

**IN THE COURT OF COMMON PLEAS OF  
DAUPHIN COUNTY, PENNSYLVANIA**

MILTON PURCELL,	:	
ETHEL CAMPBELL,	:	CIVIL DIVISION
GRAHAM MCINTYRE,	:	
IVAN DIETRICH,	:	NO. 2005-CV-0463-EQ
RALPH FINK,	:	
HARVEY DEITRICH,	:	
GIRARD GAUGHAN,	:	
HARRY HEATH,	:	
ROBERT PATTON,	:	
GERALD LONG,	:	
JUNIOR VIA,	:	
RICHARD MATTIS,	:	
CHRISTINE COOK, and	:	
ROBERT HEIST,	:	
	:	
PLAINTIFFS	:	
	:	
vs.	:	
	:	
MILTON HERSHEY SCHOOL	:	
ALUMNI ASSOCIATION,	:	
JOHN RICE, and	:	
JERRY WATERS	:	
	:	
DEFENDANTS	:	

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

Plaintiffs filed this action pursuant to 15 Pa.C.S.A. §5793 in order to seek judicial review of certain actions taken by the Officers and Directors of the Milton Hershey School Alumni Association (“MHSAA”), a Pennsylvania non-profit corporation. Specifically, Plaintiffs sought judicial review of the election of certain Officers and the removal of certain Directors which took place at meetings of the Board of Directors held on November 14, December 19 and December 26, 2004.

At those meetings, the two individual Defendants, on behalf of MHSAA, took every possible step, legal and illegal, to preserve their control of the MHSAA Board. When one measure (such as illegally disenfranchising three Chapters) was not sufficient to achieve that end, they invented others, one after another, until they did achieve their goal. Most, if not all, of their actions were illegal and deprived both the members of MHSAA and properly elected or selected members of the Board their right to a vote and a voice in how MHSAA is to be governed.

While Defendants make repeated references to the so-called reform litigation against the Trust and the School, this is not a case about how MHSAA should relate to the Milton Hershey School.<sup>1</sup> Rather, it is a case about how the Association will be governed - - by rules or by administrative fiat directed solely at maintaining the incumbents. The answer, of course, is that the rules must govern. That is all that the Plaintiffs seek in this case.

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<sup>1</sup>There is, of course, no evidence that the so-called reform litigation will be affected by the outcome of this case. In fact, many of the Plaintiffs were Officers and Directors of MHSAA when it first undertook its reform efforts fifteen years ago, who led those efforts for many years..

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

Plaintiffs filed their Complaint in this matter on February 1, 2005. At the same time, Plaintiffs filed a Motion for a Preliminary Injunction. Later that week, Plaintiffs filed an Amended Motion for a Preliminary Injunction.

On May 10, 2005, the lower court held a hearing on Plaintiffs' Amended Motion for a Preliminary Injunction. At that hearing, the parties stipulated to certain facts and the authenticity of a variety of documents. They also presented limited testimony.

On June 6, 2005, the lower Court issued an Order requiring Defendants to hold a new election for three officer positions and to allow each of the disputed Board members to vote in that election. That Order is on appeal. Argument will be heard in September of 2005.

Presently pending before the Court is Plaintiffs' Motion for a Summary Judgment. This Brief is filed in support of that Motion.

### **B. Statement of the Facts**

#### **1. The Parties**

Defendant Milton Hershey School Alumni Association ("MHSAA") is a non-profit corporation with approximately 5500 members, including Alumni of the Milton Hershey School, as well as honorary and associate members who are not alumni of the school. Heist Aff. Para. 1. The other two Defendants are its immediate Past President, John Rice, and its President, Jerry Waters. Heist Aff. Para. 2. Plaintiffs are properly elected members of the Board of

Directors of Milton Hershey School Alumni Association and include several properly elected Officers of the Association.

## **2. The Board of Directors**

Under the By-Laws of MHSAA (the “By-Laws”), not less than one-half of the members of the Board of Directors are to be elected by the membership at annual meetings. Article III, Section 2. At present and at all relevant times, there were twelve (12) members of the Board of Directors elected by the membership. There is no dispute about the right of those Directors to serve on the Board. Heist Aff. Para. 3.

