

and Defendant Erie Water Works. A true and correct copy of the Complaint is attached as Exhibit A.

2. The parties agreed that the Union Defendants' response to the Complaint would be filed on or before January 25, 2019. A true and correct copy of the correspondence showing the parties' agreement that the Union Defendants would respond to the Complaint on or before January 25, 2019 is attached as Exhibit B.

3. The Complaint asserts a Duty of Fair Representation claim against the Union Defendants and Defendant Erie Water Works. (Compl. ¶¶ 59-79).

FIRST PRELIMINARY OBJECTION

4. Defendant Randy Procius is the President of AFSCME Local 2206. (Compl. ¶ 17).

5. Defendant Shane Clark is a Staff Representative for Defendant AFSCME District Council 85. (Compl. ¶ 18).

6. Plaintiffs have brought a Duty of Fair Representation claim against Defendant Procius and Defendant Clark. (Compl. ¶¶ 59-79).

7. Pennsylvania courts have long held that Duty of Fair Representation claims may not be pursued against individual union officials. See

Falsetti v. Local 2026, United Mine Workers of America, 400 Pa. 145, 161 A.2d 882, 896 (1960). (“Officials of the Union, acting in their authorized capacities, cannot be held individually liable in damages to a member-employee for failure to process a grievance since they are but agents responsible only to the Union itself. It is the Union that is the proper target of appellant’s complaint.”); Narcotics Agents Reg’l Comm. v. AFSCME, 780 A.2d 863, 867 (Pa. Cmwlth. 2001) (“a public employee’s remedy for a union’s refusal to submit a grievance to arbitration is an action against the union for breach of its duty of fair representation”) citing Ziccardi v. Commonwealth, 500 Pa. 326, 456 A.2d 979 (1982) (emphasis added); Plouffe v. Gambone, 2012 U.S. Dist. LEXIS 85405, *28 (E.D. Pa. June 20, 2012) (dismissing plaintiff’s duty of fair representation claim against individual union officials with prejudice because “defendants are correct that the fiduciary duty owed to the member-employee is by the union, not by its individual representatives”); Jusiti v. City of Chester, 2018 U.S. Dist. LEXIS 180520, **21-22 (E.D. Pa. October 22, 2018) (dismissing plaintiff’s duty of fair representation claim against the local union president because “as an individual union officer, [the local union president] may not be held liable for any breach of the duty of fair representation.”).

8. Because Defendant Procius is a representative of AFSCME Local 2206 and because Defendant Clark is a representative of AFSCME District Council 85, Plaintiffs have no actionable duty of fair representation claim against Defendant Procius and Defendant Clark.

WHEREFORE, the Union Defendants respectfully request that the Court sustain their First Preliminary Objection based on legal insufficiency, pursuant to Pa. R. Civ. P. 1028(a)(4) and dismiss the Duty of Fair Representation claim asserted in Count I against Defendant Procious and Defendant Clark with prejudice.

SECOND PRELIMINARY OBJECTION

9. Plaintiffs have demanded a jury trial on their Duty of Fair Representation claim. (Compl., p. 11).

10. Pa. R. Civ. P. 1007.1 provides that a jury demand is proper only where there is a right to a jury trial.

11. The Pennsylvania Supreme Court has made clear that a plaintiff asserting a cause of action arising from a statute is only entitled to a jury trial if (1) there exists an expressed right for a jury trial under the statute which created the cause of action asserted by the plaintiff, or (2) Article I, Section 6 of the Pennsylvania Constitution, at the time it was drafted in 1790, recognized a right to a jury trial for the particular cause of action asserted by the plaintiff. See Wertz v. Chapman Twp., 559 Pa. 630, 741 A.2d 1272, 1277 (1999).

12. Plaintiffs have brought a Duty of Fair Representation claim against the Union Defendants. (Compl. ¶¶ 59-79).

13. Plaintiffs' Duty of Fair Representation claim arises under the Public Employee Relations Act, Act of July 23, 1970, P.L. 563, No. 195, codified at 43 Pa.C.S. §1101.101, et seq. ("PERA"). See Martino v. Transport Workers' Union of Philadelphia, 505 Pa. 391, 480 A.2d, 242, 245 (1984); Waklet-Riker v. Sayre Area Educ. Ass'n, 440 Pa. Super. 494, 656 A.2d 128, 141 (1995).

