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In The

SUPREME COURT OF VIRGINIA

Record No. 171381

GEORGE PRIMOV,

Petitioner/Appellant,

v.

SERCO INC.,

Respondent/Appellee.

BRIEF OF APPELLEE SERCO INC.

On Appeal from
The Circuit Court for the County of Fairfax, Virginia
No. 2016-17124

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May 7, 2018

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STATEMENT OF THE CASE

On September 30, 2015, Appellant George Primov ("Appellant" or "Primov") filed a complaint against Appellee Serco Inc. ("Appellee" or "Serco") in the Circuit Court of Fairfax County claiming that Serco breached Primov's employment agreement by allegedly failing to pay him his agreed upon compensation. Primov filed this complaint without first complying with the mandatory dispute resolution provision in his employment agreement. After litigating that claim for almost a year, Primov moved for a voluntary nonsuit on the day of trial.

Primov re-filed his Complaint on December 14, 2016, again without complying with the mandatory dispute resolution provision. In response, Serco filed a demurrer and plea in bar, both of which were fully briefed by the parties. On July 7, 2017, the trial court held an evidentiary hearing on Serco's plea in bar. On July 19, 2017, the trial court issued a robust and reasoned opinion in which it granted Serco's plea in bar and properly dismissed Primov's claim with prejudice. The trial court then denied Serco's demurrer as moot.

Primov noticed an appeal, asserting five alleged assignments of error. However, this Court granted Primov's Petition for Appeal only as to Assignment of Error No. 2, which reads as follows:

> The trial court erred by dismissing Primov's complaint with prejudice—an unduly harsh remedy—when it should have either declined to dismiss it at all, or else, dismiss it without prejudice.

Appellant Brief at 1. As explained *infra*, the trial court correctly exercised its discretion and dismissed Primov's complaint with prejudice. As such, the judgment of the trial court must be affirmed.

STATEMENT OF FACTS

Serco, a U.S. military contractor, formerly employed Primov as an Information Systems Generalist at Serco's BCAT office in Afghanistan. *See* Appx. at 3. On or about June 24, 2012, Serco sent Primov an Offer of Employment ("Offer Letter") in which Serco agreed to pay Primov $880.00 per week, plus a straight rate of $22.00 per hour for hours worked in excess of forty (40) while Primov was deployed in Afghanistan. *See* Appx. at 9-10. In addition, Serco agreed to pay hardship and danger uplifts on Primov's base pay. *See* Appx. at 21. Notably, the June 24 Offer Letter does not specify the amounts of the danger and hardship pay uplifts. *See* Appx. at 9-10. The Offer Letter states that it is contingent on a successful security clearance, and that additional terms outside the Offer Letter, to be disclosed in a later Letter of Assignment, would also govern the terms of Primov's employment. *See* Appx. at 9-10. Primov accepted the offer on or about June 25, 2012. *See* Appx. at 10.

On November 6, 2012, Serco sent Primov the Letter of Assignment, which provides that Primov would receive a 15% hardship pay uplift and a 35% danger pay uplift on his base pay. *See* Appx. at 11. The Letter of Assignment also contains the following provision requiring a good faith attempt at mediation before any party may file suit (the "ADR provision"):

> The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation. If the dispute has not been resolved by mediation within 60 days of a written request to mediate made by one of the parties, then either party may bring suit in the state or federal courts located in Fairfax County, Virginia. The parties consent to the exclusive jurisdiction of the state and federal courts located in Fairfax County, Virginia.

Appx. at 14-15. The Letter of Assignment further advises Primov to direct any questions concerning the terms of the agreement to Julie Van Leunen, Serco's International Human Resources Specialist. *See* Appx. at 15.

Primov acknowledged receipt and confirmed acceptance of the terms and conditions of the Letter of Assignment on or about November 8, 2012. *See* Appx. at 15. In doing so, Primov expressly affirmed that he read and understood the terms and conditions of the letter. *See* Appx. at 15. Thus, the Offer Letter and Letter of Assignment collectively governed the terms of Primov's employment ("Employment Agreement"). *See* Appx. at 27.

