1(b)(1), (g). If a party does not timely respond to such discovery requests or otherwise objects, the party seeking a response may apply for an order compelling discovery under Rule 4:12.

Pursuant to Rule 4:9A, a party may serve a subpoena duces tecum on a nonparty for the production of documents, also subject to the requirements of Rules 4:1(b)(1) and 4:1(g). The opposing counsel may object on behalf of the nonparty and file a motion to quash the subpoena. *Id.* 4:9A(c)(3).

i. The Motion to Compel Rests Upon Faulty Pleadings and a Misguided Legal Theory.

RLLC served upon Sturgill 42 requests for admissions. Absent leave of court or an agreement by the parties, Rule 4:11(e) limits the number of requests to 30, including all parts and subparts, except for admissions related to the genuineness of documents. The requests at issue do not seek admissions related to the genuineness of documents and consequently are a nullity.

Out of an abundance of caution and consistent with the spirit of professionalism, Sturgill answered the first 30 requests for admissions. However, the Court does not approve of the practice of a party sending more than 30 requests and finds it more appropriate to strike the discovery request altogether, rather than encourage non-compliance with the Rules of Discovery. Additionally, a number of requests are invalid as they seek an admission to the ultimate issues presented in this case, such as Requests Nos. 40 and 41.

With respect to the purported deficiencies in Sturgill's responses to the interrogatories and request for the production of documents, Sturgill's financial information, mental health records, and other personal inquiries border on abusive discovery tactics, which may have been an unintended consequence of a misguided legal theory. Meanwhile, Sturgill's discovery responses appear to be complete and appropriately responsive. The following are examples for why the Motion to Compel is denied:

(1) Sturgill's financial assets have no relevance to the damages sought by RLLC under a breach of contract action and tortious interference claim;

(2) Int. No. 8 requires Sturgill to identify prematurely her exhibit list. Further, the overbroad nature of the request renders the interrogatory faulty;

(3) RLLC sought Sturgill's social media information, which is of questionable value given that her employment with Ingenuity Prep was undisputed; and

(4) The request for Sturgill's health records is borderline abusive when considering the clear issues at hand.

The Court further notes that the Motion to Compel lacked particularity. In this jurisdiction, motion pleadings are limited to five pages. While the motion itself was only two pages, the Court was called upon to study 83 pages of discovery responses to determine the deficiencies. A party seeking an order compelling discovery must clearly and accurately identify the deficiencies within the five pages allotted.

Additionally, RLLC submitted an affidavit for attorney's fees that included numerous billings for time spent on other matters in this case. Because RLLC failed to specify the billings related to the discovery motions, the Court had to study the invoices to reach its own conclusion. A fee applicant is not entitled to recover fees for services rendered on claims which do not permit the recovery of attorney's fees. *Ulloa v. QSP, Inc.*, 271 Va. 72, 81-82 (2006). "[W]here multiple claims exist, only one of which permits the recovery of attorney's fees, the party requesting attorney's fees must fairly and reasonably separate out its attorney's fees with specificity." *Couch v. Manassas Autocars, Inc.*, 77 Va. Cir. 30, 32 (Prince William 2008) (citing *Ulloa*, 271 Va. at 83). Setting aside the fact that RLLC is not entitled to recover attorney's fees because it is not the prevailing party here, the "kitchen sink" billings submitted would have been insufficient to support the granting of fees.

ii. <u>The Subpoena Duces Tecum Sought Relevant Information to the Issue of Damages, and RLLC Has No Standing to Raise an Unduly Burdensome Objection.</u>

RLLC moves to quash a nonparty subpoena duces tecum issued to its tax preparer, William Reagle, on the basis of relevance and undue burden.

The information requested of Mr. Reagle is discoverable, as it would lead to admissible evidence contesting RLLC's damages claim. The statutes relied upon by RLLC in support of its Motion to Quash, Va. Code Ann. § 16.1-89 and Fed. R. Civ. Pro. 45(d)(3), are inapplicable to the determination of the issues here. Counsel's reliance on the federal rules was a factor in the difficulties she encountered at the commencement of this litigation, which resulted in an Order compelling discovery on October 30, 2015.

Moreover, RLLC has no standing to raise an unduly burdensome objection. Rule 4:9A(c)(3) provides that "the person so required to produce, or [] the party against whom such

production is sought[] may [] quash or modify the subpoena[] . . . if the subpoena would otherwise be unduly burdensome or expensive." Whether a request is unduly burdensome depends on various factors unique to the individual or entity subject to the subpoena. Counsel for RLLC does not represent Mr. Reagle, nor does RLLC bind him. This is not to say that RLLC may not otherwise object to a Rule 4:9A subpoena, as evidenced by the relevance objection. However, RLLC has no interests in whether the request is unduly burdensome to Mr. Reagle. The burden of complying with the subpoena rests solely on Mr. Reagle, not RLLC. Accordingly, RLLC lacks standing to claim that the subpoena is unduly burdensome.

iii. The Circumstances Suggest That An Award of Fees to Sturgill Would Be Unjust.