14. PERA does not provide a right to jury trial for any claim arising under that statute.

15. Article I, Section 6 of the Pennsylvania Constitution did not recognize a Duty of Fair Representation claim against a union at the time it was adopted in 1790, because PERA was not yet enacted and a Duty of Fair Representation claim was not otherwise recognized.

16. Thus, in accordance with our Supreme Court's ruling in Wertz, Plaintiffs have no legal entitlement to a jury trial for their Duty of Fair Representation claim against the Union Defendants.


17. The Union Defendants do not consent to a trial by jury on Plaintiffs' claim against them.

WHEREFORE, the Union Defendants respectfully request that the Court sustain their Second Preliminary Objections and strike the Jury Demand against the

Union Defendants, for failure to confirm to law or rule of court and/or for legal insufficiency, pursuant to Pa. R. Civ. P. 1028(a)(2) and (4).

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

By: 
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Dated: January 23, 2019

CERTIFICATE OF SERVICE

I, Alidz Oshagan, hereby certify that I have, on this 23rd day of January, 2019, sent a copy of the foregoing Preliminary Objections via First Class U.S. Mail, postage prepaid, upon the following:

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Justin T. Miller, Esq.
Nathan J. McGrath, Esq.
Joshua M. Montagnini, Esq.
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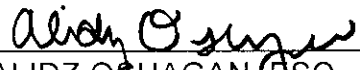

ALIDZ OSHAGAN, ESQ.

Exhibit A

COURT OF COMMON PLEAS OF PENNSYLVANIA
ERIE COUNTY

MARK KIDDO; JOAN HORDUSKY; MIKE DZURKO;
CHRISTINE ARNONE; JENNIE CLAY; MADELYN
GROOVER; MELISSA GUZOWSKI; and JEFF
GRANGER,

Plaintiffs,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 2206;
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES DISTRICT COUNCIL 85;
RANDY PROCIOS IN HIS OFFICIAL CAPACITY;
SHANE CLARK IN HIS OFFICIAL CAPACITY; and ERIE
WATER WORKS,

Defendants.

Case No. _____

Judge _____

**COMPLAINT AND DEMAND FOR JURY
TRIAL**

AND NOW come Plaintiffs Mark Kiddo; Joan Hordusky; Mike Dzurko; Christine Arnone; Jennie Clay; Madelyn Groover; Melissa Guzowski; and Jeff Granger (collectively, "Plaintiffs"), by and through their undersigned counsel, and state the following claims for relief against Defendants American Federation of State, County and Municipal Employees Local 2206 ("Local 2206"); American Federation of State, County and Municipal Employees District Council 85 ("District Council 85"); Randy Procius, President of Local 2206; Shane Clark, AFSCME Representative¹; and Erie Water Works ("EWW") and aver as follows:

SUMMARY OF THE CASE

1. Plaintiffs bring this civil action to address AFSCME's failure to fairly represent the

¹ Local 2206, District Council 85, and Messrs. Procius and Clark will be referred to, collectively, as ("AFSCME").

bargaining unit. *See Case v. Hazelton Area Educ. Support Pers. Ass'n (PSEA/NEA)*, 928 A.2d 1154, 1158 (Pa. Cmwlth. 2007).

2. Because the “[u]nion has assumed the role of trustee for the rights of its members and other employees in the bargaining unit” and employees are “beneficiaries of fiduciary obligations owed by the [u]nion[,] . . . the [u]nion bears a heavy duty of fair representation to all those within the shelter of its protection.” *Falsetti v. Local Union No. 2026, United Mine Workers of Am.*, 161 A.2d 882, 895 (Pa. 1960). Accordingly, unions must “act in good faith, in a reasonable manner and without fraud.” *Id.*

3. Unfortunately, AFSCME breached its duty of fair representation to Plaintiffs by failing to “act in good faith, in a reasonable manner and without fraud.” *Id.*

4. Among other breaches of the duty of fair representation, AFSCME violated Paragraph 7 of AFSCME’s “Bill of Rights for Union Members,” which provides as follows:

Members shall have the right to full participation, through discussion and vote, in the decision making processes of the union, and to pertinent information needed for the exercise of this right. This right shall specifically include decisions concerning the acceptance or rejection of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours, or other terms and conditions of employment.

