

VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JOHN H. BIRDSALL,

HARRY BURN,

REYNOLDS COWLES,

LANDON HILLIARD,

KIWI HILLIARD,

JOHN G. MACFARLANE, III

DUDLEY MACFARLANE,

and

JACK SANFORD, JR.

Plaintiffs

v.

Case No. CL17000001-00

FOXFIELD RACING ASSOCIATION, INC.

and

THOMAS J. DICK,

MOTION TO DISMISS COUNT I OF THE PLAINTIFFS AMENDED
COMPLAINT FOR LACK OF STANDING AND LACK OF SUBJECT MATTER
JURISDICTION

Defendants Foxfield Racing Association, a Virginia nonstock corporation, and Thomas J. Dick the corporation's sole director, by counsel, move to dismiss Count I of the Amended Complaint of the Plaintiffs on the following grounds:

Introduction and Relevant Facts

Count I of the Plaintiffs Amended Complaint claims that there was a trust created in the Will of Mariann S. De Tejada, hereinafter Tejada, that the alleged trust is controlled by the Virginia Uniform Trust Code, that provisions of the VUTC have been violated, and the Plaintiffs claim that they are beneficiaries of an alleged trust and that there is a justiciable controversy over which this court has jurisdiction and they request that the Court enter a Declaratory Judgement.

The following facts provide a framework which may assist the Court in determining Tejada's intentions as expressed in the language of her Will. In 1980 Tejada, contacted attorney J. Benjamin Dick, hereinafter Dick, and hired him to investigate and if necessary take action to recover assets from a trust to which she was the named beneficiary. Tejada suspected that perhaps hundreds of thousands of dollars had been withdrawn from the trust as a result of mismanagement or defalcations by the various trustees and the bank and she granted Dick a Specific Power of Attorney which authorized him to investigate this matter fully and recover funds if any were due. (Defendants' Exhibit 1) As a result of her investigations into the trust and the trustees actions she terminated the trust and demanded an accounting from the trustees who she believed had mismanaged properties which had been placed in trust for her benefit. (Defendants Exhibit 2) Proceeds and assets from the same trust (the California Trust) which she referred to in Article VI of her Will (Plaintiffs Exhibit B) were used to

fund the local trust. Dick did in fact pursue the recovery of funds from the California trustee and the revocable trust Tejada herself had established (Defendants Exhibit 3) and thereafter Mariann Tejada trusted Dick explicitly and implicitly and eventually involved him in the corporate governance of Foxfield Racing Association because of his loyalty to her. Tejada appointed Dick along with John H. Nelson as the Executors of her estate in Article VII of her Will and memorializes her special belief in their loyalty to her on the face of the Will.

“I have explicit trust in their loyalty to me and their dedication to carrying out my wished as stated in this Will, and I wish to give them the broadest possible authority in carrying out my wishes as stated herein.”

Tejada’s Will was drafted three years after she hired Mr. Dick to pursue assets which were improperly removed from her trust and by that time her attitude on trusts and trustees had soured. Her will did not create a trust, name a trustee, or designate beneficiaries because Tejada did not intend to create a trust. Her bitter experiences as the beneficiary of the local trust in Virginia as well as the trust in California convinced her that she wanted nothing to do with trusts and the resulting entanglements with trustees. As a result of those her negative experiences she did, with clear and unequivocal language, leave the Foxfield Property, the residuary estate and the bulk of her real and personal properties to Foxfield Racing Association the nonstock corporation which she had created in 1977 as Foxfield Steeplechase, Inc.. Except for the references to the California trust, the words trust, trustee and beneficiary do not appear in her will. Tejada used this nonstock corporation to conduct the Foxfield Races from 1977 until her death on December 26, 1985.

Argument

I. The will did not establish a trust and Tejada chose a Virginia Nonstock Corporation as the vehicle for accomplishing her purposes as set out in her will and Plaintiffs lack standing to intervene in corporate affairs.

A Virginia Nonstock Corporation can have an unlimited life as long as the corporate charter remains active and additionally the corporation provides unfettered authority for its officers and better protections for its directors than a trust as envisioned in the Virginia Uniform Trust Code. Tejada's difficulties with the revocable trust which she herself set up and the California trust referred to in her Will caused her to use corporate ownership to accomplish the purposes expressed in the will. Her corporation, Foxfield Racing Association, which would survive her death, did not require the consent or action of trustees, a prospect she wanted to avoid, and the directors who had been actively involved in corporate governance for eight years, were familiar with the races and Tejada's desires and could continue to benefit from the control and protection of the same corporation which had been chosen by Tejada as the useful and preferred vehicle for managing the Foxfield Races.