Under Rule 4:12(a)(4), "the court shall, after opportunity for hearing," require the losing party – either the client, the attorney, or both – to pay to the prevailing party "the reasonable expenses incurred in opposing the motion, including attorney's fees," unless the losing party was substantially justified or an award of expenses would be unjust.

The Court finds that RLLC's discovery motions were not substantially justified and finds troubling RLLC's comments that fees were being sought because fees had been previously imposed. However, the Court concludes that other circumstances make the award of fees unjust.

Those circumstances include the Court's dismissal of this action. Such dispositive pre-trial motions should ordinarily be brought well before trial and before the parties are forced to bring discovery disputes to the Court's attention. The Court did not invite further arguments on the discovery disputes as the issues were fully briefed and because the evidence and applicable law made it clear that Sturgill's Plea-in-Bar would be sustained. Further, this case would have ended prior to the filing of these discovery motions but for a scheduling issue with the June 15 Hearing, at no fault to RLLC.

Also, the subpoena duces tecum contained one overbroad request. Request No. 3 sought all "communications, including but not limited to, e-mails, letters, notes and documents reflecting verbal conversations, between you (Reagle) and anyone working for RLLC." Similar to the overly broad requests issued by RLLC, this request by Sturgill does not properly limit the inquiry to communications relevant to the subject matter of this litigation.

Furthermore, the subpoena duces tecum is flawed because it requires production in Washington, D.C.[3] There is no authority for a Virginia subpoena to require compliance in another jurisdiction. This Court places the same geographic limitation on a nonparty subpoena duces tecum as is found under Rule 4:5(a1)(ii). Thus, unless otherwise provided by law or absent an agreement, the production of documents by a nonparty witness must occur where the nonparty resides, is employed, or has a principal place of business. A party may even request that the documents be sent to the courthouse, but this Court will not compel a nonparty in Virginia to produce documents out-of-state without the nonparty's consent.

[3] Although RLLC did not raise this particular issue, the Court may act upon its own initiative upon reasonable notice to counsel under Rule 4:1(c).

Lastly, the information sought was unnecessary to the resolution of this case. RLLC's loss of gross revenue claims would have been unsustainable under *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177 (2006). Once Sturgill confirmed that Ingenuity Prep's contract with ETES ended and Ingenuity Prep was looking for an in-house speech-language pathologist, RLLC's damages claim would have failed as having been purely speculative, if not disproven altogether. The Court notes that, to her credit, Sturgill did not seek to hold the nonparty in contempt for his failure to comply with the subpoena duces tecum as allowed under Rule 4:9A(g).

B. The Plea-in-Bar is Sustained Because the Non-Compete is Unenforceable and the Contract Violates Virginia Public Policy.

The non-compete in the Agreement is unenforceable for two independent reasons. First, the scope of the restrictive covenant is overly broad. Second, the entire Agreement is void as a violation of public policy for misclassifying Sturgill as an independent contractor.

i. The Restrictive Covenant is Unenforceable.

A non-compete will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy. *Omniplex World Servs. Corp. v. US Investigations Servs.*, 270 Va. 246, 249 (2005). The employer bears the burden of proof in establishing its reasonableness. *Id.* Each non-compete is evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved. *Id.*

In determining whether an employer has carried that burden, Virginia courts focus on three factors: (1) the duration of the restraint; (2) the geographic scope of the restraint; and (3) the scope and extent of the activity being restricted. *Simmons v. Miller*, 261 Va. 561, 580 (2001). The third factor is the dispositive issue here.

a. *The scope of the non-compete is overly broad because it prohibits Sturgill from contracting in any capacity.*

RLLC contends that the covenant is not overly broad because the parties and other RLLC workers understood that the scope was limited to speech pathology services. Sturgill argues that the covenant prohibits her from working for a client in any capacity, thereby failing the "janitor" test. The law is in favor of Sturgill's position.

"Restrictive covenants that prohibit employees from working in any capacity for a competitor are overbroad." *Strategic Enter. Sols., Inc. v. Ikuma*, 77 Va. Cir. 179, 182 (Fairfax 2008) (citing *Motion Control Sys. v. E.*, 262 Va. 33, 37-38 (2001)).

