



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 15, 2021

### **LETTER OPINION**

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Re: *Whitehall Farm, LLC v. Whitehall Farms, LLC, et al.*  
Case No. CL-2021-3114

Dear Counsel:

This cause comes before the Court to determine how the affirmative equitable defense of laches applies to a claim of trademark infringement under Virginia state law.

**OPINION LETTER**

The Court is presented with three distinct questions in evaluating whether to grant Defendants' Plea in Bar alleging that laches forecloses Plaintiff's suit: (1) whether this Court should adopt the guidance of the federal courts in applying laches to Virginia trademark law; (2) whether the Defendants placed before the Court sufficient evidence to sustain the defense of laches; and (3) whether the defense of laches, if denied at the plea in bar stage, may be reasserted at trial.

The Court finds, first, that the standard for the applicability of laches in the Virginia state trademark law context is supplied persuasively by federal precedent, which is fact-dependent, and required Plaintiff to act timely once it knew or should have known of the infringement. The Court further finds the Defendants did not place before the Court sufficient undisputed evidence to sustain the defense of laches, failing to prove the delay in bringing suit was unreasonable and that the Defendants suffered undue prejudice. Lastly, the Court holds the Defendants' failure to prove laches at the plea in bar stage effectively forecloses the opportunity for the defense to be reasserted at trial, because the finding regarding the viability of the Defendants' affirmative defense of laches is a decision on the merits.

Consequently, the Court denies Defendants' Plea in Bar asserting the defense of laches, with prejudice.

## **BACKGROUND**

Whitehall Farm, LLC ("Plaintiff") registered its trademark, "Whitehall Farm," on October 20, 2020, with the Virginia State Corporation Commission. Prior to the registration of the trademark, the Plaintiff's business was in operation since 1947. In 2002,

the business converted to a limited liability corporation. The Plaintiff found Whitehall Farms, LLC, Whitehall Farms Property, LLC, and Whitehall Farm Events Barn, LLC (collectively, "Defendants") advertising as "Whitehall Farm" or "Whitehall Farms" on a wedding website in May of 2020. The Defendants maintained to have used the name "Whitehall Farms" since 1959. For at least sixty-one years, both Plaintiff and Defendants operated businesses under the name of "Whitehall Farms," "Whitehall Farm," or some other variant of similarity.

On at least one occasion Plaintiff's business was confused with Defendants' business at the Culpeper Farmer's Cooperative. (Compl. ¶ 35.) Plaintiff claims to have received miscommunications for events happening at Defendants' property, and that it was incorrectly tagged on a Facebook page by a vendor meaning to tag the Defendants. (Pl.'s Opp. to Def.'s Plea in Bar at 2-3.) In August 2021, Plaintiff received an invoice, which was intended for Defendants' principal, Jeff Waters. (*Supra* text accompanying note 1.)

Plaintiff filed its trademark infringement complaint March 2, 2021. On March 29, 2021, Defendants responded by filing the Plea in Bar, object of this opinion.

## ANALYSIS

### I. **Federal Precedent Applies Persuasively to Evaluation of the Defense of Laches in the Context of Virginia Trademark Law**

The first question for the Court to resolve is whether federal precedent should be applied persuasively to evaluation of the viability of Defendants' laches defense to Plaintiff's Virginia trademark infringement claim, given the absence of specific Virginia

guiding authority. In Virginia, a certificate of registration of a trademark issued by the Commonwealth is

prima facie evidence of the registrant's ownership of the mark and of the registrant's exclusive right to use the registered mark within the Commonwealth on or in connection with the goods or services specified in the certificate, and shall be admissible in evidence as competent and sufficient proof of the registration of such mark in any actions or judicial proceedings in any court of this Commonwealth.

Va. Code § 59.1-92.6 (2021). The federal Lanham Act is substantially identical to the Virginia trademark statute. Under the federal system,

[a] certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

15 U.S.C. § 1057(b) (2021). Since there is no precise Virginia precedent as to how the defense of laches pertains to trademark claims, this Court accepts well-developed federal case law as persuasive in this context, particularly considering the Lanham Act's similarity to Virginia law regarding ownership and exclusive use. Thus, the Court employs such authority in the analysis of the questions at hand.