Tejada herself formed this nonstock corporation and its express purpose was "to promote the sport of steeplechasing in the Commonwealth of Virginia"... the Articles state that "... the corporation shall have the power to own, lease, buy, sell or rent steeplechase and other horse related facilities and promote and operate steeplechase race meets." (Plaintiffs Exhibit B) No limitations were placed upon the corporation's authority to conduct its corporate affairs and Code of Virginia Section 13.1- 825 provides

that a non-stock corporation incorporated under the act "...has the purpose of engaging in any lawful activity..." Tejada used this corporation to conduct the business of holding the Foxfield Races during her lifetime and she was personally involved in the day to day operations of both the races and the corporation naming herself as one of the original directors . The language and terms of her will clearly demonstrate that she intended to fund the Foxfield Racing Association so that it could conduct the Foxfield Races after her death. She was quite familiar with trusts as the beneficiary of the trust mentioned in Article VI (2) of her Will and she avoided the use of the words trust or trustee throughout the Will because she did not desire to set up a trust. She had soured on the trust as an appropriate vehicle for accomplishing her purposes because of the poor treatment she had received by the trustees of the California trust. Under the General powers provisions of the nonstock corporation statutes Section 13.1-826 Foxfield Racing Association "...has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including, without limitation, power: A (4) To sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property;". Clearly Foxfield Racing Association which owns the Foxfield Property by general warranty deed has the legal authority to sell that property without considering the wishes of its neighbors if that is in the best interest of the corporation.

The duties of the directors of Foxfield Racing Association a non-stock Virginia corporation are set out in Code of Virginia Section 13.1-870 General standards of conduct for directors. (A.) "A director shall discharge his duties as a director , including his duties as a member of a committee in accordance with his good faith business judgment of the best interests of the corporation." This is a different standard than that

required of a trustee pursuant to the Virginia Uniform Trust Code and a director of Foxfield Racing Association must discharge his duties to promote the best interests of the corporation and not cater to the interests of the neighbors and horse racing fans who are the Plaintiffs. The Plaintiffs have no standing to intervene in corporate affairs and even if a trust had been established they are not settlors or trustees or other parties with the authority to intervene in trust affairs.

II. Provisions of the Virginia Nonstock Corporation Act apply and not provisions of the Virginia Uniform Trust Code.

In *Dodge v. Trustees Of Randolph- Macon Woman's College* , 276 Va. 10, 661 S.E. 2d 805 (2008) the Virginia Supreme Court sustained a trial court decision to grant a Demurrer filed by the Trustees when the unsuccessful plaintiff argued that the trust provisions in the Code of Virginia and the duties it imposed upon trustees applied to a Virginia nonstock corporation. In rejecting the appellants argument that the nonstock corporation became a trust controlled by the obligations and standards imposed by the Uniform Trust Code the Supreme Court in an opinion authored by Chief Justice Hassell, Sr. held that : “ This statute does not authorize a circuit court to declare by judicial fiat that a nonstock charitable corporation is a trust. We hold that the College is not a trust and, therefore, the College is not subject to Code 55-541.02 (B). p. 810 It is worth noting that the nonstock corporation in that case was a charitable corporation which accepted contributions from donors intended to benefit the college and Foxfield Racing Association does not. Also the Attorney General had intervened in that case and both of those factors, which are absent in the facts before this court, are arguably stronger grounds for a court’s intervention. Despite those additional factors the Virginia Supreme

Court held that intervention by the Attorney General and the application of trust duties under the guise of protecting charitable assets was not allowed.

