

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

JOHN DeGROOTE SERVICES, LLC, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	
)	
F. EDWIN HARBACH, <i>et al.</i>)	Civil Action No. 2011-10612
)	
Defendants.)	
)	

**PLAINTIFFS’ OPPOSITION TO DEFENDANT
F. EDWIN HARBACH’S MOTION CRAVING OYER**

Plaintiffs John DeGroote Services, LLC and John DeGroote, as liquidating trustee (the “Trustee”) for and on behalf of the BearingPoint, Inc. Liquidating Trust (the “Trust”), by undersigned counsel, submit this Opposition to Defendant F. Edwin Harbach’s Motion Craving Oyer (the “Motion”). In support thereof, the Trustee states as follows:

1. The purpose of a motion craving oyer is to incorporate into a pleading a document that “forms a basis for any of the plaintiff’s claims.” *See Colinsky Consulting, Inc. v. Richard Holloway, Jr, et al.*, 57 Va. Cir. 403, 405 (Norfolk 2002) (citing *Sjolinder v. Am. Enter. Solutions, Inc.*, 51 Va. Cir. 436, 437 (Charlottesville 2000)). At least one court has explained that “a motion to crave oyer is a request of the Court to require that *a document sued upon*, or a collateral document *which is necessary to the Plaintiff’s claim*, be treated as though it were part of the Plaintiff’s pleadings.” *Ragone v. Waldvogel*, 54 Va. Cir. 581, 582 (Roanoke 2001) (emphasis added; citations omitted).

2. The type of document subject to a craving oyer request is limited. “[The] power is not absolute, as ‘the right to crave oyer of papers mentioned in a pleading applies only to

specialties and letters of probate and administration, not to other writings” *Monger v. Herring, et al.*, 79 Va. Cir. 470, 472 (Rockingham County 2009) (quoting *Smith v. Wolsiefer*, 119 Va. 247, 250 (1916)); *see also Bagwell, et al. v. City of Norfolk*, 59 Va. Cir. 205, 208 (Norfolk 2002) (quoting *Stoney v. Franklin*, 54 Va. Cir. 591, 594 (Suffolk 2001) (“stating that motions craving oyer should be limited to ‘those cases where the cause of action depended on a unique instrument, such as a deed, bond, or letters of probate’”) (citation omitted)).

3. Harbach’s Motion attempts to incorporate three documents into the Complaint. The documents include two employment-related agreements (the “Employment Agreements”) and an email with attached memorandum (the “Email Memorandum”). The Employment Agreements and Email Memorandum are not: (i) specialties¹ or letters of probate; (ii) documents upon which the Plaintiffs’ claims are based; or (iii) “necessary to the Plaintiff[s]’ claims.”

4. The Employment Agreements and Email Memorandum do not qualify as the types of documents subject to a motion craving oyer. It is well-established in Virginia that only limited types of documents that are essential to a plaintiff’s claim may be incorporated into the pleadings. *See Colinsky*, 57 Va. Cir. at 405 (craving oyer denied because plaintiff’s “bankruptcy petition is neither a ‘specialty,’ letter of probate and administration, nor a deed . . . [and] [a]dditionally, the petition does not form a basis of the Plaintiff’s [breach of contract] claims”); *see also* John L. Costello, *Virginia Remedies* § 7-9(g), at 226 (2d ed. 1999) (craving oyer motions should be limited to “those cases where the cause of action depended on a unique instrument, such as a deed, bond or letters of probate”).

5. Next, as Harbach acknowledges, “Plaintiffs’ central contention is that the defendant directors, including F. Edwin Harbach, breached their fiduciary duties” Motion

¹ A “specialty” is a “contract under seal.” *See Colinsky*, 57 Va. at 405, n.2 (citing *Black’s Law Dictionary*, 1571 (4th ed. 1951)).

at ¶ 1. In fact, the only causes of action asserted in Plaintiffs' Complaint are breaches of fiduciary duties, which emanate not from any document, but from the common law of Delaware.

6. In *Sjolinder*, 51 Va. Cir. at 436-37, defendants in a breach of contract and fiduciary duty case filed a motion craving oyer seeking to incorporate certain documents, including notes, loan documents, and a stock exchange agreement, on grounds that they are necessary to determine the rights and obligations of parties. *See id.* at 436. The court denied the defendants' motion because the material sought did not form a basis of any of the counts of the plaintiff's claims. *See id.* at 437. The court noted: "While it is entirely possible that the Plaintiffs could have made additional claims based on the Stock Exchange Agreement, they chose not to do so. The mere fact that it is referenced in their pleadings does not justify incorporating it in its entirety into their pleadings." *Id.*; *see also Colinsky*, 57 Va. Cir. at 405 (citing *Sjolinder*, 51 Va. Cir. at 437). Similarly, the Employment Agreements and Email Memorandum do not form the basis of Plaintiffs' claims here.