## **II. The Defense of Laches Was Unproven at the Hearing on the Plea in Bar**

In federal trademark infringement jurisprudence, courts apply laches to "address the inequities created by a trademark owner who, despite having a colorable infringement claim, has unreasonably delayed in seeking redress to the detriment of the defendant."

*Ray Communications, Inc. v. Clear Channel Communications, Inc.*, 673 F.3d 294, 300 (4th Cir. 2012) (citing *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461 (4th Cir.

1996)). In determining whether laches operates as a viable defense to a trademark infringement claim, the following factors are considered:

(1) whether the owner of the mark knew of the infringing use; (2) whether the owner's delay in challenging the infringement of the mark was inexcusable or unreasonable; and (3) whether the infringing user has been unduly prejudiced by the owner's delay.

*Ray Communications*, 673 F.3d at 300-301; *What-A-Burger of Virginia, Inc. v. Whataburger, Inc. of Corpus Christi, Texas*, 357 F.3d 411, 448 (4th Cir. 2004); *Sara Lee Corp.*, 81 F.3d at 461 n. 7. This Court finds Defendants failed to muster sufficient evidence and supporting law to sustain any of the aforesaid factors in favor of their laches defense, as further discussed herein below.

**A. Plaintiff Owner of the Mark Did Not Have Actual or Constructive Knowledge of the Infringing Use Until the Year 2020**

The first issue for the Court to decide is when Plaintiff first knew of Defendants' infringing use of the mark. An owner knows of the infringing use of a mark when the trademark owner has (1) actual or constructive knowledge of the infringer's use of the mark, and (2) the use of the mark causes a likelihood of confusion. See *Brittingham v. Jenkins*, 914 F.2d 447, 455-456 (4th Cir. 1990).

Here, in the Plea in Bar, Defendants failed to prove Plaintiff had actual or constructive knowledge of Defendants' infringement prior to the year 2020. Defendants claimed Plaintiff should have known of Defendants' infringing use of Plaintiff's mark because there are forty-seven other businesses operating under the name "Whitehall" or "White Hall." However, it is not proven to this Court whether the Plaintiff actually or

constructively knew that Defendants' use of "Whitehall Farms" was an infringing use of Plaintiff's mark, not just that use of the trade name existed.<sup>1</sup>

Secondly, Defendants claim the Plaintiff's predecessors were "allowing the defendants to use the name for at least fifty-five years prior to trial." (Def's Plea in Bar at 3.) Still, without evidence that Plaintiff knew the Defendants were using the mark in an infringing manner, or causing a likelihood of confusion, there is no evidence the Plaintiff allowed the Defendants use of Plaintiff's mark. The forty-seven other trade names in use might be so unrelated to the same line of business as the Plaintiff's name that it would create no likelihood of confusion between them. According to the Defendants, the number of similar trade names placed the onus of discovery of infringement on the Plaintiff, specifically, that the Plaintiff was required to seek out every business with a similar trade name and research the business of the company to determine whether there is a likelihood of confusion.

However, that is not the test for the burden Plaintiff must sustain. Rather, the test is whether the Plaintiff had actual or constructive knowledge of infringing use that was causing the likelihood of confusion. According to the Plaintiff, it only became aware of Defendants' use of "Whitehall Farms" or "Whitehall Farm" when it found Defendants' advertisement on a website. Defendants failed to prove in advancing their laches defense that Plaintiff possessed actual or constructive knowledge of the Defendants' alleged

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<sup>1</sup> "Trade name" means any name used by a person to identify a business or enterprise." Va. Code § 59.1-92.2. In contrast, "Trademark" means any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods of such person from those manufactured or sold by others." *Id.*

infringing use of Plaintiff's trademark prior to May of 2020. Therefore, this Court finds analysis of the first applicable factor is not supportive of the defense of laches.