In addition, the By-Laws provide that members of the Association may, with the approval of the Board of Directors, form Chapters which are then to elect a Representative to serve on the Board of Directors by appointment. Article X, Section 1. There are presently eight (8) approved Chapters: Homestead, Honorary, Lancaster, Delaware Valley, Harrisburg, New York, Philadelphia and Washington D.C. Heist Aff. Para. 4. Defendants disallowed the votes of three of those Representatives at the Association’s organizational meeting. Heist Aff. Para. 8-9. They subsequently removed one of those Representatives from the Board. Heist Aff. Para. 22.

During the relevant time period, the Board of Directors also included three Emeritus Directors who had always been granted the right to vote on all matters. Article V, Section 2. The Defendants purported to remove all three of these Directors from the Board and disallow their votes in the contested organizational meeting. Heist Aff. Para. 17.

Finally, the Board of Directors includes the Officers of the Association, including the President, the Past-President, the Vice-President/President Elect, Treasurer, Secretary and

Assistant Secretary/General Counsel. Article V, Section 2. All but one of these positions, Past President, was originally disputed. Plaintiffs no longer press their claim that Waters was not eligible to be President.

### **3. Meeting of November 14, 2004**

The 2004 organizational meeting of the MHSAA Board of Directors was held on November 14, 2004. Attending that meeting were twenty-six (26) 2004 Board members. Also attending the organizational meeting were the four (4) members elected by the membership to serve on the Board beginning in 2005. Heist Aff. Para. 6-7.<sup>2</sup> Under the By-Laws, only 2005 Board members are permitted to vote for Officers. Article VI, Section 7(a).

During the meeting, a question was raised as to whether three of the Chapters had held proper elections to elect their Chapter Representatives. After a discussion, during which the facts were hotly contested, the 2004 Board members voted fifteen (15) to ten (10) to disallow the votes of those three Representatives: Plaintiff Milton Purcell of the Homestead Chapter; Plaintiff Ethel Campbell of the Honorary Chapter; and Plaintiff Graham McIntyre of the Washington D.C. Chapter.<sup>3</sup> Heist Aff. Para. 8-9.

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<sup>2</sup>See also Plaintiffs' Exhibit 2, the Minutes of the November 14, 2005 meeting, which the parties have stipulated "are truthful and accurate insofar as what they say." N.T. 17.

<sup>3</sup>Plaintiffs also claimed that another Board member, Francine Serafin, was also improperly excluded from the meeting. She was unable to attend the meeting in person, but requested in writing to the 2004 President, Defendant John Rice, that she be allowed to participate by telephone. Rice, who presided over the meeting, made no effort to allow her to participate by telephone and excluded her from the meeting. In light of the lower court's Order that a new election be held, this claim is moot.

After the 2004 Board eliminated those votes, the 2005 Board purported to elect Officers. Chuck Welsh was purportedly elected Vice President/President Elect by a vote of eleven (11) to ten (10). Heist Aff. Para. 10-11. If permitted to vote, Purcell, Campbell, McIntyre and Serafin would have voted against Welsh and he would not have been elected the Vice President/President Elect.

Plaintiff Girard Gaughan was elected Secretary by a vote of eleven (11) to ten (10). Heist Aff. Para. 12. If permitted to vote, Purcell, Campbell, McIntyre and Serafin would have voted for Gaughan.

Plaintiff Harry Heath was elected Treasurer by a vote of eleven (11) to ten (10). Heist Aff. Para. 13. If permitted to vote, Purcell, Campbell, McIntyre and Serafin would have voted for Heath.

Prior to electing Plaintiff Gaughan as Secretary, the Board rejected a motion to elect Chris Ortiz as Secretary and James Behren as Treasurer, both by a vote of 11-10. Heist Aff. Para. 14. If permitted to vote, Purcell, Campbell, McIntyre and Serafin would have voted against Ortiz and Behren.

At the November 14, 2004 meeting, the Board recognized, by a vote of confirmation, the rights of the three Emeritus Directors to vote for the 2005 Officers. As a result, their votes were recognized and included in the elections of 2005 Officers. Heist Aff. Para. 15.