“In summary, we hold that Code 2.2-507.1 does not impose any duties upon a nonstock charitable corporation. We also hold that the College is not subject to the Uniform Trust Code.” P. 810

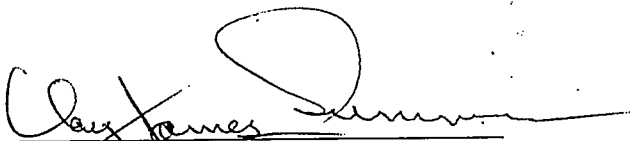
If the only issue before the court involves corporate governance then the exclusive remedies for addressing those issues lies within the Virginia Nonstock Corporation Act and this Court lacks subject matter jurisdiction to impose trustee duties, issue injunctions or declaratory judgements on behalf of these Plaintiffs as those powers are reserved to the State Corporation Commission. Commonwealth of Virginia v. The JOCO Foundation, et al. 558 S.E. 2d 280, 263 Va. 151 (2002) .

Conclusion

For the foregoing reasons, Defendants, by counsel, respectfully request that the Court enter an order dismissing Count I of the Amended Complaint with prejudice.

FOXFIELD RACING ASSOCIATION and
THOMAS J. DICK sole director

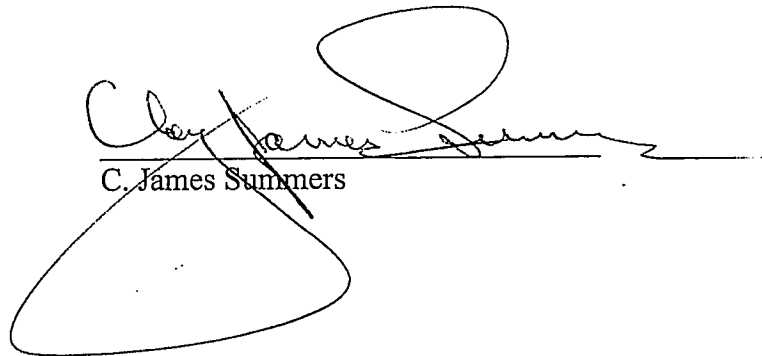
Counsel for Defendants


C. James Summers (VSB#16338)
415 Park Street
Charlottesville, VA 22902
Telephone: (434) 295-7709
Facsimile: (434) 295-3151
sumlaw01@comcast.net

CERTIFICATE

I hereby certify that I sent by first class mail postage prepaid a true copy of the foregoing Answer and Affirmative Defenses this 8th day of February 2017 to:

William H. Hurd
Ashley L. Taylor
Stephen C. Piepgrass
TROUTMAN SANDERS LLP
P.O. Box 1122
Richmond, Virginia 23218-1122



C. James Summers

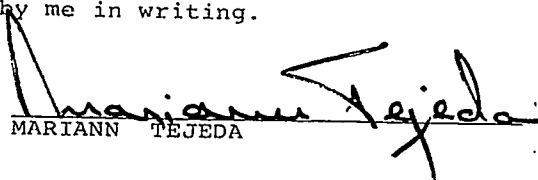
Defendants Exhibit # 1

SPECIFIC POWER OF ATTORNEY

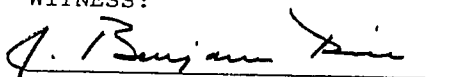
I, Mariann Tejada, being of sound mind and disposition, do hereby authorize J. Benjamin Dick, an attorney at law licensed in the State of Virginia, and John H. Nelson, a certified public accountant, licensed in the State of Virginia, and both of whom I have duly hired to work in conjunction together for the expressed purpose for which I hereby state to review all and every record, correspondence, and things of any kind whatsoever in the hands or possession of others, be it a state, federal, private or public organization and corporation to include my present attorney, Frederick N. Colmer, and CPA Peter Dickinson, and Mr. Bruce B. Galloway, and Alexander von Thelen of the Fidelity American Bank of Charlottesville, among others who have or are dealing with my estate, affairs, records, and the like, all of whom I have in the past or present, presented or entrusted my personal affairs, real, personal, or otherwise, and that said J. Benjamin Dick and John H. Nelson are to have full and complete access to all of my records, correspondence, papers and things kept by any persons or organizations as aforesaid, particularly such persons or corporations entrusted as aforesaid including but not limited to any and all records, correspondence, ledgers, and the like in any way related to my real property, trust estate, investments, personal property, corporations owned by me, my monies, funds, checking and savings accounts, tax returns, financial statements, check and stubs related thereto, or the same of any nature. I hereby command all said persons, organizations, corporations, including my present attorney, Frederick N. Colmer and my trustees of my trust to reveal any and all other records of any kind whatsoever

that J. Benjamin Dick and John H. Nelson shall request on command within time periods as they shall designate.