In *Modern Env'Ts v. Stinnett*, 263 Va. 491 (2002), the non-compete provided that the employee "will not (i) directly or indirectly, own, manage, operate, control, be employed by, participate in or be associated in any manner with the ownership, management, operation, or control of any business similar to the type of business conducted by the company." The court struck down the non-compete as overly broad because the employer failed to offer a legitimate

business interest for prohibiting the employee from working for a competitor "in **any capacity**." *Id.* at 495.

In *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 239 Va. 369 (1990), the non-compete prohibited the employee from being "employed by or act[ing] on behalf of any competitor of Employer which renders the same or similar services as Employer, . . . expressly provided however, that this covenant does not preclude Employee from working in the medical industry in some role which would not compete with the business of Employer." Due to the latter provision, the court found that the non-compete did not prevent the employee from working for a competitor in any capacity and upheld the covenant in light of the company's business interests. *Id.* at 373.

The non-compete in this Agreement bars Sturgill from "contract[ing] with any current client of [RLLC] for a period of two (2) years." Unlike *Blue Ridge*, it does not contain a clause that limits or defines the capacity in which Sturgill is prohibited from contracting. Essentially, like *Modern Env'Ts*, Sturgill is prohibited from entering into any contract in any capacity with any company or person to whom RLLC provides services. She cannot sell them furniture, provide them with cleaning services, or plan any school functions. *See Integrity Auto Specialists, Inc. v. Meyer*, 83 Va. Cir. 119, 125 (Chesapeake 2011) ("An agreement so facially broad as to prevent an auto detailer from tendering his services to clients of his former employer as a concert promoter, fishing guide, sous chef, or plumber, *inter alia*, cannot be upheld.").

RLLC failed to present a legitimate business interest that justifies the need for such a broad restriction. Rather, RLLC argues that Sturgill and other RLLC workers understood the meaning and limitations of the non-compete.

This Court declines Plaintiff's invitation to consider the enforceability of non-competes based on the subjective beliefs or knowledge of the parties. Virginia courts do not engage in the practice of "blue penciling" restrictive covenants. *Lasership, Inc. v. Watson*, 79 Va. Cir. 205, 216 (Fairfax 2009); *Strategic Enter. Sols., Inc. v. Ikuma*, 77 Va. Cir. 179, 185 (Fairfax 2008). The Court "must give effect to the intention of the parties as expressed in the language of their contract." *Martin & Martin v. Bradley Enters.*, 256 Va. 288, 291 (1998). Likewise, this Court will not construe the contractual provision contrary to its facial import nor read into it a limiting clause similar to the one in *Blue Ridge*. As the non-compete is overly broad as written, it is unenforceable.

The Court also questions whether the non-compete prohibits Ms. Sturgill from contracting with a company that actually competes with RLLC. *See Omniplex World Servs. Corp. v. US Investigations Servs.*, 270 Va. 246, 250 (2005) ("Non-competes have been upheld only when employees are prohibited from competing directly with the former employer or through employment with a direct competitor."). RLLC provides speech pathology services. Whereas, Ingenuity Prep provides general educational services and has an in-house speech pathologist. In any event, the type of restrictive covenant found here is more so a non-solicitation clause than a non-compete.

b. Even if enforceable, Sturgill did not breach the non-compete considering the language employed. [4]

Restrictive covenants "will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee." *Modern Env'Ts v. Stinnett*, 263 Va. 491, 493 (2002). "The presumption always is that the parties have not used words aimlessly and that no provision is merely a superfluity unless it is plainly merely a repetition." *Am. Health Ins. Corp. v. Newcomb*, 197 Va. 836, 843 (1956).

The covenant in this case states, "RLLC and the Consultant agree not to **employ** any contracted employee or **contract** with any current client of the Other." (Emphasis added). The use of "employ" in one phrase but "contract" in the other suggests that Sturgill is prohibited only from becoming an independent contractor for Ingenuity Prep. In other words, the covenant prohibits Sturgill from forming her own company or joining another to service Ingenuity Prep. It does not bar Sturgill from working for Ingenuity Prep in-house. This interpretation is further supported by RLLC's familiarity with the differences between an employee and an independent contractor. Such an experience indicates that RLLC knew of the difference between the two terms when the contract was drafted and did not intend for the phrase "contract" to be a mere repetition of "employ."

Sturgill accepted a position with Ingenuity Prep as an employee of the company, not as an independent contractor. Interpreting the provision strictly, the Court finds that Sturgill did not breach the covenant when she began her employment with Ingenuity Prep.

c. The enforceability of the non-compete in this case could have been resolved at the demurrer stage, considering RLLC's argument for enforceability.

This is one of the few cases in which the enforceability of a restrictive covenant could be resolved on demurrer, without an evidentiary hearing.