#### **4. Meeting of December 19, 2004**

On December 19, 2004, the Board of Directors held a special meeting. During the meeting, Defendant John Rice simply announced that the votes cast by the Emeritus Directors at

the November 14, 2004 organizational meeting were void ab initio because those three members served terms of only one year and their terms had expired. There was no vote on that issue.

Heist Aff. Para. 16-17.<sup>4</sup>

As a result of that ruling, Plaintiff Gaughan was purportedly replaced by Chris Ortiz as Secretary on the ground that the actual vote on November 14, 2004, after disallowing the votes of the three Emeritus Directors, was ten (10) to eight (8) in favor of Ortiz and ten (10) to eight (8) against Gaughan. Similarly, as a result of that ruling, Plaintiff Heath was purportedly replaced by James Behren as Treasurer on the ground that the actual vote on November 14, 2004, after disallowing the votes of the three Emeritus Directors, was ten (10) to eight (8) in favor of Behren and ten (10) to eight (8) against Heath. Heist Aff. Para. 18-19.

By a unanimous vote, the Board adopted motions permitting the Emeritus Directors, and the Homestead and Honorary Chapter Representatives to vote in the future. Apparently the Homestead Chapter had held a new election and the Honorary Chapter adequately answered the questions raised about the election of its Representative. The Board failed to muster a 2/3 majority to overturn the decisions to disallow their votes and those of the D.C. Chapter for purposes of the organizational votes. Heist Aff. Para. 20-21.

Sometime during or after that meeting, John Rice announced that the Honorary Chapter was illegal and could not elect a Representative to the Board, notwithstanding the fact the Honorary Chapter Representatives had been allowed to vote on the Board since at least 2000. No

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<sup>4</sup>See also Plaintiffs' Exhibit 3, the Minutes of the December 19, 2005 meeting, which the parties have stipulated "are truthful and accurate insofar as what they say." N.T. 17.

vote was ever taken on that decision. He also declared that the Emeritus Directors had no status and therefore no right to vote under By-laws. There was no vote on that declaration either. Heist Aff. Para. 22-23.

### **III. STATEMENT OF THE QUESTIONS PRESENTED**

- A. Whether Plaintiffs are entitled to summary judgment when there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law?
- B. Whether the Chapter Representatives of the Homestead, Honorary and Washington D.C. chapters were improperly excluded from voting at the November 14, 2004 meeting?
- C. Whether the Homestead and Honorary Chapter Representatives should be allowed to vote because the Board restored their right to vote in 2005 at the meeting on December 19, 2005?
- D. Whether the Honorary Chapter Representative is entitled to vote on the Board?
- E. Whether the Emeritus Directors are permitted to vote on the Board?

### **IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT**

#### **A. Summary Judgment Standard**

Summary judgment may be granted in those cases where the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. P.J.S. v. Pennsylvania State Ethics Comm'n, 555 Pa. 149, 154 (Pa. 1999);

Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (Pa. 1991). As will be demonstrated below, this is such a case.

**B. Standards for a Permanent Injunction**

To prevail in a claim for a permanent injunction, the plaintiff must prove a "clear right to relief." Buffalo Township v. Jones, 571 Pa. 637, 644, 813 A.2d 659, 663 (2002), cert. denied, 540 U.S. 821, 157 L. Ed. 2d 41, 124 S. Ct. 134 (2003). The injury claimed must be one that cannot be compensated by an award of damages. Peugeot Motors of America, Inc. v. Stout, 310 Pa. Super. 412, 456 A.2d 1002, 1008-09 (Pa. Super. 1983). In contrast to a preliminary injunction, a permanent injunction does not require a showing of irreparable harm or the need for immediate relief. Buffalo Township, supra at 644, 813 A.2d at 663. Rather, the plaintiff must show that an actual and substantial injury has occurred and/or is threatened in the future. Peugeot Motors, supra at 1008. A permanent injunction is appropriately awarded "to prevent a legal wrong for which there is no adequate redress at law." Buffalo Township, supra at 644, 813 A.2d at 663 (quoting Soja v. Factoryville Sportsmen's Club, 361 Pa. Super. 473, 522 A.2d 1129, 1131 (Pa. Super. 1987)). WellspanHealth v. Bayliss, 2005 PA Super 76, P12 (Pa. Super. Ct., 2005).