Primov was deployed to Afghanistan from approximately November 7, 2012 through September 1, 2014, or 47 two-week pay periods. *See*

Appx. at 3, 6. Pursuant to the terms of the Letter of Assignment, Serco paid Primov a 15% hardship pay uplift and 35% danger pay uplift on his base pay throughout his entire deployment. *See* Appx. at 6. After fully completing a two-year deployment, Primov now claims several years later that he was entitled to a 35% pay hardship uplift while he was deployed in Afghanistan. Primov also claims that he was entitled to danger and hardship uplifts on his overtime pay. Notably, Primov does not allege that he ever communicated these concerns to Serco at any point during his employment. *See generally* Compl. Nor does Primov allege that he ever tried to resolve his concerns with Serco prior to filing suit by making a written demand for mediation, as required by the Letter of Assignment. *See generally* Compl.

Primov filed suit for breach of contract in the Circuit Court for Fairfax County on September 30, 2015, claiming that Serco owed him approximately $61,014.80 in additional compensation. *See* Appx. at 21. Notably, Primov failed to comply with the mandatory dispute resolution provision in the Letter of Assignment before filing suit, and even conceded that fact during his deposition. *See* Serco Plea in Bar, Exhibit 1. After litigating that lawsuit for almost a year, Primov nonsuited the action on August 15, 2016, the day trial was scheduled to begin. *See* Appx. at 21.

Primov re-filed this action on December 14, 2016. *See* Appx. at 21. Because Primov again failed to comply with the mandatory dispute resolution provision, Serco filed a demurrer and plea in bar on March 24, 2017. *See* Serco Demurrer; Serco Plea in Bar. After an evidentiary hearing and oral argument, the Chief Judge of the trial court properly sustained Serco's plea in bar, finding that compliance with the dispute resolution provision was a condition precedent to litigation, and that Primov failed to comply with the provision. *See Appx. at 20-28*. Specifically, the trial court found that "[t]he plain language of the mandatory mediation provision in the Assignment Letter clearly states that the parties must attempt mediation outside of court at the written request of the aggrieved party at least 60 days prior to initiating litigation[,]" and that Primov "has not satisfied the condition precedent." *See* Appx. at 27. As such, the trial court correctly dismissed Primov's second Complaint with prejudice. *See* Appx. at 27.

STANDARD OF REVIEW

As acknowledged by Primov, the decision to dismiss a case with or without prejudice is within the sound discretion of the trial court and is, therefore, reviewed under an abuse of discretion standard. *See, e.g., Jones v. Jones,* 206 F. Supp. 3d 1098, 1113 n.12 (E.D. Va. 2016) ("A

determination whether a dismissal is with prejudice or without prejudice is within the Court's discretion."). The abuse of discretion standard is highly deferential, and "necessarily implies that, for some decisions, conscientious jurists reach different conclusions based on exactly the same facts—yet still remain entirely reasonable." *Reston Hosp. Ctr., LLC v. Remley,* 63 Va. App. 755, 764-65 (Va. Ct. App. 2014) (quoting *Hamad v. Hamad,* 61 Va. App. 593, 607 (Va. Ct. App. 2013)). "The circuit court 'has a range of choice, and its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *Id.* at 765 (quoting *Lawlor v. Commonwealth,* 285 Va. 187, 212-13 (2013)).

Indeed, when applying the abuse of discretion standard, an appellate court "[does] not substitute [its] judgment for that of the trial court." *Beck v. Commonwealth,* 253 Va. 373, 385 (1997). "The abuse-of-discretion standard, 'if nothing else, means that the trial judge's 'ruling will not be reversed simply because an appellate court disagrees.'" *Tynes v. Commonwealth*, 49 Va. App. 17, 21 (Va. Ct. App. 2006) (quoting *Thomas v. Commonwealth*, 44 Va. App. 741, 753 (Va. Ct. App. 2005)). "Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." *Id.* Applying this highly deferential standard to the facts of this

case, it is clear that the trial court did not abuse its discretion when it correctly dismissed Primov's complaint with prejudice.