I hereby command any and all such persons, corporations, organizations, attorneys or their agents or any persons or employees of the aforesaid with whom my estate and personal affairs of any nature or kind have been worked upon or entrusted to, that they honor all such requests made by my attorney, J. Benjamin Dick, and my certified public accountant, John H. Nelson, unless otherwise directed personally by me in writing.


MARIANN TEJEDA

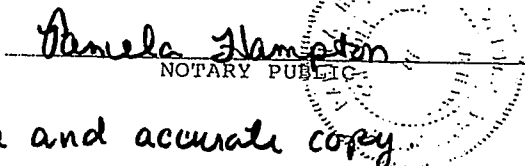
WITNESS:



NOTARY

The following instrument was acknowledged before me on this ^{5th} day of March, 1980 and that Mariann Tejada did on oath swear to the truth of the above and affixed her signature hereto.

My Commission Expires: July 25, 1983


NOTARY PUBLIC

I certify this as a true and accurate copy.

Pamela Hampton

Defendants Exhibit # 2

SUBJECT: REVOCABLE TRUST MADE IN ALBEMARLE COUNTY, VIRGINIA
TO: Trustees of the Trust and all pertinent parties thereto

APRIL 25, 1980

REVOCATION OF REVOCABLE TRUST AND OTHER MATTERS

(Executed in the State of Virginia, Albemarle
County, Virginia)

I, MARIANN SEYMOUR DE TEJEDA, the GRANTOR of a certain trust document dated January 27th, 1970, the trust being a REVOCABLE TRUST executed by my expressed authority before Carolyn S. Montgomery, a notary public, and in which I duly named as "Trustees", Fred N. Colmer (an attorney at law) and Alexander J. V. Thelen, and I being of sound mind and competent to do so of my own free will and pursuant to ARTICLE XII of the Revocable Trust, DO HEREBY REVOKE IN ITS ENTIRETY SAID REVOCABLE TRUST and DEMAND of the the Trustees a complete accounting consistent with the laws of the situs of the trust, the laws of the Commonwealth of Virginia pursuant to Article XIV of the said Revocable Trust.

FURTHER, I REVOKE the said trust effective April 25, 1980, and direct pursuant to my power reserved in the said trust, ARTICLE XII, that the Trustees are hereby notified in writing as attested to by my signature afixed to this document and duly notarized by a Notary Public authorized to acknowledge my signature in execution of this revocation of my trust, April 25, 1980.

FURTHER, I am a resident of Albemarle County, Virginia, residing at Laurel Ridge, my home and farm. I further note that Fred N. Colmer, both my attorney and trustee, is a resident of Albemarle County in Ednam Village and whose office is located at 105 West High St., Charlottesville, Virginia. I note further that Alexander J. V. Thelen, my other trustee named in the trust, resides at Chathill on Bloomfield Rd., Charlottesville, Virginia and is employed at the Fidelity American Bank of Charlottesville, 200 East Main Street, Charlottesville, Virginia.

(Continued - Revocation of Trust by Mariann Seymour De Tejada)

PAGE TWO OF THREE

FURTHER, I expressly revoke all power of attorneys given unto my trustees at any time and Fred N. Colmer shall cease as my attorney

FURTHER, pursuant to Article XII of the said Trust, I direct my trustees to convey to me, the Grantor, all properties of the trust estate and corpus, real, personal, tangible, intangible, or otherwise wherever situated and of whatever kind immediately and to follow my written directions as fiduciaries under the laws of Virginia are bound to do as follows pursuant to Article XII&XIV and which directions I made further add to or amend ninety days hence

- 1) Immediately upon the deliver of this instrument as executed, the trustees will account for, transfer, assign, pay, deliver and convey all of my assets directly to me in my lawful name and in care of my duly designated agents, namely:

J. BENJAMIN DICK, ATTORNEY AT LAW
of COUNSEL
421 Park St. Charlottesville, Virginia
22901

JOHN H. NELSON, CPA
c/o The Law Office of J. Benjamin Dick
421 Park St.
Charlottesville, Virginia 22901