**C. Plaintiffs Have a Clear Right to Relief**

**1. The Chapter Representatives of the Homestead, Honorary and Washington D.C. Chapters were Improperly Excluded from Voting at the November 14, 2004 Meeting**

According to the By-Laws, the Chapters are authorized to elect Chapter Representatives. Article X, Section 9. However, at the organizational meeting held on November 14, 2004, the

Board of Directors of MHSAA purported to disallow the votes of the Chapter Representatives of the Homestead, Honorary and Washington D.C. Chapters because of alleged, but disputed, irregularities in the election of those Representatives.

While authorizing the Chapters to elect Representatives to serve on the Board of Directors, the By-Laws are silent as to how those elections are to be held. And, nothing in the By-Laws or the relevant statute gives the Board of Directors of MHSAA the power to review, reverse or reject the election of a Chapter Representative by an approved Chapter, especially without notice, as was done here.

Article X, Section 5, allows revocation of a charter by the Board of Directors of the Association “provided that the Officers of the Chapter shall be given notice of the proposed action thirty (30) days in advance of the meeting of the Board . . . .” No such notice was given in this case.

In addition, Article X, Section 9, requires that “[e]ach Chapter shall elect [such officers] as it may require and shall function in accordance with any regulation set forth by the Board of Directors.” However, there is no evidence of any regulation set forth by the Board of Directors which governs the conduct of elections by the Chapters.

Finally, there is no apparent standard for the exercise of judgment by the Board of Directors in rejecting the elections of the Honorary, Homestead and D.C. Chapters. For example, the D.C. election was apparently rejected because the nomination process was purportedly not sufficiently open. However, nothing in the By-Laws of the Association or that Chapter govern the manner in which nominations are to be made for Chapter Representative.

What Defendants really seek is a blank check for the incumbent majority of the Association's Board to maintain its majority status by randomly eliminating any potential opponents selected by the Chapters. Nothing in the By-Laws or the statutes explicitly provides that power and no such power should be implied.

**2. Even if the Board had the Power to Review and Reverse the Chapter Elections, the Homestead and Honorary Chapter Representatives Should be Allowed to Vote Because the Board Restored Their Right to Vote in 2005 at the Meeting on December 19, 2004**

According to the Minutes of the December 19, 2004 meeting, the Board of Directors voted unanimously at that meeting to restore the right of the Homestead and Honorary Chapter Representatives to vote in 2005. Plaintiffs' Exhibit 3, pp. 4-5. Apparently, the Board concluded that the Honorary Chapter election had been proper in the first place and that the Homestead Chapter had remedied any defects in its election process. Id.

Now Defendants argue that the Court should allow the rejection of those votes, but disallow their restoration. Apparently, the Defendants are claiming that the only Board members that can vote in the future are those that were qualified to vote at the November meeting. That is absurd. If the Board was empowered to take away the right of Chapter Representatives to vote, it was also empowered to restore that right. There is no sound basis in law or equity to allow the rejection but ignore the restoration and exclude the votes of two Chapter Representatives whom the Board has found are entitled to vote on 2005 matters.

**3. The Honorary Chapter Representative is Entitled to Vote**

**a. The Honorary Chapter Satisfies the Requirements of Article X of the By-Laws**

Under the By-Laws:

A chapter may be organized in any territory in which fifty percent (50%) of the Alumni or fifteen (15) members, whichever is the least, are active members of the Association.

Article X, Section 3. Under its By-Laws, the Honorary Chapter is a national chapter because there is no geographical limitation on membership. Plaintiffs' Exhibit 5. In fact, according to its President, John Cook, the Chapter actually has members outside of the Hershey area and outside of Pennsylvania.

Moreover, it was the undisputed testimony of Michael Weller that he was Executive Director at the time the Honorary Chapter was approved and that, at that time, more than 50% of the Alumni were considered active members of the Association because dues were no longer required and **all** alumni were (and are) considered active members of the Association. Thus, the Honorary Chapter was and is qualified under Article X, Section 3.

