NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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March 2, 2018

John A.C. Keith, Esquire
Michael K. Kim, Esquire
BLANKINGSHIP & KEITH, P.C.
4020 University Drive, Suite 300
Fairfax, VA 22030
mkim@bklawva.com

Michael W. Robinson, Esquire
VENABLE, LLP
8010 Towers Crescent Drive
Suite 300
Tysons, VA 22182
mwrobinson@Venable.com

Counsel for Plaintiffs

Bethany R. Benes, Esquire
R. Peyton Mahaffey, Esquire
William J. Bethune, Esquire
McCANDLISH LILLARD, P.C.
11380 Random Hills Road, Suite 500
Fairfax, VA 22030
bbenes@mccandlishlawyers.com

Counsel for Defendant

Re: *Logan Antigone, et al. v. Jay C. Taustin*, Case No. CL-2017-16560
Motion Craving Oyer; Letter Opinion

Dear Counsel:

The relevant question presented is whether a defendant may crave oyer for documents other than deeds or letters of probate and administration. The court holds that a defendant may

OPINION LETTER

not do so, outside some narrow, inapplicable exceptions that include (1) the agreement of the parties or (2) supplements to documents related to deeds or probate already attached to a complaint. Therefore, Defendant's Motion Craving Oyer is denied.

The plaintiffs filed a Complaint seeking a Declaratory Judgment and other relief related to the ownership and control of some limited liability companies. The defendant subsequently filed a Motion Craving Oyer, seeking to add to the Complaint a variety of documents, including articles of incorporation, operating agreements, amendments to operating agreements, a settlement agreement in a related case, and two confessed judgment promissory notes. He argues that the contents of those documents form the basis of the Complaint and were referenced therein.

The practical effect of successfully craving oyer is that a court "in ruling on a demurrer may properly consider the facts alleged [in a Complaint] as amplified by any written agreement added to the record on the motion." *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997) (brackets supplied). It is such a powerful tool that "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Id.*

At common law, the Oyer Doctrine could only incorporate deeds or letters of probate and administration. *Langhorne v. Richmond Ry. Co.*, 91 Va. 369, 372 (1895). Prior to 1977, a statute addressed the concept of oyer, but this statute was not included in the Code when it was substantially revised that year.[1]

The Oyer Doctrine has expanded in two ways. First, while defendants could originally crave only sealed instruments in the permitted categories of deeds or letters of probate and administration, the Supreme Court of Virginia expanded the types of documents subject to oyer to include signed contracts not under formal seal within the permitted categories. *Grubbs v. National Life Maturity Ins. Co.*, 94 Va. 589, 591 (1897). The Supreme Court of Virginia further expanded the doctrine to include other, "unsealed" records if it was necessary to supplement records already attached to a Complaint in a case within the permitted categories. *Culpeper Nat'l Bank v. Morris*, 168 Va. 379, 382 (1937).

The second way the Supreme Court of Virginia has expanded the Oyer Doctrine is when parties mutually consent to oyer in a given case, which can be described as "oyer by agreement."[2] In those instances, which may include oyer for documents otherwise outside the permitted categories of deeds or probate, Virginia courts treat the newly attached documents as part of the Complaint. *See Smith v. Wolsiefer*, 119 Va. 247 (1916). Virginia Appellate courts do the same in cases where oyer is unopposed at the trial level. *See Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997); *Hechler Chevrolet v. General Motors*, 230 Va. 396 (1985).

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[1] *See* Virginia Code § 8-105 (repealed 1977). *See* editor's notes to Virginia Code § 8.01-1 for a history of the substantial statutory changes in 1977.

[2] This is a term coined by this judge, not the Supreme Court of Virginia.

However, the Supreme Court of Virginia has not explicitly expanded the Oyer Doctrine beyond deeds or letters of probate and administration. The parties to this case have presented no Supreme Court of Virginia opinions, and this court has found none, where a defendant has successfully craved oyer for corporate documents or other contracts over a plaintiff's objection.[3]

Defendant argues that the Supreme Court in *Culpeper* expanded the Oyer Doctrine to permit oyer for documents of any category – even on a contested basis. *Culpeper*, in the context of a will contest, held that once the plaintiff offered edited parts of a lower court record along with its Complaint, the defendant could crave oyer for the rest of the record to make it complete. *Culpeper*, 168 Va. at 382.