The Virginia Supreme Court in *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 139 (2013) held that "a demurrer cannot be used to decide on the merits whether a restraint on competition is enforceable." In *Assurance Data*, the court considered a restrictive covenant that limited the scope of the non-compete to services that were competitive with those provided by the employer. *Id.* at 140. The trial court sustained the defendant's demurrer after finding that the covenants at issue were unenforceable as a matter of law, despite the plaintiff's argument that it was entitled to present evidence to establish the enforceability of the covenants. *Id.* at 142. On appeal, our Supreme Court found that the trial court erred by deciding the matter on demurrer in contravention of the plaintiff's desire to present evidence of reasonableness. *Id.* at 145. In support of this conclusion, the court noted that "restraints on competition are neither enforceable nor unenforceable in a factual vacuum." *Id.* at 144.

[4] The Court recognizes that this analysis is more appropriate under a summary judgment motion than a plea-in-bar, but includes it as additional grounds for supporting Defendant's case.

This case is distinguishable from *Assurance Data*. In its opposition, RLLC's only proposed business interest, which is included in ¶16 of the SAC, is that the "schools often try to steal their therapists." Unlike the more limited scope found in *Assurance Data*, the non-compete here prohibits Sturgill from contracting in any capacity. Taking this business interest as true, the non-compete is facially overly broad and unenforceable.

RLLC's other arguments for reasonableness pertain to Sturgill's and other RLLC workers' subjective understandings of the non-compete. Subjective opinions about the scope of the covenant are irrelevant to the issue and thus do not require an evidentiary hearing.

RLLC understandably expressed disappointment that a business model it had successfully followed for the past 14 years might be in jeopardy. The company pointed to other independent contractors who understood the limitations of the non-compete and honored its terms.

However, the law changes over time, and RLLC stands in the same position as the Home Paramount Pest Control Company. In 1989, the Virginia Supreme Court upheld a non-compete in *Paramount Termite Control Co. v. Rector*, 238 Va. 171 (1989). In 2011, that same non-compete came under fire again in *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412 (2011), but was found to be overly broad and unenforceable based on the evolution of the law on restrictive covenants. Ultimately, an employer cannot sustain an *in terrorem* effect on its workers simply because it had succeeded to do so in the past.[5]

ii. The Contract is Void for Violating Virginia Public Policy.

Contracts that violate Virginia public policy are void. *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 364 (2007). However, "courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain." *Id.* (citations omitted). Thus, "[t]he presumption is against finding contracts void on public policy grounds." *Lehman v. Lehman*, 38 Va. App. 598, 604 (2002).

a. Protecting workers from misclassification is a clear public policy of this Commonwealth.

Sturgill argues that misclassification of an employee as an independent contractor violates Virginia laws requiring employers to properly classify employees, pay appropriate taxes, and provide certain labor protections. RLLC contends otherwise by distinguishing the cases cited by Sturgill. The Court sides with Sturgill's argument, but for the basis provided below.

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[5] During the hearing, RLLC questioned Sturgill's ethics because of her alleged violation of the non-compete. The issue of ethics is rarely, if ever, relevant in the run-of-the-mill breach of contract case or tort claim. Associations who proscribe ethical conduct based on unproven legal principles subject their members to unreasonable standards. For example, assume ASHA requires its members to observe all covenants not to compete, even when those covenants are found to violate public policy. Strict application of ASHA's ethical principles would require its members to act unlawfully. Accordingly, this Court gives little to no weight to an ethical rule that promotes anti-competitive behavior and restricts an individual's right to work in contravention to public policy.

"Public policy can no more be accurately defined than can due process of law." *Old Dominion Transp. Co. v. Hamilton*, 146 Va. 594, 608 (1926) (calling it "a very unruly horse"). "There is no fixed rule by which to determine what contracts are repugnant to it." *Wallihan v. Hughes*, 196 Va. 117, 124 (1954). The Virginia Supreme Court has remarked that "[t]he courts have, however, frequently approved [a] definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare." *Id.*

Then, in *Wood v. Bd. of Supervisors*, 236 Va. 104, 115 (1988), the court assigned the task of determining what constitutes public policy by noting that "it is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests, and to devise standards for implementation." *See also Marblex Design Int'l, Inc. v. Stevens*, 54 Va. App. 299, 309 (2009) ("[W]ith few exceptions, the public policy of Virginia is 'expressed by the General Assembly.'"). Thus, Sturgill must point to a Virginia statute to support her claim.