A true and correct copy of AFSCME’s Constitution, including the Bill of Rights for Union Members, which begins on page 8, is attached hereto as “Exhibit A” and incorporated by reference herein.

JURISDICTION AND VENUE

5. “[B]reach of the duty of fair representation . . . is within the exclusive jurisdiction of the courts of common pleas.” *Dailey v. PLRB*, 148 A.3d 920, 924 (Pa. Cmwlth. 2016).

6. Venue is proper in Erie County. *See* Pa. R.C.P. 2179(a)(1)–(4).

PARTIES

7. Plaintiff Mark Kiddo is an adult individual residing in Erie County, Pennsylvania. Mr. Kiddo is an employee of EWW, member of AFSCME, and a “public employe” for purposes of the Public

Employe Relations Act (“PERA”), 43 P.S. § 1101.301(2).

8. Plaintiff Joan Hordusky is an adult individual residing in Erie County, Pennsylvania. Ms. Hordusky retired from her work with EWW on October 30, 2018 and is no longer an AFSCME member. However, Ms. Hordusky was an employee and union member when AFSCME breached its duty of fair representation and due to AFSCME’s breach, Ms. Hordusky *has suffered and continues to suffer* injury.

9. Plaintiff Mike Dzurko is an adult individual residing in Erie County, Pennsylvania. Mr. Dzurko is an employee of EWW, member of AFSCME, and a “public employe” for purposes of PERA, 43 P.S. § 1101.301(2).

10. Plaintiff Christine Arnone is an adult individual residing in Erie County, Pennsylvania. Ms. Arnone is an employee of EWW, member of AFSCME, and a “public employe” for purposes of PERA, 43 P.S. § 1101.301(2).

11. Plaintiff Jennie Clay is an adult individual residing in Erie County, Pennsylvania. Ms. Clay is an employee of EWW, member of AFSCME, and a “public employe” for purposes of PERA, 43 P.S. § 1101.301(2).

12. Plaintiff Madelyn Groover is an adult individual residing in Erie County, Pennsylvania. Ms. Groover is an employee of EWW, member of AFSCME, and a “public employe” for purposes of PERA, 43 P.S. § 1101.301(2).

13. Plaintiff Melissa Guzowski is an adult individual residing in Erie County, Pennsylvania. Ms. Guzowski is an employee of EWW, member of AFSCME, and a “public employe” for purposes of PERA, 43 P.S. § 1101.301(2).

14. Plaintiff Jeff Granger is an adult individual residing in Erie County, Pennsylvania. Mr. Granger is an employee of EWW, member of AFSCME, and a “public employe” for purposes of PERA, 43 P.S. § 1101.301(2).

15. Defendant Local 2206 is a labor union with a principal place of business at 626 State Street, Erie, PA 16501. Local 2206 is an “employee organization” for purposes of PERA, 43 P.S. § 1101.301(3), and an affiliate of District Council 85.

16. Defendant District Council 85 is a labor union with a principal place of business at 1276 Liberty Street, Franklin, PA 16323. District Council 85 is an “employee organization” and Plaintiffs’ exclusive representative for purposes of PERA, 43 P.S. §§ 1101.301(3), 1101.606.

17. Defendant Randy Prociuous, is an adult individual employed by the City of Erie and serves as the President of Local 2206 with an address at 626 State Street, Erie, PA 16501-1146. Mr. Prociuous is sued in his official capacity as President of Local 2206.

18. Defendant Shane Clark is an adult individual with an address of 5296 Autumnwood Drive, Cochranton, PA 16314. Mr. Clark is employed by AFSCME and sued in his official capacity as staff representative.

19. Defendant EWW, also known as the Erie City Water Authority, is a municipal authority of the city of Erie, Pennsylvania, incorporated under the Municipal Authorities Act, 53 Pa.C.S. §§ 5601–5623, with its principal place of business at 340 West Bayfront Parkway, Erie, PA 16507-2004. EWW is the Plaintiffs’ “public employer” for purposes of PERA, 43 P.S. § 1101.301(1).