**B. Plaintiff's Delay in Challenging the Infringement of the Mark Was Excusable and Reasonable**

The next question for this Court to decide is whether Plaintiff unduly delayed its suit against the Defendants. The defense of estoppel by laches arises "only where the plaintiff has *unreasonably delayed its pursuit of a remedy.*" *Sara Lee Corp.*, 81 F.3d at 462 (emphasis in original). The cornerstone of trademark law, then, only requires the trademark owner to sue when "the likelihood of confusion looms at large." *Id.* Therefore, the owner guarding a trademark may "delay its pursuit of a remedy until its right to protection ha[s] clearly ripened." *Id.* (emphasis added).

At the hearing on the Plea in Bar, the Defendants argued Plaintiff unreasonably delayed in bringing the suit because the Defendants' use of the trade name in dispute was in the "public domain."<sup>2</sup> Therefore, according to the Defendants, the Plaintiff had a

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<sup>2</sup> Defendants confuse the concept of when a mark is in the "public domain" with when the owner of the mark merely acquiesces to use by another. Here, the facts suggest the Plaintiff was the first to use the mark and has done so continuously since 1947, and would thus be "entitled to prevent others from using the mark to describe their own goods' in that market." *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 400 (4th Cir. 2009) (quoting *Defiance Button Mach. Co. v. C & C Metal Prods. Corp.*, 759 F.2d 1053, 1059 (2d Cir. 1985)). It is only once use of a mark is "abandoned" that the

mark returns to the public domain and may, in principle, be appropriated for use by others in the marketplace, *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 412 (7th Cir. 1994), in accordance with the basic rules of trademark priority, *Manhattan Indus., Inc. v. Sweater Bee by Banff Ltd.*, 627 F.2d 628, 630 (2d Cir. 1980); see also *McCarthy* § 17:1 ("Once held abandoned, a mark falls into the public domain and is free for all to use. *While acquiescence may bar suit against one person, abandonment opens rights to the whole world.* Abandonment paves the way for future possession and property in any other person.") (footnotes omitted).

*George & Co., LLC*, 575 F.3d at 400-401 (emphasis added). Defendants also maintain in their Plea in Bar that the Plaintiff has no right to assert exclusive use of the term "Whitehall" as it is a name in "common usage by numerous businesses for at least seventy-three years." (Def.'s Plea in Bar at 5.) Defendants add that such trade name is in use by twenty-six federally and forty-seven Virginia listed entities, accusing the Plaintiff of registering their trademark in the state system to avoid scrutiny and the potential bar posed by examination by a U.S. Patent and Trademark Office examiner. (*Id.* at 4.) If Plaintiff's registered trademark

burden to seek out infringing marks. Defendants have used the name “Whitehall Farms” since 1959 when the current owner’s parents acquired the property.<sup>3</sup> Defendants cited two periods of active use of the trade name in dispute, with a break in between due to the illness of the Defendants’ business owner. Defendants state that Plaintiff effectively “allowed” the Defendants to use the name for lengthy periods dating from 1959, prior to registering the trademark, thereby causing unreasonable delay in prosecuting the claim.

However, the second evaluative factor does not place this kind of burden on any plaintiff pressing a trademark infringement suit. Under the doctrine of progressive encroachment, the Plaintiff is allowed “some latitude in the timing of its bringing suit.”

*ProFitness Physical Therapy Center v. Pro-Fit Orthopedic and Sports Physical Therapy, P.C.*, 314 F.3d 62, 70 (2d Cir. 2002). The Plaintiff “should not be obligated to sue until its right to protection has ripened such that Plaintiff knew or should have known, not simply that defendant was using the potentially offending mark, but that plaintiff had a provable infringement claim against defendant.” *Id.* In application,

[t]he doctrine of progressive encroachment, therefore, focuses the court’s attention on the question of whether defendant, after beginning its use of the mark, redirected its business so that it more squarely competed with plaintiff and thereby increased the likelihood of public confusion of the marks.