- 2) That any claimed reasonable charges by the trustees for the above be tendered in itemized form to the said designated agents.
- 3) That any state, federal, or local laws in regards to my trust and regarding compliance therewith be noted and complied with thereto and my designated agents be so notified of such requirements under said laws.
- 4) That all records, powers of attorneys, and other documents having any legal effect whatever or otherwise be turned over to my designated agents forthwith.
- 5) That the Trustees are on notice and to their own peril with my right to hold the trustees liable that they are of April 26, 1980 unauthorized to act in my name or as Trustees in any regard as to existing Banking accounts, stocks, bonds, securities, or other property constituting my estate of the trust, be it real, personal, tangible or intangible, and that the Trustees shall so notify any and all corporations, organizations, or any other legal entity or person that the trustees are so unauthorized to act on my behalf and that the Trustees shall do the same immediately.
- 6) That all stock brokerages, stock exchanges, and all other corporations, partnerships, Banks, realtors, and like legal entities and persons shall be notified by the Trustees that their power to act on my behalf under the trust or otherwise has been revoked effective this 26th day of April, 1980, as of the start of this business day, April 26th, 1980.

(Continued - Revocation of Trust by Mariann Seymour De Tejada)

PAGE THREE OF THREE

FURTHER, I hereby deny any indemnification of the trustees their successors, or assigns, from any loss, costs, liability and expenses that they may wish to claim against my estate or of the trust by reason of their duties and in following my written instruction here so noted pursuant to Article XII of my Revocable Trust.

TO TRUSTEES AND WHOM IT MAY CONCERN

FURTHER, I do hold harmless my designated agents, namely J. Benjamin Dick and John H. Nelson in their professional and personal capacities to complete and comply with my wishes as noted herein and from any claims of the trustees against them.

FURTHER, I hereby grant to J. Benjamin Dick and John H. Nelson in their professional capacities a SPECIAL POWER OF ATTORNEY to do any and all necessary things as noted herein and to act on my personal behalf with all legal entities, be it a person, corporation, Banks, organization, partnership or any other entity recognized by the laws of Virginia and the United States, or otherwise, so to meet my obligations, debts, bills, and otherwise, and to handle my assets of my estate, real, personal, tangible or intangible property and assets, to settle my accounts with the Trustees, to bring any necessary legal action, and to hire with my permission after consultation any necessary and desired consultants of the learned professions or otherwise to assist them in their charge that I hereby expressly give to them. In witness WHEREOF, I do sign my name of my own accord.

J. Benjamin Dick
Witness

Mariann Seymour De Tejada (SEAL)
MARIANN SEYMOUR DE TEJEDA, GRANTOR

STATE OF VIRGINIA, TO WIT:

I, Pamela Hampton, Notary Public for the Commonwealth at Large, do certify that Mariann Seymour De Tejada, did appear before me this 25th day of April 1980 and did acknowledge the above and revocation of her trust before me and affixed her signature thereto.

GIVEN UNDER MY HAND THIS 25th day of April, 1980.
My Commission expires: July 25, 1983

Pamela Hampton
Notary Public

Defendants Exhibit # 3

LAW OFFICES OF
J. BENJAMIN DICK & JOHN MICHAEL CASSELL
421 PARK STREET
CHARLOTTESVILLE, VIRGINIA 22901

October 13, 1982

(804) 977-6807
(804) 296-7202

Thomas D. Benson
Senior Trust Officer
Sumitomo Bank of California
Sumitomo Bank of California
365 California Street
San Francisco, California 94184

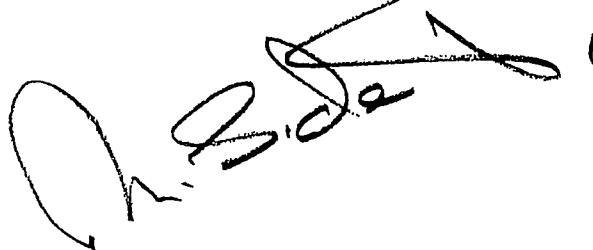
RE: Mariann Tejada

Dear Mr. Benson:

Mrs. Mariann Tejada by counsel as per her duly notarized affidavit attached hereto, to be consistent with our conferences with your Bank in San Francisco hereby requests under the terms of the trust for her reasonable support, care, comfort and benefit (without regard to the trust remainderman) an invasion by the Trustee of the corpus of her inter vivos trust. It is my understanding that cash funds as well as securities are in the trust and that those constitute the corpus.