FACTUAL ALLEGATIONS

20. From January 1, 2013, to December 31, 2017, Plaintiffs worked under terms and conditions of employment set forth in a collective bargaining agreement (“CBA”) between EWW and Local 2206, a true and correct copy of which is attached hereto as “Exhibit B” and incorporated by reference herein.

21. AFSCME and EWW began negotiations over a successor agreement prior to the expiration of the CBA.

22. At that time, certain employees at EWW were entitled to post-employment subsidies and/or

other benefits from EWW under their respective terms of employment. For example, a true and correct copy of the collective bargaining agreement between EWW and General Teamsters Local 397 is attached hereto as "Exhibit C" and incorporated by reference herein.

23. Plaintiffs desired a successor agreement that included post-employment subsidies and/or other benefits.

24. Before or during collective bargaining negotiations over the successor agreement, one or more Plaintiffs expressed their desire for post-employment subsidies and/or other benefits to AFSCME officials and/or to members of the negotiating team for AFSCME.

25. On or about December 22, 2017, during the course of collective bargaining, EWW presented to the negotiating team for AFSCME a document, a true and correct copy of which is attached hereto as "Exhibit D" and incorporated by reference herein.

26. Said document was entitled "Final Offer." Ex. D ("Final Offer").

27. The Final Offer contained two options with respect to, among other subjects, wages, health care, and retirement benefits ("Option #1" and "Option #2"). Final Offer, at 2-3.

28. Option #1 included a 3.00% wage increase beginning in 2018, a post-employment subsidy of \$400 per month, and a 457(b) retirement plan for new hires. Final Offer, at 2.

29. By contrast, Option #2 included a 2.50% wage increase beginning in 2018, no post-employment subsidy, and a pension plan for new hires instead of the 457(b) retirement plan. Final Offer, at 3.

30. EWW intended for the Final Offer, complete with Option #1 and Option #2, to be presented to AFSCME membership, including Plaintiffs, for potential ratification.

31. EWW has maintained that its Final Offer included both Option #1 and Option #2 and specifically requested that the Final Offer be presented to Local 2206 for ratification. A true and correct

copy of EWW correspondence to AFSCME officials is attached hereto as composite "Exhibit E" and incorporated by reference herein.

32. Members of AFSCME's bargaining team understood that the Final Offer included both Option #1 and Option #2 and even doubted their ability to withhold Option #1 from membership.

33. For example, on or about January 4, 2018, Mr. Clark considered his obligation to present the Final Offer, complete with Option #1 and Option #2, to membership. At that time, Mr. Clark confirmed his understanding that the Final Offer was indeed "presented as a final offer with two options." A true and correct copy of Mr. Clark's e-mail exchange is attached as composite "Exhibit F" and incorporated by reference herein.

34. On or about January 5, 2018, Mr. Clark informed EWW that he believed he was under no obligation to present the Final Offer to membership. A true and correct copy of Mr. Clark's email to EWW is attached hereto as "Exhibit G" and incorporated by reference herein.

35. Ultimately, the Final Offer was not presented to membership for ratification.

36. Instead, on or about January 11, 2018, AFSCME removed or omitted Option #1 from the Final Offer, caused Option #1 to be omitted from the Final Offer, or modified the Final Offer so as to exclude Option #1 from the Final Offer, leaving a document that resembled the Final Offer but did not include Option #1 ("Altered Offer").

37. On or about January 11, 2018, AFSCME presented the Altered Offer to Local 2206 membership for ratification.

38. The Altered Offer presented to Plaintiffs did not include Option #1, which was included in EWW's Final Offer.

39. AFSCME did not inform Plaintiffs that the Final Offer contained Option #1.

40. AFSCME did not inform Plaintiffs that EWW was willing to agree to a contract that

included Option #1.

41. Plaintiffs were disappointed to learn that the post-employment subsidy and/or other benefits were not purportedly available to them or otherwise included in the “final offer” as it was presented to them.