*Id.* Thus, the Court must ponder the likelihood of confusion in the use of the trade name in question by both the Plaintiff and Defendants. *Id.* To do so, the Court may consider

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of “Whitehall Farm” were in the “public domain,” or if the term is one not subject to being trademarked, then the affirmative defense of laches would be moot because Defendants would be free to appropriate the use of the mark. This Court’s determination herein is restricted to whether the defense of laches has been proven by Defendants and does not reach other issues which may be of material dispute and the province of further resolution at trial.

<sup>3</sup> Defendants cited a belief the trade name was in use by a predecessor in interest for a further unspecified period that preceded 1959.

seven factors: (1) the strength or distinctiveness of Plaintiff's mark; (2) the similarity of the competing marks; (3) the similarity of the goods/services the competing marks identify; (4) the similarity of the facilities the two parties use in their business; (5) the similarity of the advertising used by the two parties; (6) the Defendants' intent; and (7) actual confusion. *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984).

The question, then, is not whether the Plaintiff should have known of the infringing use because the Defendants' names were in the "public domain." Rather, the proper question is whether there was a likelihood of confusion in the use of the competing trade names such that the Plaintiff had a provable claim against the Defendants. This Court finds the Plaintiff did not delay unreasonably in bringing suit because the Defendants could not show the Plaintiff had a ripened, provable trademark infringement claim other than in the year prior to the Plaintiff filing its trademark suit. In unintentional accentuation of this point, Defendants asserted in their Plea in Bar that "[f]or at least sixty-one years, both farms operated businesses under the name of 'Whitehall Farms' or some similar variant with no evidence of any confusion by any consumers." (Def.'s Plea in Bar at 3.)

Although Defendants admitted that Plaintiff's claim did not ripen during the past sixty-one years, Defendants conceded the Plaintiff discovered the Defendants advertising under the name "Whitehall Farm" on a wedding website in May of 2020. After additional research, the Plaintiff found that Plaintiff's business was being confused with Defendants' business at the Culpeper Farmer's Cooperative. (Compl. ¶ 35.) Additionally, Plaintiff cited to communications about inquiries for events happening at Defendants' property, and when Plaintiff was incorrectly tagged on a Facebook page by a vendor meaning to tag

the Defendants. (Pl.'s Opp. to Def.'s Plea in Bar at 2-3.) Additionally, Plaintiff cited to confusion in August 2021, when Plaintiff was invoiced by a vendor of Defendants, which bill was intended for Defendants' principal, Jeff Waters. (*Supra* text accompanying note 1.)

Actual confusion is an important factor in the "likelihood of confusion" analysis, and without evidence of such confusion prior to 2020, this Court cannot find that Plaintiff's suit ripened prior to that year. See, e.g., *Pizzeria Uno*, 747 F.2d at 1526. Therefore, this Court cannot find that Plaintiff unreasonably delayed in bringing suit.

### **C. The Defendants Failed to Prove They Were Unduly Prejudiced by the Plaintiff's Delay in Bringing Suit**

The third question the Court must answer is whether the Defendants were unduly prejudiced by the Plaintiff's delay in bringing suit. In *Brittingham*, the U.S. Court of Appeals for the Fourth Circuit, affirmed the trial court in part in finding "laches is not available to one who intended the unfair competition."<sup>4</sup> 914 F.2d at 457. Nevertheless, the Fourth Circuit applied laches to limit damages sought by the owner of a trademark to those incurred from the date of judgment in the trial court. *Id.* (considering prejudice to the defendant that would result from ordering disgorgement of profits pertaining to a lengthy period of delay in the owner's enforcement of its trademark).