SUMMARY OF THE ARGUMENT

This appeal is limited to the narrow issue of whether the Circuit Court of Fairfax County properly dismissed Primov's Complaint with prejudice. As explained below, the decision of the trial court should be affirmed because the mandatory ADR provision is a condition precedent to litigation that must be satisfied prior to filing suit in court. Primov has now filed the same claim against Serco on two separate occasions, and each time has failed to comply with the ADR provision. Because Primov has knowingly failed to comply with the ADR provision on multiple occasions, and because Serco has incurred considerable time and expense in defending the same action twice, the trial court's decision to dismiss the Complaint with prejudice was proper and must be affirmed.

ARGUMENT

Primov erroneously argues that the trial court "had two available options" when it ruled on Serco's dispositive motions. *See* Appellant Brief at 8. First, Primov argues that the trial court could have overruled Serco's plea in bar and demurrer and allowed the case to proceed past the pleading stage. *See* Appellant Brief at 8. Alternatively, Primov argues that

the trial court could have stayed the proceedings for sixty (60) days and ordered the parties to engage in non-binding mediation. *See* Appellant Brief at 8-9. Neither of these "options" was available or appropriate, as the only proper resolution was to dismiss the complaint with prejudice.

I. The Trial Court Properly Sustained Serco's Plea In Bar And Dismissed The Complaint With Prejudice.

A. The Trial Court Correctly Found That Primov Failed To Comply With A Condition Precedent.

As an initial matter, the trial court correctly determined that the ADR provision was a condition precedent to litigation. In his well-reasoned opinion, Chief Judge Bruce D. White, explained that the "main issue to be determined on Defendant's Plea in Bar is whether or not the demand to mediate was a condition precedent to litigation." Appx. at 25. In making this determination, Judge White further explained that a two-step inquiry was necessary. *See* Appx. at 25. First, the trial court needed to determine whether the Letter of Assignment applied to Primov's breach of contract claim and, therefore, constituted a condition precedent to litigation. *See* Appx. at 25. If it did, the trial court then needed to determine whether Primov made a written request to mediate *prior* to filing suit. *See* Appx. at 25.

The trial court evaluated the terms of the Offer Letter and Letter of Assignment, and properly concluded that "both documents should be considered applicable to Plaintiff's [breach of contract] claim." Appx. at 26. Further, the court reasoned that because "[t]he plain language of the mandatory mediation provision in the Assignment Letter clearly states the parties must attempt mediation outside of court at the written request of the aggrieved party at least 60 days prior to initiating litigation[,]" it was a condition precedent that Primov needed to satisfy before filing suit. *See* Appx. at 27. As Judge White recognized, "Virginia courts have enforced mandatory mediation provisions or time period restriction provisions as conditions precedent to filing suit." Appx. at 26; *see also L. White & Co., Inc. v. Culpeper Mem'l Hosp.,* 81 Va. Cir. 27, 29 (2010) (sustaining plea in bar where plaintiff failed to abide by informal negotiation and mediation provision prior to filing suit); *Performance Food Grp. Co. v. Java Trading Co.,* No. 305CV447, 2005 WL 2456980, at *4 (E.D. Va. Oct. 5, 2005) ("Dismissal of the case is proper when all issues presented are subject to a dispute resolution clause."); *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.,* No. 1:05CV802 (JCC), 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005) ("Until mediation is completed, the condition precedent for the initiation of this suit is not met."); *TC MidAtlantic Dev., Inc. v. Virginia,* 280

Va. 204, 210 (2010) (affirming dismissal of complaint where plaintiff failed to allege compliance with a condition precedent). Thus, because the ADR provision was a condition precedent, the trial court was then tasked with determining whether Primov satisfied the condition precedent prior to filing suit.

While Primov still attempts to argue that he complied with the condition precedent, *see* Appellant Brief at 9-10, that issue is not before the Court in this appeal. *See* Writ dated February 27, 2018 (granting Petition of Appeal only as to Assignment of Error No. 2). Nonetheless, the trial court correctly rejected Primov's argument that he satisfied the condition precedent when his counsel expressed his willingness to explore mediation "concurrently" with the litigation;[1] rather, he concluded that it "was not a request for mediation as required by the mandatory mediation provision, and he has not satisfied the condition precedent." Appx. at 27.

In light of the well-established case law that failure to comply with a condition precedent to litigation warrants dismissal, the trial court had no choice but to dismiss Primov's complaint.