In any case, the Honorary Chapter was approved by the Board of Directors. That approval cannot be withdrawn by fiat of the President. The By-Laws provide a procedure for withdrawing the approval of a Chapter. Article X, Section 5. That procedure was not followed here. Absent such action, the Honorary Chapter continues to be an approved and a proper Chapter.

**b. Honorary Members are Permitted to be Voting Members of the Board**

Unlike Associate Members who cannot vote and may not be Board Members under any circumstances, Article II, Section 4, Honorary Members have all voting rights of active members and are prohibited only from holding “elected Board positions.” Article II, Section 3.<sup>5</sup> Thus, the question here is not whether Honorary Members can serve on the Board but, rather, whether the Board position held by a Chapter Representative is an elected position.

Admittedly, all members of the Board are “elected,” either by the membership at large, the members of a Chapter or, in the case of Officers and Emeritus Directors, by the Board of Directors. However, since the By-Laws clearly contemplate that Honorary Members (unlike Associate Members) can serve on the Board in “unelected” positions, those same By-Laws must also contemplate that one or more of those types of Directors, members at large, Chapter Representatives or Officers do not serve in “elected Board positions.”

To resolve this ambiguity, the lower court properly looked to the intent of the drafters of that language and the course of conduct which followed its adoption. The by-laws of an association constitute a “contract” among its members. While prior dealings or practice do not create or amend a contract or the by-laws of a non-profit corporation, it is appropriate to consider course of conduct or performance in determining the meaning of an ambiguous contract.

Pennsylvania Engineering Corp. v. McGraw-Edison Co., 500 Pa. 605, 459 A.2d 329, 332 (1983);

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<sup>5</sup>The later provision that “[a]ny active member of the Association shall be eligible to be a member of the Board of Directors” does not purport to be exclusive and therefore does not contradict Article II, Section 3.

Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 376 n. 6, 390 A.2d 736, 741 n. 6 (1978); see also Restatement (Second) of Contracts §§ 202(4)a, 212 & comment b (1981). To say the least, the MHSAA By-Laws are ambiguous on the status and rights of Honorary Members and many other issues. Thus, the Association's course of conduct is instructive.

The Honorary Chapter was approved in May of 1998 with the proviso that "they would have no vote at the Board meeting **until the Association By-Laws are clarified.**" (Emphasis added). Plaintiffs' Exhibit 9. Given that language, it seems unlikely that the Board intended the By-Laws to be clarified so that the Chapter would not be able to vote.

Sure enough, shortly thereafter, Michael Weller, the Executive Director of the Association, drafted an amendment to the By-Laws which he intended to clarify the issue by letting the Honorary Chapter have the right to elect a voting representative to the Board. According to Weller, Honorary Members were intended to be eligible for Board membership, just not as elected Officers.

The first amendment he prepared provided that "Honorary members have all voting privileges but may not hold Board positions." Plaintiffs' Exhibit 10. Subsequent versions provided that "Honorary members have all voting privileges but may not hold **elected** Board positions." (Emphasis added). Plaintiffs' Exhibits 1, 11, and 12. In either case, Mr. Weller was clear that the intent was to grant the Honorary Chapter a voting Representative on the Board. That amendment was adopted in 1999 and is part of the current By-Laws.

Not surprisingly, after the adoption of that amendment, and up until the meeting of November 14, 2005, MHSAA allowed the Honorary Chapter Representatives to participate and

vote at all Board meetings. That history and course of dealings easily resolves the ambiguity concerning the term “elected Board position.” Under the By-Laws, as intended by the drafter and interpreted by MHSAA over the years, Honorary Members can serve on the Board as the Representative of the Honorary Chapter.

#### **4. The Votes of the Emeritus Directors Were Improperly Disallowed**

During the meeting held on December 19, 2004, Defendant John Rice announced that the votes cast by the Emeritus members of the Board of Directors at the November 14, 2004 organizational meeting were void ab initio because those three members served terms of only one year and their terms had expired. However, under statute, 15 Pa.C.S.A. §5724:

Each director shall hold office until the expiration of the term for which he was selected and until his successor has been selected and qualified or until his earlier death, resignation or removal.