In the wrongful discharge context, the public policy required to give rise to a *Bowman* claim have been limited to two categories. The first involves laws containing explicit statements of public policy. *City of Va. Beach v. Harris*, 259 Va. 220, 232 (2000). The second includes laws that do not contain an explicit statement, but are designed to protect the "property rights, personal freedoms, health, safety, or welfare of the people in general." *Id.* These categories were created as narrow exceptions to the employment-at-will doctrine, a rule strongly adhered to in Virginia. *See Miller v. SEVAMP, Inc.*, 234 Va. 462, 465 (1987). In limiting what constitutes public policy, our Supreme Court has noted:

> 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.

Harris, 259 Va. at 232. This Court, however, is not limited to the *Bowman* categories of public policy as this is not a wrongful discharge claim.

Although Virginia has yet to decide whether misclassification is a violation of public policy, at least one other state has. *See Sanchez v. Lasership, Inc.*, 2012 U.S. Dist. LEXIS 122404, at *21 (E.D. Va. Aug. 27, 2012) ("Massachusetts has a substantial policy interest in how Massachusetts-based workers are classified and compensated."). Enacted in 1990, the "legislative purpose behind [Mass. Gen. Laws ch. 149 § 148B] is to protect employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 592, 911 N.E.2d 739, 749 (2009). In ratifying this statute:

> [The Massachusetts Legislature] appeared [to be] most concerned with . . . the "windfall" that employers enjoy from the misclassification of employees as independent contractors: the avoidance of holiday, vacation, and overtime pay; Social Security and Medicare contributions; unemployment insurance

> contributions; workers' compensation premiums; and income tax withholding obligations . . . . Misclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden.
>
> *Id.* at 750 (citations omitted).

Members of our General Assembly have echoed the same sentiment towards misclassification. *See* JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N, REVIEW OF EMPLOYEE MISCLASSIFICATION IN VIRGINIA, S. DOC. NO. 10 (Va. 2012).

Unlike Massachusetts, Virginia does not have a statute that directly penalizes the misclassification of workers. However, our General Assembly has enacted several statutes designed to protect employees but not independent contractors. *See, e.g.*, VA. CODE ANN. § 40.1-29 (wage payment). In applying these statutes, courts are not bound by the parties' classification of the worker, but must engage in a factual inquiry to determine whether the worker is truly an employee or an independent contractor. Thus, the General Assembly clearly did not intend for a misclassification to serve as a shield for employers to avoid these statutory obligations.

In fact, our Supreme Court has recognized that several tests can be used to determine whether a worker is an employee or independent contractor. *See Atkinson v. Sachno*, 261 Va. 278, 284 (2001). Regardless of the test employed, courts are required to conduct a laborious analysis to answer this question. *See Tex. Co. v. Zeigler*, 177 Va. 557, 566 (1941) ("[I]ndividual circumstances of each case play an important part in answering the query."). In borderline cases, courts are to find the existence of an employer-employee relationship. *Va. Emp't Com. v. A.I.M. Corp.*, 225 Va. 338, 346 (1983).

In this instant case, the misclassification of Sturgill implicated several Virginia statutes. The Agreement provides that RLLC "shall not be responsible for withholding city, state, local or federal income taxes or payroll taxes of any kind." Sturgill "shall be responsible for payment of FICA, FUTA, self-employment, income and similar taxes due and payable with respect to any amounts received by [RLLC]." As a result, the misclassification violated Va. Code Ann. § 60.2-212(C), which requires a business to pay unemployment taxes based on the number of employees, § 65.2-800 et seq., which requires a company to include employees in its workers' compensation insurance policy and pay the resulting premiums, and § 58.1-461, which requires an employer to deduct and withhold income tax from employees.

Failure to pay these expenses is a violation of Virginia law and deflects the responsibility onto the Commonwealth and other businesses. For example, an employee misclassified as an independent contractor may later seek unemployment benefits. All the while, the employer has not paid its fair share of unemployment taxes, thereby shifting the cost of paying such benefits onto others. Thus, if a contract is created to assist an employer to avoid his statutory obligation to pay

taxes and other employment-related expenses, that contract is void for violating Virginia public policy.

Moreover, misclassifying a worker as an independent contractor has major and clear implications under federal law. For example, federal anti-discrimination statutes and labor laws do not apply to independent contractors. *See Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 642 (7th Cir. 2004) (ADA); *Farlow v. Wachovia Bank of N.C., N.A.*, 259 F.3d 309, 313 (4th Cir. 2001) (Title VII); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 981 (4th Cir. 1983) (ADEA); *Democratic Union Org. Comm., etc. v. NLRB*, 603 F.2d 862, 872 (1978) (NLRA). Employers can also escape statutory duties designed to benefit workers by hiring independent contractors instead of employees. *See Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 763 (8th Cir. 2014) (FMLA); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (FLSA); *Lambert's Nursery & Landscaping v. United States*, 894 F.2d 154, 155 (5th Cir. 1990) (federal employment taxes).

