IN THE SUPREME COURT
OF VIRGINIA

RECORD NO: 091410

STATION #2, LLC.

Appellant,

v.

MICHAEL AND LISA LYNCH,
MARATHON DEVELOPMENT GROUP, INC.,
and **FRANK T. ("BUDDY") GADAMS,**

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

NOW COMES the Appellees, Michael and Lisa Lynch, by counsel, and submits this Brief of Appellees pursuant to Rule 5:28, Virginia Supreme Court Rules, (all references made to documents in the Joint Appendix to be abbreviated with the letters "JA").

I. STATEMENT OF THE CASE

Michael and Lisa Lynch oppose the Appeal filed by Station #2, LLC (herein, "Station #2") insofar as it involves the rulings of Judge Fulton of October 7, 2008 dismissing Count VII as to all Defendants with prejudice, (JA 211, Lines 23-25 and JA 212, lines 1-25; Assignment of Error 5 of

Appellant's Brief). The other assignments of error do not involve Mr. and Mrs. Lynch.

II. CROSS ASSIGNMENTS OF ERROR

Michael and Lisa Lynch have no cross assignments of error.

III. QUESTIONS PRESENTED

Question 5, as set out in Appellant's Brief, is a correct statement of the issue. Michael and Lisa Lynch believe the Court correctly ruled on this issue.

IV. STATEMENT OF THE FACTS

As to the defendants Michael and Lisa Lynch, the only ruling appealed from is a decision as a matter of law regarding Count VII ("Tortious Interference with Business and Violation of Code Sections 18.2-499 and 18.2-500; All Defendants"). The only salient allegations set out in Station #2's Second Amended Complaint are the vague aspersions set out in paragraphs ¶ 71 and ¶ 72 of the Second Amended Complaint to the effect that the Defendants "...deceived the principals of Station 2..." (¶ 71, at JA 24) and "[U]tilizing improper methods and deceitful tactics, these defendants combined, associated, agreed and mutually undertook actions together for the purpose of willfully and maliciously injuring Station 2 in its

reputation, trade and business . . ." (¶72, Second Amended Complaint, at JA 24).

V. PRINCIPLES OF LAW AND ARGUMENT

A. Standard of Review

The issue presented in this appeal involves a question of law and is therefore reviewable by this Honorable Court *de novo*. A demurrer tests the legal sufficiency of the facts alleged. *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 587 S.E.2d 589. A plaintiff's complaint is not legally sufficient if the court concludes that all facts as stated would not entitle the plaintiff to relief under the law. *E. I. Du Pont De Nemours & Co. v. Snead's Adm'r.*, 124 Va. 177, 97 S.E. 812 (1919).

B. Brief of Appellant Assignment of Error 5.

The Trial Court did not err in sustaining the Demurrer to Count VII of the Second Amended Complaint as to all Defendants and Dismissing Count VII with prejudice.

The Ruling of the Court on this issue was made at oral argument on October 7, 2008 (JA 211, Lines 23-25 and JA 212, Lines 10-25). It was argued in support of the Demurrer of Hourigan Construction Company that the cause of action set forth in Count VII was legally insufficient for failure to allege that Defendants used "illegal" means or intended to serve an

"unlawful purpose" to accomplish the alleged conspiracy, whether under case law or under Code of Virginia 18.2-§ 499 and § 500 (JA 203-212).

After hearing this argument Judge Fulton sustained the Demurrer as to Hourigan and all Defendants and the Order was later entered (JA 297). This was correct.

The cases cited by Station #2 in the Brief of Appellant are either inapposite or involve underlying conduct which would clearly be unlawful. The first three cases cited all involved the actions of directors and/or employees having a fiduciary duty towards their employing corporation who conspired to resign as a group, taking the employer's proprietary information, documents and client lists with them. See *Feddeman & Company v. Langan Associates*, 260 Va. 35, 530 S.E.2d 668 (2000), *Advanced Marine Enterprises v. PRC, Inc.* 256 Va. 106, 501 S.E.2d 148 (1998) and *Commercial Business Systems v. Bell South*, 249 Va. 39, 453 S.E.2d 261, 1995.

In *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 431 S.E.2d 277 (1993), a case involving the self-dealing of a corporate agent, this Court opined that the Code of Virginia 18.2-§ 499 does not require actual malice, or that the conspirator's primary purpose be to injure another in his trade or business, but rather only that the defendant act intentionally and

without lawful justification. In all of the cited cases, there was a clear legal duty to act with fidelity towards an employer and this duty was breached. No such allegations are made in the Second Amended Complaint.

To plead the conspiracy cause of action, Plaintiff must allege that two or more persons, using some concerted action, conspired to accomplish some *criminal* or *unlawful purpose*, or to accomplish some non-criminal purpose by *criminal* or *unlawful means*. See *Werth v. Fire Adjust. Bureau*, 160 Va. 845, 855, 171 S.E. 255, 259, cert. denied, 290 U.S. 659, 54 S.Ct. 74, 78 L.Ed. 570 (1933) as cited in *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337, S.E.2d 744, 748 (1985). The Court in *Hechler* goes on to state, "[T]here can be no conspiracy to do an act which the law allows" (at 748).

The words used in the salient paragraphs of Count VII of the Second Amended Complaint are that Defendants "...deceived the principals of Station 2..." (¶ 71) and used "...improper methods..." to willfully injure Station 2. (¶72, See JA 24). In no place is illegal conduct alleged nor are unlawful ends alleged.

Station 2 seeks to find a <u>crime</u> or some <u>unlawful purpose</u> where its representatives simply failed to follow sound commercial business practices and to obtain the necessary written agreement from the joint

owners to accomplish its business goals. Judge Fulton correctly found that the Complaint allegations do not support the cause of action set forth in Paragraph VII as required by the jurisprudence of this Court.

VI. CONCLUSION

WHEREFORE APPELLEES, Michael and Lisa Lynch, respectfully request that this Honorable Court uphold the rulings of the trial court which are presented in this appeal as consistent with the applicable law and dismiss the appeal of Station #2. Counsel for the Appellees requests an opportunity to present oral argument to this Court.

MICHAEL LYNCH and
LISA LYNCH

By _____
Of Counsel

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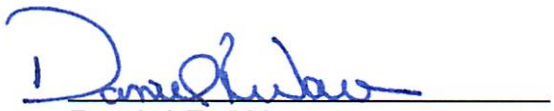
CERTIFICATE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, twelve (12) copies of this Brief of Appellees were hand-delivered to the Clerk of the Supreme Court of Virginia and three (3) copies of the Brief of Appellees have been mailed to opposing counsel for Station #2, Inc., Kevin E. Martingayle, Esquire and to John C. Lynch, Esquire, opposing counsel for Marathon Development Group, Inc. and Frank T. Gadams, on this 22nd day of December, 2009. On this date, the Brief for Appellees was also filed electronically with this Honorable Court, with an electronic copy being sent to Kevin E. Martingayle, Esquire and John C. Lynch, Esquire.



Daniel R. Warman