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[1] Indeed, Primov attempted to skirt his obligations under the dispute resolution clause by imposing the additional condition that Serco bear the entire cost of mediation before he would consider it.

B. The Trial Court Did Not Abuse Its Discretion When It Dismissed The Complaint With Prejudice.

Primov wrongly argues that the trial court abused its discretion when it dismissed his Complaint with prejudice, as opposed to dismissal without prejudice. *See* Appellant Brief at 9. However, the decision to dismiss the action with prejudice was certainly within the trial court's sound discretion. *See, e.g., Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.,* 761 F.2d 970, 974 (4th Cir. 1985) (noting that a dismissal with or without prejudice is within the court's discretion); *see also Jones,* 206 F. Supp. 3d at 1113 n.12 (same).

1. Dismissal With Prejudice Was Not Unduly Harsh.

While Primov expounds upon the alleged unfairness of a dismissal with prejudice—without citing a single authority holding that the dismissal should have been without prejudice—he ignores that he had two opportunities to litigate his claim. Prior to commencing the action below, Primov litigated his claim for over a year, and up to the day of trial before nonsuiting, all the while knowing that he had failed to comply with the mandatory dispute resolution provision. Primov then again failed to request mediation before filing his second action.

These actions directly contravene the two-fold purpose of the dispute resolution clause. First, pre-lawsuit mediation allows the parties to try and resolve disputes before litigation starts and avoid the associated costs and

expenses. Second a "confidential mediation" affords the parties the opportunity to privately resolve their disputes. By ignoring the dispute resolution clause altogether – and twice filing a public action in court – Primov frustrated both purposes of the clause. In turn, Serco was forced to immediately bear the expense of defending a lawsuit and the dispute was made public, including confidential settlement communications between counsel.

In light of these important policy factors, it would have been improper for the trial court to allow Primov to file a third action against Serco given the significant prejudice to Serco of two years of unnecessary litigation fees and costs. *See, e.g., Brown v. Jacobs,* 289 Va. 209, 218 (2015) (denying leave to amend when "[t]he court had already given [the plaintiff] leave to amend her original complaint more than one year after she initiated her lawsuit."). Indeed, the Virginia Supreme Court has recognized that dismissal with prejudice is appropriate even when a decision does not reach the merits of the claim. In *Gilbreath v. Brewster*, for example, the trial court dismissed a lawsuit without prejudice for lack of timely service of process. *See* 250 Va. 436, 439 (1996). The defendant appealed and argued that the actions should have been dismissed ***with*** prejudice. *See id.* The plaintiffs countered by arguing that the dismissal must be without

prejudice because "the dismissal is not based on the merits of the claim." *Id.* at 439. The Virginia Supreme Court rejected the plaintiffs' argument and reasoned that "not all dismissals terminating a cause of action without determining the merits are dismissal without prejudice." *Id.* at 440. Noting that Rule 3:3 is silent regarding whether a dismissal should be without prejudice, the court turned to public policy and reasoned that "[a] dismissal without prejudice under these circumstances would condone the plaintiff's lack of diligent prosecution . . . Accordingly, we conclude that a dismissal under Rule 3.3 is a dismissal with prejudice and the trial court erred in dismissing Brewster's and Brann's actions without prejudice." *Id.* at 441-42. Likewise, a dismissal without prejudice in this case would unfairly condone Primov's repeated refusal to comply with the mandatory dispute resolution clause before filing suit.

There is also strong precedent outside this jurisdiction in which courts have dismissed actions with prejudice when a party failed to comply with a condition precedent to litigation. *See, e.g., Stoll v. United Way of Champaign Cty., Illinois, Inc.,* 883 N.E.2d 575, 582 (Ill. 2008) (dismissing breach of contract suit with prejudice because plaintiff "did not comply with the grievance procedures contained in [contract]"); *see also Dawson v. Gerritsen*, 295 Ark. 206, 207 (1988) (affirming dismissal with prejudice