42. The ratification meeting on or about January 11, 2018, involved heated discussion.

43. For example, AFSCME led Plaintiffs to believe that one or more Plaintiffs would risk losing their pensions if Local 2206 membership failed to ratify the Altered Offer. Accordingly, Plaintiffs voted to ratify the Altered Offer.

44. In reality, Plaintiffs would not lose their pensions if they rejected the Altered Offer.

45. But for AFSCME’s concealment of Option #1, Plaintiffs would not have voted to ratify the contract as it was presented.

46. Had Plaintiffs known that EWW had made Option #1 equally available to them, Plaintiffs would not have voted to ratify a contract that included Option #2.

47. Additionally, had Option #1 been presented to Plaintiffs, Plaintiffs would have selected Option #1 and voted to ratify a contract that included Option #1 instead of Option #2.

48. On or about February 8, 2018, Plaintiffs learned that EWW’s Final Offer included both Option #1 and Option #2. A true and correct copy of EWW’s letter to Mr. Kiddo is attached hereto as “Exhibit H” and incorporated by reference herein.

49. Between February 14 and 15, 2018, Plaintiffs conferred by email among themselves and with other AFSCME members, and thirteen AFSCME members—a majority of the bargaining unit—stated that they wanted to revote and formally decide between Option #1 and Option #2. A true and correct copy of the email requests for revote is attached hereto as composite “Exhibit I” and incorporated by reference herein.

50. Had they been provided with truthful and pertinent information, Plaintiffs would have voted for a contract that included Option #1 instead of Option #2. A true and correct copy of affidavits completed by AFSCME members eligible to vote at the January 11, 2018 ratification meeting are attached hereto as composite "Exhibit J" and incorporated by reference herein.

51. Plaintiffs have exhausted all internal remedial efforts reasonably required before filing the instant lawsuit.

52. On or about February 21, 2018, Mr. Kiddo, on behalf of himself and twelve other AFSCME members, filed an Official Grievance Form with AFSCME requesting a cancellation of the January 11, 2018 ratification vote and the opportunity to revote on the Final Offer, which included both Options #1 and #2. A true and correct copy of the Official Grievance Form is attached hereto as "Exhibit K" and incorporated by reference herein.

53. On or about April 25, 2018, Richard Abelson, AFSCME Judicial Panel Chairperson, sent a letter to Mr. Kiddo, Local 2206 President Randy Prociuous, and union representative Shane Clark informing them that the grievance was scheduled for a hearing before the AFSCME Judicial Panel. A true and correct copy of Chairperson Abelson's April 25, 2018 letter is attached hereto as "Exhibit L" and incorporated by reference herein.

54. On or about June 4, 2018, Chairperson Abelson served as the Trial Officer and heard testimony and arguments pertaining to Plaintiffs' grievance against Mr. Prociuous and Mr. Clark.

55. On or about July 20, 2018, Chairperson Abelson issued his decision dismissing the charges against Mr. Prociuous and Mr. Clark. A true and correct copy of the Trial Officer's decision is attached hereto as "Exhibit M" and incorporated by reference herein.

56. On or about August 16, 2018, Plaintiffs filed a Notice of Expedited Appeal to the full Judicial Panel.

57. On or about October 9, 2018, the full Judicial Panel sustained the decision of Chairperson Abelson.

58. According to Article XI, section 15, of AFSCME's Constitution, any decision rendered by the full Judicial Panel can be appealed only to the International Convention. The next International Convention is scheduled for the Summer of 2020 and constitutes an unreasonable measure for purposes of exhaustion of internal remedies. Ex. A, at 128.

COUNT I
Breach of Duty of Fair Representation
(All Plaintiffs against All Defendants²)

59. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

60. Because the “[u]nion has assumed the role of trustee for the rights of its members and other employees in the bargaining unit” and employees are “beneficiaries of fiduciary obligations owed by the [u]nion[.] . . . the [u]nion bears a heavy duty of fair representation to all those within the shelter of its protection.” *Falsetti v. Local Union No. 2026, United Mine Workers of Am.*, 161 A.2d 882, 895 (Pa. 1960). Accordingly, unions must “act in good faith, in a reasonable manner and without fraud.” *Id.*

61. AFSCME failed to act in good faith, in a reasonable manner, and/or without fraud.

62. AFSCME's actions were arbitrary, discriminatory, and/or made in bad faith.

63. AFSCME's conduct caused harm to Plaintiffs.

64. AFSCME breached its duty of fair representation to Plaintiffs.

65. AFSCME breached its duty of fair representation to Plaintiffs by failing to present the Final Offer in its entirety to Plaintiffs for ratification.