Thus, in a misclassification situation, an employer deprives a worker of statutory rights, while reaping benefits to the detriment of the entire workforce and the government. This kind of act is undoubtedly injurious to the public welfare.

In sum, the tax laws, the statutes intended for the protection of employees, and the efforts taken to protect workers from being misclassified as independent contractors signal Virginia's clear and certain public policy against misclassification.

This Court also considered whether the misclassification has to be willful or in bad faith in order to violate Virginia public policy. In California, it is unlawful for any employer to engage in the "**willful** misclassification of an individual as an independent contractor." CAL. LAB. CODE § 226.8(a)(1) (emphasis added). A violation of this statute subjects the employer to a civil penalty between $5,000 to $25,000 per violation. § 226.8(b). However, public policy concerns for voiding a contract and an intent element required to be affirmatively penalized are two distinct matters. Ultimately, a misclassification, whether intentional or not, divests a worker of rights bestowed upon them by our General Assembly and permits employers to avoid their tax obligations. This deprivation, whether willful or not, is against public policy.

b. RLLC misclassified Sturgill as an independent contractor.

Sturgill claims she was an employee of RLLC given the amount of supervision and requirements placed upon her work, especially in light of her position as a clinical fellow. RLLC contends that Sturgill is an independent contractor who sets her own hours and schedule, is free to work with other companies, and could have been supervised or mentored by any other licensed speech pathologists. In light of these factors, the circumstances of this case, and the credible testimony of Sturgill, this Court finds that Sturgill was an employee of RLLC.

An independent contractor is one "who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work according to his own ideas, or in accordance with plans furnished by the person for whom the work is done, to whom the owner looks only for results." *Atkinson v. Sachno*, 261 Va. 278, 284 (2001).

The employee versus independent contractor inquiry requires a case-by-case analysis of the individual circumstances. *Ogunde v. Prison Health Servs.*, 274 Va. 55, 60 (2007). In Virginia, there are four factors to consider: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. *Atkinson*, 261 Va. at 284-85 (citing *Hadeed v. Medic-24, Ltd*, 237 Va. 277, 288 (1989)).

The fourth factor, the power to control, is the most significant. *Id.* "It is immaterial whether the employer [actually] exercises this control; the test is whether the employer has the power to exercise such control." *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81 (1997). Further, the inquiry is not whether the employer controlled the ultimate outcome of the work, but whether it dictated the means and methods implemented to achieve that result. *S. Floors & Acoustics, Inc. v. Max-Yeboah*, 267 Va. 682, 687 (2004).

"[O]ther factors merely help to elucidate the manner and degree of control." *Richmond Newspaper, Inc. v. Gill*, 224 Va. 92, 98 (1982). "It is only by consideration of all the facts . . ., including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the [worker] is [an employee or an independent contractor]." *Atkinson*, 261 Va. at 286.

Sturgill worked for RLLC as a clinical fellow. She serviced clients in the District of Columbia, where she did not have a license in speech-language pathology.[6] Therefore, she was required to be directly supervised by a licensed speech-language pathologist, who was required to provide mentorship and formal evaluations. According to the ASHA 2014 Standards and Implementation Procedures for the Certificate of Clinical Competence in Speech-Language Pathology (Def's Ex. 3), the mentoring must include on-site observations and a litany of other monitoring activities. The amount of direct supervision must occur periodically and is commensurate with the fellow's knowledge, skills, and experience, but must not fall below 25% of the fellow's total contact with each client.

Essentially, a clinical fellow requires substantial supervision in comparison to a licensed, certified speech-language pathologist. *See VTA Mgmt. Servs. v. United States*, 2004 U.S. Dist. LEXIS 26772, at *27-29 (E.D.N.Y. Dec. 14, 2004) (comparing the level of supervision between clinical fellows and licensed therapists at a company in New York); *Ghosh v. S. Ill. Univ.*, 331 F. Supp. 2d 708, 725 (C.D. Ill. 2004) ("If the individual requires substantial training and supervision, an employer/employee status is more likely."). In addition, the very nature of this clinical fellowship program suggests that the supervisors have the right to control the details of the fellow's activities. *See Spriggs v. Sirinek*, 402 F. Supp. 2d 739, 747 (W.D. Tex. 2004) ("[T]he nature of a residency program in general suggests that it is the supervising-institution that has the right to control the details of the residents' activities.").

As evidenced by the Agreement alone, the degree of control and supervision that RLLC had over her leads to the conclusion that she was an employee. The Agreement provides that Sturgill is required to "keep daily progress notes[,] . . . evaluate, write goals[,] attend IEP meetings

[6] Based on Defendant's Exhibit 4, to obtain a D.C. license in speech-language pathology, an application must, among other requirements, complete the clinical fellowship.

as required[,] [and] maintain documentation of all sessions." Notably, it states that Sturgill "will be supervised by a licensed [speech-language pathologist] in accordance with the ASHA guideless [sic] for the Clinical Fellowship Year."