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<sup>4</sup> Plaintiff presented no evidence that Defendants' use of the trademark in question was by "one who intended the unfair competition," so as to foreclose Defendants from being able to assert the laches at all. Even if Plaintiff's had proven such intent on the part of Defendants, as *Brittingham* makes clear, the defense of laches might still apply to limit damages if the Plaintiff delayed unduly in enforcing its claim against the Defendants that intended unfair competition. However, the evidence suggests that until the year 2020, neither Plaintiff nor Defendants were aware they were competing in a similar business in use of substantially similar trade names, and thus, no such specific intent to compete unfairly was proven at the plea in bar stage.

In contrast in the instant case, the Defendants did not even argue in their filings, nor prove at the hearing on the Plea in Bar, that any identifiable prejudice occurred to them due to Plaintiff's delay in filing suit. To the contrary, Defendants maintained that for most of their overlapping use of the similar trade names, there was no confusion between Plaintiff's and Defendants' businesses. (Def.'s Plea in Bar at 3.) While this is an issue for trial, if true, such fact may operate as a practical limit on the damages Plaintiff can demonstrate at trial for the period prior to the provable existence of any confusion among customers in conducting business with the parties. In the context of laches, however, this Court cannot find the factor of undue prejudice in support of Defendants' defense.

### **III. The Defense of Laches Should Not Be Permitted to Be Reasserted at Trial**

The third issue before this Court is whether the defense of laches may be pursued anew at trial if the defense was not sufficiently proven at the earlier hearing on a plea in bar. The Virginia Supreme Court has long held that a dismissal with prejudice after a plea in bar is "as conclusive of the rights of the parties as if the suit had been prosecuted to a final disposition adverse to the plaintiff." See, e.g., *Gilbreath v. Brewster*, 250 Va. 436, 440 (1995) (internal quotation marks and citations omitted). The Court reasoned that the dismissal "not only terminates the particular action, but also the right of action upon which it is based." *Id.* Therefore, even when the substantive claim of a plaintiff may not have been litigated on its merits on a plea in bar, any dismissal of the case arising from a plea in bar is a determination on the merits and must be with prejudice. *Id.* ("A dismissal based on a plea in bar, such as a plea of sovereign immunity, is a dismissal with prejudice.").

It logically follows, then, that a denial of a plea in bar raising a defense pretrial is an equally binding decision. While in this case the Court does not dismiss the Plaintiff's claim against the Defendants, the viability of the laches defense was tried upon evidence and decided on the merits at the Plea in Bar. Therefore, even if the Plea in Bar does not result in a dismissal of the Plaintiff's cause of action, the finding the defense of laches did not bar the suit, is a decision on the merits of that issue. "The defensive plea in bar shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). When "parties present evidence on the plea ore tenus, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support." *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019). The choice to so shorten litigation before reaching trial by jury is for the Defendants to make.

Nevertheless, while determination of an issue by plea in bar is preclusive, the trial court retains jurisdiction under Rule 1:1 of the Supreme Court of Virginia to reconsider any orders of the court, unlike is the case for issue preclusion arising from a separate previous *final* proceeding between the parties. Compare Va. Sup. Ct. R. 1:1 with *The Funny Guy v. Lecego*, 293 Va. 135, 142 (2017). Yet, Rule 1:1 also contemplates that any ruling respecting a plea in bar is to be treated akin to a grant of summary judgment on the point in question. See Va. Sup. Ct. R. 1:1(d).

The authority of a trial court sitting without benefit of a jury to foreclose the reopening of evidence is not without limitation. The Supreme Court of Virginia has held it

was an abuse of discretion, *in a bench trial*, for the presiding judge not to reopen the plaintiff's evidence after granting the defendant's motion to strike when the omitted evidence was "purely an oversight," the witness was still in the courtroom, "the admission of his additional testimony on the point raised would not have caused defendant any inconvenience or consumed any appreciable time," and "would not have worked a surprise or injustice on defendant." *Fink v. Gas and Oil Company*, 203 Va. 86, 92 (1961). *Fink* implies that the reopening of a ruling on plea in bar would be requisite in the similarly narrow factual confines that case presented.