The key point, however, is that the context of the oyer in that case was "probate" – one of the permitted categories eligible for oyer under Common Law. Within that specific context the *Culpeper* Court makes an otherwise sweeping statement embraced by the defendant in the case at bar as well as various modern Circuit Courts that have cited the language to justify expanding oyer to include documents of any category: [4]

> No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. . . . When a court is asked to make a ruling upon any paper or record, it is the duty to require the pleader to produce all material parts.

Culpeper, 168 Va. at 382-383. However, if the Court in *Culpeper* intended to broaden the permissible categories of oyer, it certainly would have said so as it dramatically expanded the scope of a Common Law doctrine. Instead, the Court, writing to an audience in 1937, may have assumed that everyone understood the long-time limitations of oyer.

There have been efforts to persuade the Supreme Court of Virginia to expand the Oyer Doctrine. A committee of the Boyd-Graves Conference[5] on September 28, 2010, recommended

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[3] Defendant points to *Macon v. Crump*, 5 Va. 575, 581 (1799) and *Byars v. Thompson*, 39 Va. 550, 561 (1841) to show that prior to *Langhorne* the Supreme Court of Virginia granted oyer for matters other than deeds or letters or probation and administration. However, in *Byars*, the defendant craved oyer of a "bond." A deed is defined as the method by which the title of real estate is transferred from one person to another. *American Net & Twine Co. v. Mayo*, 97 Va. 182 (1899). A "bond" is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. *Preston v. Hull*, 64 Va. 600 (1873). In *Macon*, the defendant craved oyer for materials related to a deed. *Macon*, 5 Va. at 581 ("The declaration states a profert of the agreement; but does not state a profert of the award; which is equally necessary, with the deed, to make out the cause of action."). In any event, *Langhorne* is the older case on point.

[4] *See, e.g., Penney v. Brock*, 84 Va. Cir. 459 (Accomack 2012) (granting oyer as to "Order Confirmations"); *Resk v. Roanoke Co.*, 73 Va. Cir. 272 (Roanoke 2007) (granting oyer to a Traffic Impact Analysis Report, design guidelines, meeting minutes, and Board agenda materials); *Studio Ctr. Corp. v. Ferraro*, 72 Va. Cir. 518 (Norfolk 2007) (granting oyer for an employment agreement).

[5] For an explanation of the influence of the Boyd-Graves Conference, *see Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 150 n.14 (2017). The Conference is very well respected. It is common to see the Conference's legislative bills in the General Assembly marked "this is a recommendation of the Boyd-Graves Conference." *See, e.g.*, HB 1024 (2018), http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB1024.

amending Rule 3:7 of the Rules of the Supreme Court of Virginia to permit oyer for any instrument upon which a plaintiff maintains that a cause of action is founded.[6] However, on August 31, 2011, the Conference didn't have a consensus and did not present the proposed rule to the Supreme Court.[7]

Professor John L. Costello, in his treatise *Virginia Remedies*, explains some rationales for not expanding oyer. John L. Costello, *Virginia Remedies* § 7:09[3] (3d ed. 2005). He notes that motions craving oyer bypass ordinary discovery and the salutary processes for the admission of evidence. *Id.* at 7-31. He also cites Virginia's strong public policy against taking cases away from juries. *Id.* at 7-32.

While the Supreme Court of Virginia has not expanded oyer, and the legislature has eliminated mention of it from the Code, Circuit Courts within the past few decades have expanded the doctrine to such a degree that Motions Craving Oyer are now a routine part of modern pre-trial procedure. One Circuit Court wrote:

> [Defendant] relies upon some very old decisions of the Virginia Supreme Court limiting the right to crave oyer to deeds and letters of probate and administration and not to written contracts. *See, e.g., Smith v. Wolsiefer*, 119 Va. 247, 250 (1916). More recent decisions, however, have apparently expanded the application of oyer to written contracts that form the basis of a claim. *See Ward's Equipment v. New Holland North America*, 254 Va. 379, 382-83 (1997) (Oyer was taken of a written dealer agreement between the parties . . .).

Colonna's Shipyard, Inc. v. Alpha Pipe Co., 2012 Va. Cir. LEXIS 210, at *5 (Norfolk 2012).