RLLC argues that Sturgill could set her own schedule. Sturgill admits that she had flexibility in determining her schedule, such as deciding the order in which she saw her clients and the duration of each session. However, RLLC dictated which school sites to visit and how many students to see in a given week, and had final approval over Sturgill's schedule. She also had to relay to her supervisors when and where she was going to see each client. The client sessions were always held either in the school or at a facility provided by RLLC. These circumstances suggest that Sturgill had little to no self-autonomy to deviate from a schedule that required the approval of her supervisors.

Further, the Agreement provides that Sturgill "will meet regularly with her supervisor to determine the frequency and nature of each patient visit." Sturgill testified that she met frequently with her supervisors to discuss treatment plans, and that her supervisors had to sign off on any reports she drafted and her hours worked. These factors resemble significant control over the manner and method in which Sturgill performed her work. The fact that Sturgill could propose her own schedule and session plans does not abrogate the reality that her supervisors had the power to alter them. *See Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 734 (1982) ("It is not the fact of actual interference with the control, but the right to interfere, that makes the difference.").

At the hearing, RLLC asked about Sturgill's ability to leave the school early once the sessions ended and the amount of half-days she took. The record demonstrates that Sturgill felt the need to make her supervisors aware if she was leaving early, and that she did not feel as if she could refuse to pick up additional work. As to the half-days, Sturgill testified that her schedule at Ingenuity Prep depended on the school's schedule – if the school had a half-day, she had a half-day. Thus, although RLLC did not set an express schedule for Sturgill, it was understood that her schedule was to mirror the school's schedule. For example, Sturgill did not have the authority to schedule the sessions at night or on weekends. Additionally, Sturgill could not see her own students outside of RLLC due to this schedule, and more importantly, because her work required supervision from a licensed speech-language pathologist.

The employer/employee relationship here is further supported by other factors. Instead of being paid per client session, RLLC paid Sturgill a salary. *See id.* ("The measure of compensation is also important for where it is based upon time or piece the workman is usually a servant, and where it is based upon a lump sum for the task he is usually a contractor."). The salary was based on a defined duration of employment. Aside from providing her own iPad and other items she purchased on the side, RLLC provided Sturgill with toys, educational materials, and flashcards if needed. Further, RLLC provided all of the evaluation materials, such as testing booklets and manuals. Sturgill was also required to submit her hours by a certain time each week and received paid vacation days, subject to RLLC approval, and paid sick days.

In sum, RLLC hired Sturgill, dictated her duties, had final authority over her schedule and session plans, set her pay, and provided mentorship through evaluations and feedback. The control RLLC exercised over Sturgill was significant and militates but one conclusion as a matter of law

– that Sturgill was an employee.[7] Therefore, as the Agreement misclassified Sturgill as an independent contractor, it is void for violating Virginia public policy.

C. The Demurrer is Sustained Because the Allegations Fail to Establish a Cause of Action for Tortious Interference.

RLLC raised a claim for tortious interference with a contract and a business expectancy. To establish a prima facie case for tortious interference, RLLC must show: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 216 (2014). Where a business expectancy is involved, RLLC must also prove that Sturgill employed "improper methods." *Id.*

The elements primarily at issue here are interference inducing or causing a breach or termination, the existence of a business expectancy, and whether improper methods were employed.

i. RLLC Fails to Allege a Breach or Termination of the Contract.

The contract allegedly terminated due to Sturgill's tortious interference is the agreement between RLLC and ETES. *See* SAC ¶48 (claiming a contractual relationship with ETES only, but business expectancies with Ingenuity Prep). Sturgill claims that nothing indicates that ETES breached or terminated the contract. RLLC cites to ¶¶27, 33, 34, 36, 52 and 53 in opposition.

At most, the SAC alleges a termination of the contract between ETES and Ingenuity Prep, for which RLLC is not a party. *See* ¶34 ("Ingenuity Prep cancelled ETES' contract for providing speech services due to hiring Defendant."). Exhibit D of the SAC provides that the RLLC-ETES contract lasted from August 25, 2014 to August 25, 2015. The SAC is devoid of any facts to even infer that this specific contract was breached or terminated prior to August 25, 2015. Thus, the Demurrer will be sustained for failure to allege a breach or termination of the contract at issue.

ii. The SAC Alleges a Valid Business Expectancy.