holding that "when the second action was dismissed for failure to give written notice of an intention to sue, an earlier identical action having been dismissed on plaintiff's motion for a nonsuit, the second dismissal operated as an adjudication on the merits."); *Bakker v. Ralston*, 326 Ark. 575, 577 (1996) ("when a dismissal is granted for failure to obtain service and the plaintiff has previously taken a voluntary nonsuit, the second dismissal is to be with prejudice."); *U.S. Bank v. Sawyer*, 95 A.3d 608 (Me. 2014) (affirming dismissal of foreclosure with prejudice where bank failed to participate in mediation in good faith, as required by state law); *Stark v. PPM Am., Inc.*, 354 F.3d 666, 672 (7th Cir. 2004) (affirming dismissal with prejudice where the plaintiff failed to exhaust his remedies under an ERISA plan and stating that the plaintiff "cannot be allowed to skip the administrative procedure, cause the defendants to incur litigation costs, and then, after losing, be allowed to exhaust his remedies").

In addition, this case is not "in the very early stages of litigation," as asserted by Primov. Indeed, this case had already been litigated for almost one year before Primov moved for a nonsuit. In the almost three years that Serco has been forced to defend against Primov's claims, it has incurred considerable expenses in the form of time, attorneys' fees, costs, and disruption to its business. Finally, Serco is not, as Primov claims, inviting

the Court to "unconstitutionally encroach upon the domain of the legislative branch[.]" While Serco recognizes that Primov had a right —and exercised that right – to suffer a voluntary nonsuit in the 2015 action, that nonsuit allowed Serco to require strict compliance with the ADR provision in the subsequent action. Serco should not be punished by requiring to defend against Primov's claims for a third time simply because Primov chose to ignore the ADR provision, despite expressly being made aware of it in the 2015 action.

2. Primov Failed To Seek Leave To Amend.

It is also significant that Primov never sought leave from the trial court to amend his Complaint. For this additional reason, the trial court was under no obligation to dismiss the Complaint without prejudice. *See, e.g., Jang v. Boston Scientific SciMed, Inc.*, 729 F.3d 357, 367-68 (3d Cir. 2013) (affirming dismissal of a breach of contract claim even where the plaintiff argued that he could cure the deficiency through an amendment); *see also Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007) (holding that trial court did not err in dismissing a complaint with prejudice where the plaintiff never properly requested leave to amend).

Because Primov repeatedly failed to comply with the requirements of the ADR provision, and did not seek leave to amend his complaint, the trial court was correct in dismissing the Complaint with prejudice.

II. The Trial Court Should Not Have Stayed The Proceedings For 60 Days With An Order That The Parties Mediate.

Alternatively, Primov incorrectly asserts that the trial court "could have exercised its inherent discretionary power to stay the proceedings for sixty days, and order the parties to make a good faith effort to resolve their dispute through non-binding mediation, consistent with the mediation provision of the Agreement." Brief of Appellant at 9. This argument fails because it ignores both the plain language of the Parties' agreement, as well as the well-settled Virginia case law holding that a party's failure to comply with an ADR provision warrants a dismissal, not a stay of the action.

First, the Letter of Assignment explicitly states that "the parties shall attempt in good faith to resolve any dispute arising out of this Agreement promptly by confidential mediation." Serco Plea in Bar, Exhibit 2. The Letter of Assignment further clarifies that a party may file suit with the court only "*if* the dispute has not been resolved by mediation within 60 days of a written request to mediate." Appx. at 14-15. Thus, it is clear from the express terms of the Letter of Assignment that the Parties did not intend for

mediation to be pursued concurrently with litigation but rather as a condition precedent to seeking redress with the court.

Second, because the ADR provision was a condition precedent to litigation, the trial court had no choice but to dismiss the complaint as a result of Primov's lack of compliance. *See L. White & Co.,* 81 Va. Cir. at 29. In *L. White & Co.*, the parties entered into a contract which required them to submit any claims first to informal negotiation and then to mediation prior to filing suit. *See id.* at 27. Like Primov, the plaintiff in *L. White & Co.* admitted that he did not attempt to initiate mediation prior to filing suit and claimed that the language concerning mediation was advisory and not a condition precedent to litigation. *See id.* In affirming the dismissal, the *White* court explained, "[t]he parties decided that the alternative dispute resolution process agreed to had to occur before a court action could be filed leading the court to the decision that the pending action should be dismissed not stayed. To decide otherwise is to rewrite the parties' agreement." *Id.*; *see also Performance Food Grp.*, 2005 WL 2456980 at *4 ("Dismissal of the case is proper when all issues presented are subject to a dispute resolution clause."); *Am. Tech. Servs., Inc.*, 2005 WL 2218437 at *3 ("Until mediation is completed, the condition precedent for the initiation of this suit is not met."); *TC MidAtlantic Dev.,* 280 at 210

(affirming dismissal of complaint where plaintiff failed to allege compliance with a condition precedent). Thus, it would have been inappropriate for the trial court to stay the proceedings.