Supporting documents are enclosed to allow the Trustee a record of need by the Trustor. As those monies are Mrs. Tejada's contributed funds to the Trust deposited by her, we cannot over state that she should be allowed to invade and that an invasion is for her well-being. By research of counsel in California, Mr. Geoffrey Knudsen, the legal authority is clearly supportive of allowing the invasion without Mrs. Tejada having to further deplete her outside assets as she has so done.

We would ask on her behalf that you disburse forthwith a check to the Federal Land Bank of Charlottesville in the amount of \$29,528.42 (plus any late charges) to cover her semi-annual principal and interest payment to that lending institution (Attachment "A".) This outstanding debt created by the circumstances noted to you before and as noted in a letter written to Crocker Bank on March 17, 1981 (Attachment "H") is one which seriously impairs Mrs. Tejada's overall estate and her earnings to cover living expenses and personal obligations.



Page Two
October 13, 1982

Thomas D. Benson
Sumitomo Bank of California

We would ask also on her behalf that a check be issued to the Federal Land Bank in the amount of \$275,000.00 to substantially retard her overall indebtedness. (Attachment "B".) This will decrease considerably her debt service that is currently eroding her overall existing assets here and infringing substantially on her yearly living stipend from the investments her stock brokerage house makes to assure her an income that she has been accustomed to for her support, care, and comfort.

We would ask on her behalf that a check be issued to the Virginia National Bank in Charlottesville in the amount of \$25,020.14 to cover her obligation at the lending institution for a time note issued to cover her living and employee tax expenses. (Attachment "C".)

Mrs. Tejada further requests an invasion to cover her out of pocket expenses toward medical, accounting and attorney fees necessary to correct her personal problems deriving from the circumstances previously documented to your Bank in that letter to Crocker Bank. The check should be made payable to her. Previous invasions by the history of the file allowed medical and legal expenses. The figure paid out by Mrs. Tejada for legal and accounting services from April 1980 for Mr. Nelson and myself is marked in yellow. (Attachment "E".) (Her CPA has provided that accounting.) Of that amount, 50-75% of those out of pocket expenses are related to the problems explained to Crocker Bank in the letter of March 17, 1981. An invasion to cover medical and Mr. Nelson's and my legal expenses is also requested.

Mrs. Tejada wishes for the remainder of the corpus remaining in your care to be invested in the most aggressive manner to secure the greatest return for her money vested with your Bank. She is in this stage of her life and with her health interested in you producing income of any corpus left in the greatest amount allowable by the markets.

Any market transactions to carry out this invasion or of the investment of the remaining corpus she has authorized (Affidavit, attachment "F") her local stock brokerage firm per their agent, Michael Miller, to so transact for her and to counsel with you on buying, selling, and making investment recommendations to the Trustee per the terms of the trust, whereby, she as the Trustor is to have her input on the same. Mr. Miller has assured Mrs. Tejada that his firm can meet any discounts or other special rates offered by competing firms dealing with your Bank in the San Francisco area.

Page Three
October 13, 1982

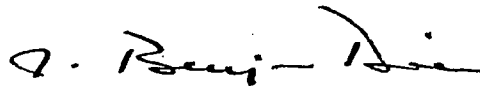
Thomas D. Benson
Sumitomo Bank of California

I wish to point out that Mrs. Tejada has seen her assets existing in 1980 eroded largely by her obligations not entirely of her own making that has decreased her assets managed here. Had she had a previous invasion, it is our professional opinion that such an invasion timely made would have minimized her losses. This did not occur. For one mere example, she would not have had to put out \$59,000.00 a year in debt service to the Federal Land Bank and those monies could have been aggressively used for maximum returns.

Mrs. Tejada existing assets are Attachment "D".
Her sales of existing securities for funds is Attachment "G".
Her stockbroker's recommendations are Attachment "I".

Due to that necessary depletion of Mrs. Tejada's assets here to meet her living expenses and personal obligation which we feel could have been considerably less had an invasion occurred as formerly requested of the Crocker Bank some time ago, we must now urge your immediate action on this request.

Respectfully,



J. Benjamin Dick
of Counsel

JBD/ljm

Enclosures

cc: John Nelson, CPA
Geoffrey Knudsen, Esquire