7. Harbach next contends that the Employment Agreements and Email Memorandum should be incorporated into the pleadings because they "undercut Plaintiffs' claims and are vital to the Court's consideration of Harbach's demurrer." Motion at ¶ 7. Harbach argues that he could have been more financially motivated to selfishly affect the sales process of BearingPoint by certain terms of the Employment Agreements. Motion at ¶ 7. Materials of this type, however, that are merely evidentiary and used to persuade a fact finder, and do not form a necessary basis for a plaintiff's claims, are not to be attached to pleadings through a motion craving oyer. *See, e.g., Bagwell*, 59 Va. Cir. at 205, 208; *Ragone*, 54 Va. Cir. at 581; *Sjolinder*, 51 Va. Cir. at 437. In *Bagwell*, the City of Norfolk craved oyer of memoranda written by certain plaintiffs relating to the city's employee relations committee process and

related election. In denying the motion craving oyer, the court explained that although it was the employee relations committee process that was at issue in the case, “[t]hey are not documents upon which Plaintiffs base their claim. Rather, the documents are merely evidence concerning the . . . procedure, and they are not properly considered in determining whether a valid cause of action has been pleaded.” *Id.* at 208. Here, the fact of whether the Employment Agreements and Email Memorandum, upon which Plaintiffs’ claims are not based, “undercut” Plaintiffs’ claims is an evidentiary issue not properly considered in ruling on Harbach’s demurrer.

8. In support of the Motion, Harbach cites four cases, all of which are inapposite to the instant case, and do not support the granting of his Motion. First, Harbach relies upon *Culpeper Nat’l Bank v. Morris*, 168 Va. 379, 382-83 (1937) for the proposition that the extraneous Employment Agreements and Email Memorandum should be incorporated because to do otherwise would “attempt to restrict [the court’s] vision to only such parts *of the record* as the litigant thinks tends to support his view.” Motion at ¶ 5 (citing *Culpeper*) (emphasis added). *Culpeper* is a case involving the probate of a will and an oyer request for inclusion of the complete court *record* in a former lawsuit contesting the validity of the will. *See Culpeper*, 168 Va. at 381-82. The court granted oyer because the litigant had submitted only a portion of the underlying court record on which the validity of the will was based, while at the same time, asking the court to accept the construction of the entire court record from those limited exhibits. *See id.* at 382-83. Here, there is no court record at issue, and no partial submission by the Plaintiffs of a document that the Court is being asked to rule upon.

9. Next, Harbach relies upon *Resk v. Roanoke County*, 73 Va. Cir. 272, 273 (Roanoke 2007). There, the court reviewed a zoning decision made by a county board (the “Board”) regarding re-zoning of land and the issuance of a permit in an ordinance. *See id.* at

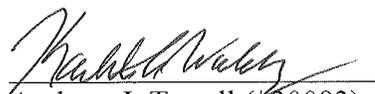
272. In reviewing the Board's decision on appeal, the court granted the Board's motion craving oyer of the complete legislative record that "shows what the Board considered and the process that the Board went through in making its decision to adopt the ordinance" so that it could determine if the Board acted appropriately. *Id.* at 274. Again, there is no underlying judicial or legislative record that is required for this Court to review in ruling on Harbach's demurrer.

10. Defendant Harbach also cites *D.R. Hall Constr., Inc. v. Spotsylvania Cty. Bd. of Supervisors*, 40 Va. Cir. 260, 263 (Spotsylvania 1996). That case also is inapposite to this case because the court declined to review the attachments, and it made no decision on a craving oyer motion because all parties consented to inclusion of the documents in the pleadings. The last case cited by Harbach, *P&T Enter., L.L.C. v. Commonwealth Sur. Assocs.*, 39 Va. Cir. 286, 287 (Richmond 1996), is another case where the court never reached the issue on the motion craving oyer because it deemed the issue moot. *See id.* at 287. Thus, *P&T* is also irrelevant.

WHEREFORE, for the reasons set forth herein, the Plaintiffs request entry of an Order denying Defendant F. Edwin Harbach's Motion Craving Oyer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January 2012, a true and correct copy of the foregoing was served via electronic mail and United States first-class mail, postage prepaid, upon the following:

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