Primov's reliance on *American Technology Services* is misplaced, as that case actually establishes that the trial court's decision to dismiss the complaint was proper. In *American Technology Services*, the parties entered into a contract in which they agreed to submit to mediation prior to filing suit with a court. *See* 2005 WL 2218437, at *3. While the court found that the condition precedent for filing suit was not met until the parties completed mediation, it was unable to determine whether either side made a good faith attempt to comply with the dispute resolution provision. *See id.* at 3. Accordingly, the court stayed the action for thirty (30) days and referred the parties to mediation. *See id*. Importantly, the *American Technology Services* court stayed the action in lieu of a dismissal *only* because the court could not determine whether either of the parties made a good faith attempt to comply with the dispute resolution provision. *See id.*

While Primov claims the trial court was faced with the same uncertainty as the court in *American Technology Services*, that is simply not so. Primov admitted that the only time in which he acknowledged the ADR provision is when his counsel sent a letter to Serco's counsel, after

litigation had commenced, stating that he was willing to consider mediation *concurrently* with the litigation. *See* Appx. at 27. Thus, there is no basis to support Primov's claim that it can be inferred that "either SERCO [sic] declined to engage in mediation, or else the parties engaged in mediation but were unable to reach a negotiated settlement of their dispute." Indeed, the trial court expressly found that Primov *did not comply*—or even attempt to comply—with the dispute resolution provision. *See* Appx. at 27.

III. The Statute Of Limitations Is Not Relevant To The Trial Court's Decision.

Finally, Primov argues that the trial court abused its discretion because it allegedly "treated the non-binding ADR provision as something akin to a statute of limitations ('SOL'), which can be complied with in only one way—through the filing of a complaint in court, on or before the date the SOL expires." Appellant Brief at 11. This argument misconstrues the court's holding. In fact, the trial did not hold that the ADR provision could only be complied with in one way, or that it was analogous to a statute of limitations. Rather, the trial court held that Primov must satisfy the ADR provision by submitting a written demand for mediation before filing suit; it did not describe the manner in which Primov needed to do so. *See* Appx. at 27. It would have been manifestly unjust for the trial court to have found that Primov's expression of willingness to mediate *after* twice commencing

litigation was sufficient to satisfy the ADR provision. Such a result would frustrate the entire purpose of including an ADR provision in the agreement.

Primov also argues that the trial court should not have dismissed the Complaint at all because "even a dismissal without prejudice would indeed prejudice Primov's right to pursue his wage claim against Serco." Appellant Brief at 16. Again, this argument apparently relates to the applicable statute of limitations for Primov's claims which began to expire in November 2017. *See* Appellant Brief at 17. However, the result is not unduly harsh, as Primov was on notice of this mandatory dispute resolution provision, and twice chose to disregard it before filing suit. Any consequential issues regarding the statute of limitations are not before this Court, and do not have any bearing on whether the trial court properly dismissed the Complaint with prejudice.

CONCLUSION

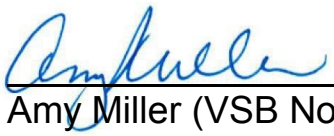
For the foregoing reasons, Appellee Serco Inc. respectfully requests that this Court affirm the decision of Chief Judge Bruce D. White, of the Circuit Court of Fairfax County, dismissing the Complaint filed by Appellant George Primov with prejudice.

Dated: May 7, 2017

Respectfully submitted,

SERCO INC.

By Counsel,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2018, pursuant to Rule 5:26, I caused three (3) paper copies of the ***Brief of Appellee Serco Inc***. to be hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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