66. AFSCME breached its duty of fair representation to Plaintiffs by violating its own internal rules.

² EWW is included as a necessary party.

67. AFSCME breached its duty of fair representation to Plaintiffs by failing to pursue terms and conditions of employment favorable to or desired by Plaintiffs.

68. AFSCME breached its duty of fair representation to Plaintiffs by presenting the Altered Offer to Plaintiffs for ratification.

69. AFSCME breached its duty of fair representation to Plaintiffs by failing to inform Plaintiffs at the January 11, 2018 ratification meeting and/or thereafter that Option #1 was included as part of the Final Offer.

70. AFSCME breached its duty of fair representation to Plaintiffs by failing to inform Plaintiffs at the January 11, 2018 ratification meeting and/or thereafter of the terms or existence of Option #1.

71. AFSCME breached its duty of fair representation to Plaintiffs by failing to communicate information pertinent to Plaintiffs' consideration of the Altered Offer, including but not limited to the terms or existence of Option #1, to the members at the January 11, 2018 ratification meeting and/or thereafter.

72. AFSCME breached its duty of fair representation to Plaintiffs by concealing the terms or existence of Option #1 at the January 11, 2018 ratification meeting and/or thereafter.

73. AFSCME breached its duty of fair representation to Plaintiffs by pressuring Plaintiffs into voting to ratify the Altered Offer despite the fact that it contained terms less favored by and less favorable to Plaintiffs.

74. AFSCME breached its duty of fair representation to Plaintiffs by misrepresenting potential choices available to Plaintiffs at the January 11, 2018 ratification meeting and/or thereafter.

75. AFSCME breached its duty of fair representation to Plaintiffs by providing misleading information to Plaintiffs.

76. AFSCME breached its duty of fair representation to Plaintiffs by denying Plaintiffs' request to vote on the Final Offer.

77. AFSCME breached its duty of fair representation to Plaintiffs when it discriminated against Plaintiffs by elevating the interests of AFSCME and AFSCME officials above that of Plaintiffs.

78. Plaintiffs voted to ratify the Altered Offer as a result of AFSCME's conduct.

79. As a result of the foregoing, Plaintiffs have suffered or will suffer pecuniary injury in the form of a loss of or decreased pay raise and loss of post-employment subsidy since at least January 11, 2018.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Honorable Court to:

- a) Enter judgment against Defendants;
- b) Order Defendants to allow Plaintiffs to revote on the Final Offer, including Option #1 and #2;
- c) And/or award damages as to AFSCME in excess of \$50,000;
- d) Award costs and fees, including reasonable attorneys' fees, and such other relief as the Court deems appropriate.

JURY DEMAND

Plaintiffs demand a trial by jury on all matters triable by jury pursuant to Pennsylvania Rule of Civil Procedure 1007.1.

Respectfully submitted,

THE FAIRNESS CENTER



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Dated: December 5, 2018

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Counsel for Plaintiffs

Exhibit B



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December 13, 2018

008013-50315

Via Electronic and First-Class Mail

David Osborne, Esquire
The Fairness Center
500 North Third Street, Floor 2
Harrisburg, PA 17101

Re: Kiddo, et al. v. AFSCME Local 2206, et al.
(Erie CCP No. 13144-18)

Dear David:

As you know, our office is legal counsel to AFSCME Local 2206, AFSCME District Council 85, Randy Prociuous and Shane Clark (both in their official capacities) defendants in the above-referenced matter. In keeping with Pa. R.C.P. 248 and 1003, the purpose of this letter is to confirm in writing our agreement of this afternoon to extend until January 25, 2018 the deadline for my clients to respond to the Complaint in this matter.

Thank you for your cooperation in this matter.

Sincerely,

Amy L. Rosenberger

ALR/st

cc: Justin T. Miller, Esquire
Nathan J. McGrath, Esquire