There has been no successor selected or qualified for the Emeritus Directors, Plaintiffs Harvey Deitrich, Ralph Fink and Ivan Dietrich. Accordingly, under 15 Pa.C.S.A. §5724, Deitrich and Dietrich continue to serve in their positions as Emeritus Directors until a successor has been selected and qualified.

Apparently recognizing that the original basis for Rice’s ruling was invalid, the Defendants now claim that the By-Laws do not provide for Emeritus Directors. However, until 1999, the By-Laws appear to have provided for the selection by the Board of Directors of two Emeritus Directors each year. See Defendants’ Exhibit 3, 4, Article IV, Section 7(a). Thus, there should be no dispute about the legality of the selection of the Emeritus Directors. And, while there is no longer a provision allowing for the selection of Emeritus Directors, there is a

provision allowing those who have been selected to vote on the Board of Directors (unless or until they are removed). Article V, Section 2. Thus, their right to vote should not be in question either.

If, however, the Court finds these By-Laws ambiguous, it should, as is noted above, look to prior conduct and practice to resolve ambiguities in the By-Laws. In the past, since at least 1988, MHSAA has had the Board of Directors select Emeritus Directors. The Board has never deemed one such Director to be replaced by another. In fact, as recently as 1999, all three Emeritus Directors were listed as members of the Board of Directors. Defendants' Exhibit 1. And, until Rice's "ruling," the Board has never questioned the right of those Directors to participate and vote at Board meetings. Testimony of Dietrich, Deitrich, Weller and Rice. Accordingly, the possible ambiguity in the By-Laws must be resolved by allowing the Emeritus Directors to vote.

**5. A Permanent Injunction is Necessary to Prevent a Legal Wrong for Which There is no Adequate Redress at Law**

In the meetings of November 14 and December 19, 2004, Defendants took actions which deprived many of the Plaintiff Directors of their right to cast their votes. Those same actions also eliminated the votes of many of the members of MHSAA by removing or rejecting the votes of Directors for whom those members had voted.

"The right to vote is a shareholder's most fundamental right." Reifsnyder v. Pittsburgh Outdoor Advertising Co., 405 Pa. 142, 149 n.8, 173 A.2d 319, 322 n.8 (1961). That is because:

The right to vote helps ensure corporate democracy, the principle that the owners of a corporation should control the direction that their corporation takes. In the face of disagreements with management, shareholders' most basic alternatives are either to sell their shares or to vote in new directors . . . .

Warehime v. Warehime, 2001 Pa. Super. 141, 777 A.2d 469, 477-78 (Pa. Super. 2001) (citing, inter alia, Blasius Indus. Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988)) (quotation marks omitted).

The right of a director to vote is equally important since a director has fiduciary duties to the corporation which can only be carried out by voting. The failure or inability to cast a vote on corporate affairs puts the director at risk of violating those duties.

"An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." West Penn Specialty MSO, Inc. v. Nolan, 1999 Pa. Super. 218, 737 A.2d 295, 299 (Pa. Super. 1999) (quoting Sovereign Bank v. Harper, 449 Pa. Super. 578, 674 A.2d 1085, 1091(Pa. Super. 1996)). Clearly, there is no adequate remedy at law for the loss of the right to vote.

## **V. CONCLUSION**

Plaintiffs have demonstrated both a clear right to relief and harm which cannot be remedied at law. Accordingly, the Court should grant summary judgment in favor of the Plaintiffs, ordering Defendants to allow the Representatives of the Honorary, Homestead and

Washington D.C. Chapters and the Emeritus Directors to vote on all matters before the MHSAA  
Board of Directors.

Respectfully submitted,

KLETT ROONEY LIEBER & SCHORLING  
A Professional Corporation

Dated: July 13, 2005

BY:

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**CERTIFICATE OF SERVICE**

On the 13th day of July, 2005, I, Glenda K. Davidson, a secretary in the law office of Klett Rooney, Lieber & Schorling, hereby certify that I have served this day a true and correct copy of the foregoing **Plaintiffs' Brief in Support of Motion for Summary Judgment** in the above case via hand delivery to those persons and addresses indicated below:

Victor P. Stabile, Esquire  
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Glenda K. Davidson