The business expectancy alleged is RLLC's continuing relationship with Ingenuity Prep. Sturgill argues that the allegations in the SAC support only a subjective expectation of a business expectancy. RLLC does not address the "subjective expectation" issue but directs the Court's attention to ¶¶ 23, 24, and 35.

"[M]ere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action." *Commercial Bus. Sys. v. Halifax Corp.*, 253 Va. 292, 301 (1997). Such an expectancy must be objective, and not merely subjective. *Id.*

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[7] In RLLC's opposition to the Demurrer, RLLC even claims that Sturgill owes fiduciary duties to RLLC as an "employee."

In *Commercial Roofing & Sheet Metal Co. v. Gardner Eng'G*, 60 Va. Cir. 384 (Fairfax 2002), the plaintiff had a prior contractual relationship with a company called Skyline. For an upcoming construction project, the plaintiff was invited to bid on future work with Skyline, but alleged that it was excluded from the bidding process by the defendant. *Id.* at 385. The court sustained the tortious interference count on demurrer, holding that "Plaintiff's expectation that it would be allowed to bid on a project does not rise to the level of a reasonable expectation of further contractual relations, even in the face of Plaintiff's prior work for Skyline." *Id.* at 387; *see also Bowers v. City of Richmond*, 79 Va. Cir. 168 (Richmond 2009) (sustaining demurrer on grounds that prior work under the contract does not amount to an objective belief of a valid business expectancy).

However, in *Foster v. Wintergreen Real Estate Co.*, 81 Va. Cir. 353 (Nelson 2010), the court declined to consider whether the allegations were merely subjective or objective at the demurrer stage. The *Foster* court noted that *Commercial Business Systems* was a case "where the trial and appellate courts ruled on the objective standard after evidence had been admitted at trial. At this stage, it is impossible for the court to rule whether the objective standard has been met because the court does not have sufficient evidence." *Id.* at 362.

In light of the noteworthy observation in *Foster*, this Court finds the allegations of a business expectancy sufficient to survive the demurrer stage. Here, RLLC claims three consecutive years of a prior relationship servicing Ingenuity Prep's students. Whether this former relationship amounts to a reasonable expectation cannot be decided on demurrer. Accordingly, RLLC has pled a valid business expectancy.[8]

iii. Conspiracy and Breach of a Restrictive Covenant Do Not Amount to An Improper Means.

The SAC alleges as improper means Sturgill's conspiracy with Ingenuity Prep to end the business expectancy and her breach of the non-compete. Sturgill contends that responding to a job solicitation is not an improper means, nor is a breach of a non-compete. RLLC responds that the improper means is actually a breach of a fiduciary duty.

"Improper methods or means generally involve violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, breach of a fiduciary relationship, violation of an established standard of a trade or profession, unethical conduct, sharp dealing, overreaching, or unfair competition." *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 404 (2012).

It is clear that "the breach of a noncompete clause is not in itself an improper method or means." *Id.* Moreover, there is no case law establishing that a conspiracy to terminate the expectancy is an improper means. A person cannot tortiously interfere with his own contract or

[8] The Court did not consider the following testimony for purposes of the Demurrer, but notes that, at the Plea-in-Bar hearing, Sturgill presented credible evidence that Ingenuity Prep had no intention of renewing its contract with ETES and was looking for an in-house speech-language pathologist, whether it was Sturgill or not. This testimony is further supported by Sturgill's testimony about an online job posting by Ingenuity Prep.

expectancy. *Foster*, 81 Va. Cir. at 362 (citing *Fox v. Deese*, 234 Va. 412, 427-29 (1987)). Thus, there can be no conspiracy between Ingenuity Prep and Sturgill to tortiously interfere with a business expectancy in which Ingenuity Prep is a party.

With respect to the breach of fiduciary duty assertion, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 205 (2007).

RLLC fails to allege a breach of a duty that is independent of the non-compete. The facts establish that Sturgill joined Ingenuity Prep after her employment contract with RLLC ended. The duty not to compete after leaving RLLC arose by virtue of the contract. Further, Sturgill could prepare for her departure from RLLC by seeking another job, considering that her employment contract ended in June of 2015 and was not renewed. Accordingly, there is no plausible claim for a breach of fiduciary duty to support the tortious interference with a business expectancy action.

IV. CONCLUSION

For the reasons above, this Court SUSTAINS Defendant's Plea-in-Bar and Demurrer and DENIES Plaintiff's discovery motions. The Court asks Defense counsel to present a Final Order for entry on August 5, 2016 that reflects the rulings above and dismisses with prejudice Plaintiff's motion for judgment. Any unpaid discovery sanctions should be reduced to a judgment. Either party may append objections to the Order as a separate page.

Sincerely,

John M. Tran
Judge, Fairfax Circuit Court