Nonetheless, the promotion of certitude at hearings on the merits is prevalent throughout Virginia jurisprudence. By way of example, the Supreme Court of Virginia has held that it is not an abuse of discretion for a court to refuse to reopen its ruling on a plea in bar and allow the additional testimony to be adduced when the defendant "could have presented that testimony at the hearing on the plea in bar or have requested additional time to develop this evidence at that hearing." *Hawthorne v. VanMarter*, 279 Va. 566, 579 (2010).

The common guiding thread harmonizing *Fink* and *Hawthorne* is that revisiting of a ruling on a plea in bar should occur at the time of the original hearing and not once again at trial. To do otherwise would invite litigants to test their defenses with an eye towards enlisting the courts advisory aid in improving their chances to prevail at a second attempt at trial. "[P]arties may not seek a 'second bite at the apple' simply because they desire a different outcome. To permit such attempts would transform a binding process into a purely advisory one." *Remmey v. Painewebber, Inc.*, 32 F.3d 143, 146 (4th Cir.

1994) (applying the stated principle in the context of arbitration) (internal quotation marks and citations omitted). Courts “are not constituted . . . to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.” See *Commonwealth v. Harley*, 256 Va. 216, 219-220 (1998) (internal quotation marks and citations omitted). Thus, once an affirmative defense is adjudicated by plea in bar, the defense’s sufficiency is determined on the merits and should not be permitted to be raised again at trial as the defendants have chosen their mode of final determination of the issue presented.<sup>5</sup>

## CONCLUSION

The Court has considered how the affirmative equitable defense of laches applies to a claim of trademark infringement under Virginia state law. The Court was presented with three distinct questions in evaluating whether to grant Defendants’ Plea in Bar alleging that laches forecloses Plaintiff’s suit: (1) whether this Court should adopt the guidance of the federal courts in applying laches to Virginia trademark law; (2) whether the Defendants placed before the Court sufficient evidence to sustain the defense of

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<sup>5</sup> Notwithstanding this holding *limited to determination of affirmative defenses*, in the instance wherein a litigant asserts by plea in bar that the trial court lacks subject matter jurisdiction to adjudicate a claim but does not prevail pretrial, the movant is not barred from raising the issue anew at trial.

“Subject-matter jurisdiction is unique.” *Watson v. Commonwealth*, 297 Va. 347, 352 (2019). It involves the judicial “power to adjudicate a case.” *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 49 (2018) (citation omitted). “Jurisdiction of the subject matter can only be acquired by virtue of the Constitution or of some statute,” *id.* at 56 (citation omitted), and it “refers to a court’s power to adjudicate a class of cases or controversies,” *In re Commonwealth*, 278 Va. 1, 11 (2009) (citation omitted). The parties cannot waive the absence of subject matter jurisdiction or confer it upon a court by their consent. *Watson*, 297 Va. at 352. If a court enters an order outside of its subject matter jurisdiction, the order can be set aside the day after its entry or a century later. In the eyes of the law, such an order is not merely an erroneous order — it is no order at all. *Cilwa v. Commonwealth*, 298 Va. 259, 266 (2019).

laches; and (3) whether the defense of laches, if denied at the plea in bar stage, may be reasserted at trial.

The Court finds, first, that the standard for the applicability of laches in the Virginia state trademark law context is supplied persuasively by federal precedent, which is fact-dependent, and required Plaintiff to act timely once it knew or should have known of the infringement. The Court further finds the Defendants did not place before the Court sufficient undisputed evidence to sustain the defense of laches, failing to prove the delay in bringing suit was unreasonable and that the Defendants suffered undue prejudice. Lastly, the Court holds the Defendants' failure to prove laches at the plea in bar stage effectively forecloses the opportunity for the defense to be reasserted at trial, because the finding regarding the viability of the Defendants' affirmative defense of laches is a decision on the merits.

Consequently, the Court denies Defendants' Plea in Bar asserting the defense of laches, with prejudice.

This Court shall enter an order incorporating its ruling herein, and this cause continues.

Sincerely,

[REDACTED]  
David Bernhard  
Judge, Fairfax Circuit Court