However, the cited "recent decision," the Supreme Court of Virginia's *Ward's Equip.* case, involved an *unopposed* Motion Craving Oyer. The Supreme Court of Virginia did not opine on the propriety of granting oyer in that case. It simply accepted that the litigants own decision to amplify the Complaint with oyer. It didn't compel the plaintiff to attach an out-of-category document to it. This makes sense when one considers that the plaintiff produces the Complaint in the first instance – it can certainly add to it by agreement, or voluntarily upon the suggestion of an opponent.[8]

To illustrate the extent of modern oyer practice in the Circuit Courts, the following are a variety of written decisions expanding the Oyer Doctrine. However, they are not anchored by a Supreme Court of Virginia opinion approving oyer expansion in a contested motion outside

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[6] Memorandum from a Subcommittee of the Virginia Bar Association to the Boyd-Graves Conference, dated Sept. 28, 2010. http://c.ymcdn.com/sites/www.vba.org/resource/resmgr/imported/10BG18.pdf.

[7] Memorandum to the Boyd-Graves Steering Committee, dated Aug. 31, 2011. http://c.ymcdn.com/sites/www.vba.org/resource/resmgr/imported/Editor%20Notes%202010%20Boyd-Graves.pdf. (A previous effort was also aborted. *See* Virginia Bar Assn. J. Vol. X, Spring 1984 at 34. http://c.ymcdn.com/sites/www.vba.org/resource/resmgr/vbaj/Pre1993/Vol_X_No2_Spring1984.pdf?hhSearchTerms=%22oyer%22.

[8] Naturally, parties need leave of court to amend pleadings. However, leave is liberally granted. Va. Sup. Ct. R. 1:8.

deeds or letters of probate and administration: *Fielder's Choice Enter. v. Augusta Cty.*, 92 Va. Cir. 66 (Augusta 2015) (oyer granted for a bid form); *Schur v. Sprenkle*, 86 Va. Cir. 455, 461 (Richmond 2013) (oyer granted for an operating agreement); *Stumpf v. Brown Distrib. Co.*, 79 Va. Cir. 284 (Richmond 2009) (oyer granted for a franchise agreement); *Ragone v. Waldvogel*, 54 Va. Cir. 581 (Roanoke 2001) (oyer granted for sales contract); and *Spiller v. James River Corp.*, 32 Va. Cir. 300 (Richmond 1993) (oyer granted for employment contract). In addition, this court is aware of many unpublished orders granting or denying motions craving oyer without regard to the subject matter being deeds or letters of probate and administration. Against this wave, the court is aware of one Circuit Court opinion that criticized the practice of oyer, calling is "archaic" and writing that it should be avoided. *Glass v. Trafalgar House Prop.*, 58 Va. Cir. 437, 439 (Loudoun 2002). This, though, is a modern minority position among Circuit Courts.

The Circuit Court expansion of oyer is unsupported. If the legislature wishes to codify the Oyer Doctrine, it can do so through a statute. If the Supreme Court wishes to expand the Oyer Doctrine, it can do so through a Rule . . . or by reversing this judge's opinion if it is so appealed. Until any of these things happen, however, oyer is a very old, rarely applicable doctrine. The defendants in the case at bar do not seek oyer in connection with deeds or letters of probate and administration and, instead, seek various corporate documents. There are no documents already attached to the Complaint that can be supplemented. The plaintiff in this matter does not agree to the motion. Since the subject matter is outside the scope of oyer and since the approved exceptions do not apply, the Motion Craving Oyer is denied. An Order is attached to this opinion.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Logan Antigone, et al.,	)	
Plaintiff,	)	
	)	**CL-2017-16560**
v.	)	
	)	
	)	
Jay C. Taustin,	)	
Defendant.	)	

ORDER

THIS MATTER CAME BEFORE THE COURT on Defendant's Motion Craving Oyer on February 9, 2018, and for the reasons stated in the accompanying letter opinion that is incorporated in this Order by reference, it is hereby

ADJUDGED and ORDERED and DECREED that Defendant's Motion is DENIED with prejudice.

Entered this 2nd day of March 2018.

[redacted]

David A. Oblon
Judge, Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRIGINIA.