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Re: Kessler v. Charlottesville, et al.—Plea in Bar and Demurrer—ruling
Hearing--April 14, 2021; Circuit Court File no. CL20-692

Dear Ms. Southall and Mr. Bodoh:

This matter is before the Court on Mr. Kessler's Petition for Declaratory, Mandamus, and Injunctive Relief, and Defendants' Demurrer and Plea in Bar. I have re-read the Petition (and original Complaint in General District Court), the Special Plea of Res Judicata and Demurrer, Petitioner's Opposition to such, and the two memoranda in support and in opposition filed by Respondents and Petitioner, respectively. I have also reviewed the pertinent sections of the Virginia Code, as well as several of the cases cited.

The Petition

The Petition is straightforward and focused. Petitioner brings this action "under the Virginia Public Records Act…and Virginia Freedom of Information Act." It seeks "declaratory, mandamus, and injunctive relief … for failure to preserve and/or make available for inspection public records in the form of text messages." Petition Page 1, ¶1. That is the extent of the relief requested in the initial section.

The Petition alleges that the City (one of the respondents here) "repeatedly and unlawfully *destroyed* public documents [that were] later requested under FOIA". Pet. 2, ¶2. (emphasis added). It specifically states that it is "not seeking the production of documents currently in possession of Respondents", many of which Petitioner had already received. The remedies sought here are for the alleged "failure…to properly archive and preserve documents from destruction". Pet. 2, ¶3.

The Petition further alleges that Respondent Wheeler "took no action…towards the 'preservation and safekeeping' of public documents on [Respondent] Jones' cell phone" (Pet. 9, ¶44), and that Respondents "destroyed [the records] in violation of the Public Records Act". Pet. 11, ¶54. In its Argument section, the Petition asserts that Respondents, under the Public Records Act, "failed…to prevent the destruction and ensure the preservation of public records", "have repeatedly destroyed public documents … [and] failed to permanently preserve public records". Pet. 11, ¶¶56, 57, 58.[1] He also asserts that under the Freedom of Information Act Respondents "have failed [and continue to fail] to take all necessary precautions, for the preservation and safekeeping of public records" Pet. 12, ¶62, citing Va. Code §2.2-3704(A).

In the Prayer for Relief, Petitioner asks that this Court 1) issue a declaration that Respondents have violated FOIA by "failing to take all necessary precaution to preserve public records" (text messages), and 2) declare that Respondents have violated VPRA by "failing to ensure the preservation of public records in the form of text messages", failing to preserve such, and failing to abide by the two-year preservation period. Pet. 12, ¶¶ 2,3. He also asks the Court 3) to enjoin the "further destruction of public documents", and 4) issue a mandamus requiring Respondents "to recover the public documents [text messages],…reveal all known information about the spoliated public documents,…establish procedures…to preserve public documents", retrieve and recover certain documents, get phone information from a third party, and hire a computer forensics firm to assist in the retrieval. Pet. 13, ¶¶6,7.

Respondents' Pleadings

Respondents then filed both a Special Plea of Res Judicata and a Demurrer. The demurrer challenges the sufficiency of the pleading—that is, whether it states a cause of action recognized in Virginia, and whether factual allegations are sufficient to support such cause of action. The plea in bar alleges the existence of facts and circumstances that would prevent the case from proceeding, based on res judicata.

The Plea in Bar

As to the Special Plea, Respondents, under Rule 1:6 of the Rules of the Supreme Court of Virginia, interpose the previous related FOIA case filed in Charlottesville General District Court which also sought to have the City produce emails and texts of Maurice Jones from August

[1] He also asserts that Respondent Jones failed to deliver public documents (text messages) to his successor, and Respondents failed to document the destruction of public records. Pet. 12, ¶¶ 59, 60.

11 and 12, 2017. They argue that under the Rule Petitioner is prohibited from relitigating not just the exact same claim, but any claim that "arises out of the same conduct, transaction or occurrence" between the same parties that relate to and could have been raised in the earlier proceeding. The subsequent action is barred "whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought." Rule 1:6 (a). Respondents assert res judicata as to both claims, but the General District Court ruled that it did not have jurisdiction on the Public Records Act claim, and only ruled on the merits on the Freedom of Information Act claim. Petitioner did not appeal the denial of the FOIA claim in General District Court.

The Demurrer

As to the Virginia Public Records Act claim, Respondents assert that Petitioner does not have standing, under the statute, for seeking a declaratory judgment or mandamus. Demurrer page 4, ¶ 3. They argue that a person does not have standing simply because he or she has a personal interest or stake in the matter, or because his rights may be affected; rather, there has to be a specific, substantial legal right to bring the action. Dem. 5, ¶¶ 5,7. Respondents assert that the VPRA does not grant any private right of action at all. Dem 5, ¶8a. The only enforcement provisions in the Act are given to the Librarian of Virginia or his designated representative, or a public official who is a custodian of certain records, and that this is an exclusive authorization. Dem. 6, ¶8b. They argue specifically that there is no standing to bring a mandamus or declaratory judgement action under either VFOIA or VPRA, and no right of action for a declaratory judgment. They assert that the declaratory judgment acts do not create any substantive rights not granted by statute. They also argue that the mere alleged violation of a statute does not confer the right for a citizen to bring a declaratory judgment or mandamus action.

As to FOIA, the only private right of action granted to citizens is to obtain records in the custody of a public official or body. The Petition specifically disclaims that it is seeking records in the possession of a public body or official.

Respondents acknowledge that there is a private right of action afforded, by way of an injunction or mandamus, with regard to the failure to disclose public records covered by the statute. However, Respondents assert that Petitioner does not have standing to bring this action as he does not allege the denial of rights afforded by this statute. Furthermore, Respondents assert that there is no factual basis pleaded to find that either Respondents Brian Wheeler, Al Thomas, or Maurice Jones, are or were at the time the FOIA request was made, custodians of the sought-after records. Thomas and Jones had already left the employ of the City, and there is no pleaded basis to find that Wheeler was or is a custodian of such records. They also assert that Petitioner acknowledges that the records possessed by the City have been turned over to Petitioner. So there is no pleaded basis for an injunction.

Respondents assert that the only remedial action granted by VPRA is that the Librarian of Virginia can force the return of documents. Also, for a mandamus to be proper there must be a clear and unequivocal duty of the public official to perform the act being requested to be enforced. In addition, mandamus, like a declaratory judgment, is prospective or forward-looking. It is not to address or resolve a past dispute or violation, or to settle a moot disagreement (e.g., "say that I was right"), and is not to be asserted as a punishment or a penalty.

Respondents also assert that, in any event, they cannot be compelled to recover, obtain, or reacquire records or documents that are no longer in their possession, and there is no duty to do such. They are not required to create new documents. Respondents also argue that they cannot be required, by mandamus, to establish procedures for the preservation of documents, as there is also no such established duty.

Finally Respondents assert that they cannot be required to pay attorney's fees and costs under FOIA because Petitioners are not seeking documents in the possession of Respondents, which is a prerequisite of such relief.

The Pertinent Statutes

This matter turns largely on the provisions of the Virginia Freedom of Information Act (Va. Code §2.2-3700 et seq.) and the Virginia Public Records Act (Va. Code §42.1-76 et seq.). The Petitioner and Respondents differ significantly in their interpretation and application of these Code provisions.

The Virginia Public Records Act's stated purpose is "ensur[ing] that…procedures used to manage and preserve public records [are] uniform throughout the Commonwealth." Va. Code §42.1-76. To pursue this goal, the Library of Virginia is directed to administer a "records management program" for the "efficient and economical" management of public records, according to regulations, guidelines, procedures, and techniques promulgated and established by the State Library. Va. Code §42.1-85.A. "Public record" is defined as "recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency", irrespective of "physical form" or "the medium upon which such information is recorded". Va. Code §42.1-77. Agencies with public records are directed to cooperate with the Library of Virginia, and each such agency is to establish a records management program, and are to ensure that such records (including "electronic records") are "preserved, maintained, and accessible". Va. Code §42.1-85.B. Each state agency and political subdivision is to have a "records officer" for the implementation and oversight of such records management programs.

There are provisions regarding essential public records, security, disposition, and archiving of public records, and delivery of such at the end of a term of office or service. There is not any provision that authorizes or anticipates individual or private actions to compel compliance with these procedures and requirements. There are two provisions that specifically address court actions. The Librarian of Virginia may petition the Circuit Court for the return of records in the possession of someone not authorized to have them (§42.1-89), and a person

seeking the return of records may request of the Circuit Court to order the sheriff or other officer to seize and return such. §42.1-90. There also is a power of auditing granted to the state librarian. §42.1-90.1

The Virginia Freedom of Information Act is a much longer and more complicated statute. The purpose of VFOIA is set forth in Va. Code §2.2-3700.B.: to ensure "the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees....[and] that all public records shall be available for inspection and copying..."[2] A large portion of the Act deals with the public records facet of the statutory obligations.

"Public records" is defined as "all writings and recordings...prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business." Such includes any writings or recordings "that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and *regardless of physical form or characteristics*." 2.2-3701. (emphasis added)

Most of the first half of the statute deals with the limitations of, and what public records are exempted from, the mandatory disclosure requirements. The balance of the statute has to do with requirements of open meetings and when closed meetings are allowed, and then enforcement actions and the availability of penalties or sanctions for violations.

Analysis and Discussion of Authority

This case, in considering the plea in bar and demurrer, can be broken down into a series of questions, which I will try to address and answer in order:

First, do the statutes, or either of them, provide or allow a private or individual right of action, particularly for the relief sought?

Second, if a private right of action is anticipated or allowed, does the petitioner in this case have standing to bring such action?

Third, if a private right of action is allowed and Petitioner has standing, are any of his claims for relief barred by res judicata?

Fourth, if a private right of action is allowed, Petitioner has standing, and any of the claims are not barred, are the items being sought (text messages) public records?

Fifth and finally, if the case may proceed, is there any other reason that the statutes do not apply or the relief requested may not be granted?

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[2] Its other purpose is to ensure entry or access to meetings of public bodies, but that purpose is not at issue here.

Private Right of Action?

While both counsel make good arguments with regard to the availability of a private right of action under each statute, after reviewing fully each statute's terms, I find that the Virginia Public Records Act does not anticipate nor provide a private right of action. It clearly has an administrative purpose--and seems, in fact, totally administrative and procedural--for the benefit of the good operation of the state government and its agencies and (unlike FOIA) not for the benefit of individual citizens themselves. A plain reading of the statute shows that it is for the internal management of records, not to vest citizens with a private right of action. It is speaking to official custodians of public records and sets forth certain requirements and expectations. But there is not an inkling as to an individual citizen being able to enforce its provisions. I agree with Respondents that there are only three references to enforcement action or authority and they are all vested in the State Library. Va. Code §§42.1-89, -90, and -90.1. I find this conclusion consistent with and compelled by the holdings in Cherrie v. Virginia Health Services, 292 Va. 309, 314-17 (2016) and Charlottesville Area Fitness Club Operators Association v. Albemarle County, 285 Va. 87, 100 (2013). See also Stoney v. Anonymous, 2020 WL 5094625 *3, Record No. 200901 (Va. 2020).

The Court in Cherrie states, "When a statute is silent [as to a private right of enforcement], we [the Court] have no authority to infer a statutory private right of action without demonstrable evidence that the statutory scheme necessarily implies it". 292 Va. at 315 (citing Small v. Federal Nat'l. Mortg., 286 Va. 119, 132 (2013), and other cases). I do not find such necessary implication here. A mere statutory violation is not enough. Id. at 315-16.

However, I have a different view with regard to the Freedom of Information Act. Clearly that does anticipate a private action to seek a mandamus or injunction where public records subject to the Act are not being disclosed. Va. Code §2.2-3713. So as to FOIA, the questions then are: 1) does Petitioner have standing to bring such an action? and 2) is he asking for relief recognizable, anticipated, and allowed under the statute? Clearly under Va. Code §2.2-3713.A., "[a]ny person" may bring such an action if they have been denied rights under this chapter. So what rights are granted here that could be denied by someone? As to such, certain records in the custody of a public body or its custodian must be turned over upon request. If they exist, are in the possession of the agency, and are not turned over, then rights granted under this provision are being denied. That person can then seek a mandamus or injunction to force the turning over, or prevent the withholding. There is no other remedy or relief that is anticipated by this statute. And if there is a violation, the only remedies allowed, other than ordering the disclosure or turning over, are attorney's fees, expert witness fees, a civil penalty, and possibly the costs of the copying, disclosure, or transmission. Va. Code §§2.2-3713.D., -3714.

I do not find that any other peripheral remedies (such as declaratory judgment) are contemplated or anticipated. Nevertheless, if there were a specific dispute or controversy that required the construction of this statute, other than to resolve a past disagreement, I believe that a declaratory judgment action might be appropriate and permissible. Cherrie; Charlottesville Fitness Operators, *supra*. But here, the declaratory judgment is being sought as to something that has already happened. A declaratory judgment is forward looking. Its purpose is to resolve

an issue of present dispute that will help resolve a greater or future issue. Here there is no controversy except a disagreement over the characterization of and application of a statute. But it does not seem that it would have any effect on this present case, just possibly future, potential, speculative disputes. In my view, this is the type of advisory opinion not allowed. And the declaratory judgment statute is not the source of, and does not provide, substantive rights not already held by a party. Such must be based in the Constitution or common law, or the statute itself. I find neither. If this were not the case, then any citizen could at any time file a suit to challenge any governmental decision and assert or allege that the municipality or government agency has not done what it should.[3] Again, Petitioner admittedly is not seeking the release of documents, but only a statement that such should not have been destroyed. If they were destroyed, then they do not exist, as believed, and are not subject to VFOIA. If they do exist, they are subject to VFOIA, but they have not been asked to be turned over in this proceeding.

There simply are some duties and obligations created for which there is not a judicial remedy but only a political (in the generic sense) or administrative one. So if this statute is not followed, there can be citizen complaints or requests to executive or legislative representatives, and in the absence of sufficient response, the persons involved (or those who appointed them) can be voted out of office. Some matters of community interest have only political remedies.

Standing

So because I find no such action authorized by the VPRA statute, I find that Petitioner has no standing to bring any such action based on that statute. So the next question is whether Petitioner, as to FOIA, has standing to bring this action. In other words, is he a person who has been "denied the rights and privileges conferred by this chapter"? It is the Court's view that he could have standing under §2.2-3713 if he had requested documents in existence and in the possession of the City or its custodian of records, and such had not been turned over. However, the problem in this case is that the Petition explicitly disavows any attempt or desire, in this proceeding, to obtain records in the possession of the City of Charlottesville under this code section: "This action is **not** seeking the production of documents currently in possession of Respondents. Production of those documents were [sic] sought and obtained via a separate action. Pet. 2, ¶ 3 (emphasis in the original). While he did earlier seek information and documents under VFOIA (in General District Court), that is not what he is doing here. So I cannot find that this action is based on any denial of any rights or privileges under FOIA, so there is no basis for an injunction or mandamus thereunder. He does argue that his rights under VPRA are derivative of VFOIA, in that the failure to preserve and maintain certain records impacts his ability to obtain or access documents under FOIA. But I do not find that to be a reason to grant relief under VPRA, and I do not find it to be a remedy allowed under FOIA. I see this ruling as consistent with Concerned Taxpayers v. Brunswick County, 249 Va. 320, 330-31 (1995) (when a remedy is in the statute, it is exclusive unless clearly stated otherwise).[4]

[3] That is the type of general right that has always been denied as it would be an undue burden on any state or local government or agency, and conceivably bring local and state government programs and administration to a halt.
[4] Much in Petitioner's arguments make logical sense, and has appeal. But it is up to the legislature, not the Court, to fashion a remedy. I have given consideration to and sympathize with Petitioner's argument that people could violate

These two findings, in my view, dispose of all of Petitioner's claims and Respondents' demurrer. However, they may not be the only reason Respondents prevail, so I will address Respondents' and Petitioner's other points in the event the matter is considered further on appellate review.

Res Judicata

Respondents argue that the General District Court's addressing of this same matter prevents Petitioner from presenting it to the Circuit Court for further consideration. Relying on Rule 1:6, Respondents assert that any matter that was litigated or *could have been litigated* pertaining to the same facts or subject matter is barred from further consideration by this court, even if such specific claims were not explicitly raised in the prior proceedings or the same remedies were not sought below. Furthermore, while acknowledging that Judge Downer determined that he did not have jurisdictions to consider the VPRA claims, Respondents say that it does not matter that the lower court determined that it had no jurisdiction; they state that the Petitioner made the election to seek relief in that forum, so those proceedings between these same parties are still a bar, prohibiting this court from hearing further argument on a similar but related issue.

But I do not see how a decision by a court with no jurisdiction over a matter or issue can operate as a bar to bringing that matter/action in the Court that does have jurisdiction or authority over it. Therefore, although I have ruled against Petitioner as to VPRA on other grounds, I do not find that that claim would be barred by res judicata if the statute allowed a private right of action or he had standing to bring such, or if the remedy were allowed (discussed below).

However, I reach a different conclusion as to VFOIA. Judge Downer ruled that though the City had not complied fully with FOIA, the records that should have been turned over, which were in existence (text messages), were not withheld willfully or deliberately, there was no cause for mandamus, and no sanction was appropriate. That matter was dismissed on the merits, with prejudice, and was not appealed. To reiterate the Rule:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, is forever barred from prosecuting *any second or subsequent civil action* against the same opposing party or parties *on any claim or cause of actions* that *arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit,* and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depend, or the particular *remedies sought.*

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the requirement to preserve records, and there would be no recourse under FOIA. But again, that is an opportunity for the legislature to act.

Rule 1:16(a) of the Rules of the Supreme Court of Virginia (emphasis added). I do not think that matter can be resurrected. Even if he were seeking disclosure of records in this Court, and so arguably had standing here, I do not believe that Petitioner can pursue another remedy in another court based on the same alleged failure to comply with FOIA as to the same or similar records.

Petitioner knew about that potential, purported, or asserted non-compliance then and should have raised it then and there or brought everything in Circuit Court. Respondent City of Charlottesville, Respondent Wheeler, and the emails and texts from Respondent Jones August 11 and 12, 2017, are all mentioned in the General District Court Complaint and are the subject of Judge Downer's order. So even if there were a private right of action, and Petitioner had standing, the claim is barred. We do not allow trying a case piecemeal. We do not allow parties to try part of a cause, and then come back with further claims against the same parties regarding the same subject matter on a different day, on different theories or claims, or allow one claim in one court and, if one loses (or wins), to file and pursue another related claim in another court.

Public Records

I do disagree with Respondents as to the characterization of the sought-after text messages. The Court finds that the text messages, to the extent that they did exist, are and were public records. To me they clearly are, under the definition of public records in both VPRA and VFOIA. They are:

> writings… that consist of letters…set down by…typewriting, magnetic impulse, optical or magneto-optical form…or electronic records, or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

Va. Code §2.2-3701. They also are:

> Recorded information that documents a transaction or activity by or with [a] public officer, agency or employee of an agency….produced, collected, received or retained…in connection with the transaction of public business [regardless of physical form or characteristic or medium].

Va. Code §42.1-77. I find that they are more like emails than phone messages or conversations, and that they constitute a writing under either statute. So while I do not grant Petitioner's request, it is not because I do not think they are public records.

Is the Relief Proper and Allowed under the statute?

Even if there were a right of private action, Petitioner had standing, and the proceedings were not barred, I believe Petitioner is asking for something not authorized or contemplated or anticipated by the Constitution, pertinent statutes, or the common law.

Under VPRA, as alluded to above, the only remedy is to have the state library seek the return of certain documents or initiate an audit. While I agree that this could weaken VFOIA, I believe it is a matter for the legislature to plug that hole, if there is one. I do not see any basis for any sanctions against Respondents under VPRA for failing to properly preserve records. Specifically there is no declaratory judgment available in that there is no present dispute that a ruling on the declaratory judgment would help resolve or advance. The only disagreement or dispute is whether such records were destroyed. So there is no remedy of mandamus, injunction, or declaratory judgment, or sanctions, under VPRA or VFOIA.

Under FOIA, since Petitioner is not seeking the release of documents or records, nor alleging destruction after the request was made, there is no remedy he is seeking that is authorized by the statute. (Even if Respondents were refusing to turn over documents, the only remedies are for them to be ordered to turn over the documents and possibly pay a civil fine, the attorney's fees, and related costs.) Even if they had been seeking records, I do not think it is within the Court's authority to require them to set up a plan, policies, or procedures, nor need they obtain the records from elsewhere. Their only duty would be as to the records in their possession. However, on this point I continue to disagree with the City in that if the documents (texts) were still in the possession of the City, even in deleted form, I believe that the City would still have the obligation and duty to retrieve (recover) them. To me it is no different than if paper records were torn up and thrown in a trashcan but had not been taken out to the garbage yet. Those documents would still be in the possession of the City and would still be documents, even though torn up ("regardless of physical form, characteristics, or medium"). I believe that deleted documents, if recoverable in the City's system or on its hardware, are still in the possession of the custodian. I also do not believe the statute draws a distinction between documents and data. I believe "records" encompasses both, as they have letters, numbers, and words.

Nevertheless, Petitioner is not at this point seeking such, so I do not see how VFOIA has any relevance in this matter.

<u>Other points raised or claims made</u>

I also agree that Respondents Jones and Thomas are not now, and were not at the time of the request, the current custodians of the records sought or desired. (It is not clear when, if at all, records were deleted or lost.) If the records were being sought in this proceeding, it would have to be the current custodian. Since the Court finds no private right or enforcement and sanctions exist, it does not matter who was a custodian at a prior time. Similarly, there is no basis to find Respondent Wheeler, the communications director, to be the custodian of such records, then or now. I do not see how they would be proper parties, under VPRA or VFOIA. And particularly Respondent Wheeler has already prevailed on the VFOIA proceeding in the General District Court.

One caveat: at the last court appearance, Counsel for Respondents indicated it had found some texts still existing on the phone that were long believed deleted or wiped. (This appears to have been the basis for one aspect of Judge Downer's ruling.) If that is so, such would appear to have been subject to Petitioner's original FOIA request. I have had no updates until Friday, October 1 (by letter). If certain texts or emails previously requested do exist, they would be subject to FOIA and future requests.

Conclusion

So I will sustain the demurrer in this proceeding. I find no private right of action or standing for the remedies sought in this proceeding, under either VPRA and VFOIA, and find that the Petition does not state a cause of action for the relief requested. Petitioner admittedly did not seek any existing records in this proceeding, and it appears now that Petitioner did not request or seek such records further because it believed (now seemingly wrongly) that none such existed (which now may not be true). I also do not find that an injunction or mandamus is necessary to prevent a failure of justice.

As to FOIA, a private right of action is allowed if such records requested are not turned over. I find that, as stated in the petition, Petitioner is not seeking a remedy allowed by the statute, and (as noted above), is not seeking access to records in the possession of the City.

Furthermore, I find that the FOIA request would also be barred by res judicata, in light of the ruling of the Charlottesville General District Court, except to the extent that Respondents falsely, wrongly, or simply incorrectly advised that no such records (texts) existed. So I would sustain the plea in bar against all claims under FOIA. However, in light of this new disclosure, I will allow Petitioner to file an amended Complaint within 21 days of entry of the order on this ruling, and replead the FOIA claim, if he so desires, only to the extent that it addresses text messages that have been in existence all along, and are in fact in existence (even if in deleted form, if still in the dominion and control of the City or its employees or agents).

This can be the subject of an amended Petition, or further discussion and negotiation between the parties. If they do not reach any agreement with the City regarding this point they may amend and replead solely to this extent. The demurrer and plea in bar are sustained in all other respects with prejudice, without leave to refile.

I ask Ms. Southall to prepare an order encompassing the findings and rulings in the letter. Thank you to both of you for your presentations.

Sincerely,

Richard E. Moore 10/8/21