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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207895
Party	Plaintiff Hokie Objective Onomastics Society LLC
Correspondence Address	KEITH FINCH THE CREEKMORE LAW FIRM PC 318 N MAIN STREET BLACKSBURG, VA 24060 UNITED STATES iplaw@creekmorelaw.com, keith@creekmorelaw.com
Submission	Motion for Summary Judgment
Filer's Name	Keith Finch
Filer's e-mail	iplaw@creekmorelaw.com,keith@creekmorelaw.com
Signature	/Keith Finch/
Date	04/08/2014
Attachments	HOOS - Motion to Strike and for Partial Summ. J. on VPI's Affirmative Defenses (with exhibits).pdf(1238469 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

HOKIE OBJECTIVE ONOMASTICS)	
SOCIETY LLC,)	
)	
Opposer,)	
v.)	Opposition No. 91207895
)	
VIRGINIA POLYTECHNIC INSTITUTE)	Serial No. 85-531,923
AND STATE UNIVERSITY,)	
)	
Applicant.)	

**OPPOSER’S MOTION TO STRIKE VPI&SU’S AFFIRMATIVE DEFENSES
AND/OR FOR PARTIAL SUMMARY JUDGMENT ON
VPI&SU’S AFFIRMATIVE DEFENSES**

Pursuant to Federal Rules of Civil Procedure 12(f) and 56, Opposer Hokie Objective Onomastics Society LLC (“Opposer”) hereby moves the Board either (a) to strike the affirmative defenses of Estoppel and Unclean Hands (the “Affirmative Defenses”) raised by Applicant Virginia Polytechnic Institute and State University (“VPI&SU”), or (b) for summary judgment against VPI&SU on the Affirmative Defenses. This motion is germane to VPI&SU’s Motion to Compel, filed on March 24, 2014, because the discovery that VPI&SU seeks in its Motion to Compel relates only to VPI&SU’s Affirmative Defenses.

ARGUMENT

1. The Affirmative Defenses Should be Stricken Because They Fail to Allege Facts Indicating that James Creekmore’s Clients Were Acting As His Agent

Both of VPI&SU’s Affirmative Defenses rely upon the theory that the Settlement Agreement attached to the Declaration filed with VPI&SU’s Motion to Compel (the “Settlement Agreement”), which was signed only by Hokie Real Estate, Inc. and John Wilburn (the “Clients”) to settle a different lawsuit, also binds James Creekmore (who acted as a lawyer

in that lawsuit) and by extension also binds Opposer (which did not exist at the time of execution of the Settlement Agreement). (*See Answer at 7-9.*)

It is important to note that in order to prevail on its Affirmative Defenses, VPI&SU would have to prove two elements. First, it would have to prove that the Settlement Agreement somehow bound James Creekmore. Second, it would have to prove that because James Creekmore is bound by the Settlement Agreement, Opposer also is bound by the Settlement Agreement.

However, the Affirmative Defenses are inadequate with respect to the first of these elements. Nowhere in the Affirmative Defenses does VPI&SU allege any facts supporting an inference that James Creekmore was bound by the Settlement Agreement. In order for James Creekmore to have been bound, the parties who actually executed the Settlement Agreement — the Clients — would have had to have been agents of James Creekmore. Under Virginia law (which governs the Settlement Agreement), an agent of a party can either have “express, implied or apparent” authority to act on behalf of that party. *Amalgamated Clothing Workers v. Kiser*, 6 S.E. 2d 562, 564 (Va. 1939); *see also* Restatement (Second) of Agency §§ 7-8 (1958).

However, nowhere in its Affirmative Defenses does VPI&SU allege that either of the Clients was an agent of James Creekmore. (*See Answer at 7-9.*) Nor does VPI&SU allege any facts indicating that either of the Clients had express, implied or apparent authority to act as an agent of James Creekmore. For example, VPI&SU could have alleged express authority by stating facts showing that James Creekmore made a manifestation of consent by “words or other conduct,” or could have alleged implied authority by stating facts showing that “the words used” or “customs and . . . relations of the parties” permitted authority to be “implied or inferred.” Restatement (Second) of Agency § 7, comments (b)-(c) (1958). VPI&SU also could have alleged apparent authority by stating facts showing that James Creekmore made “a

manifestation . . . that [a Client] is his agent.” *Id.* § 8, comment (a). VPI&SU has alleged none of these things.

Instead, the closest VPI&SU has come is to allege that James Creekmore was an agent of the Clients because he was their lawyer. (*See Answer at 8 ¶ 4.*) However, this does not automatically mean that the Clients were agents of James Creekmore. There is no principle of law that automatically makes a client an agent of his or her lawyer. Indeed, a lawyer is not even automatically the agent of his or her client. *See, e.g., Walson v. Walson*, 556 S.E.2d 53 (Va. Ct. App. 2001) (holding that attorney did not have apparent authority to sign settlement agreement for client). To allege that the Clients were agents of James Creekmore, VPI&SU must state facts supporting this allegation, *i.e.*, the words, conduct or other circumstances by which James Creekmore expressly or impliedly authorized Clients to bind him by signing the Settlement Agreement. VPI&SU has not done so.

VPI&SU’s Affirmative Defenses therefore simply are not plausible under the *Iqbal-Twombly* standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring a complaint to “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face”) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)). The majority of courts that have considered the issue have held that the *Iqbal-Twombly* standard applies to affirmative defenses. *Oleksy v. General Elec. Co.*, No. 06 C 01245, 2013 U.S. Dist. LEXIS 89351, at *50 (N.D. Ill. June 26, 2013); *see also Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (“the vast majority of courts presented with the issue have extended *Twombly*’s heightened pleading standard to affirmative defenses”); *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233-34 (E.D.N.C. 2010) (same). Because VPI&SU has not alleged any facts in its Affirmative Defenses indicating that either of the Clients was an agent of James Creekmore, its Affirmative Defenses are not plausible and should be stricken.

2. Neither Opposer nor James Creekmore Was a Party to the Settlement Agreement, So Summary Judgment is Appropriate

A party who does not manifest assent to an agreement is not a party to that agreement, and so is not bound by that agreement. *See, e.g., Persinger & Co. v. Larrowe*, 477 S.E.2d 506 (Va. 1996) (partner who did not sign partnership agreement was not bound by its terms). This is true even if the agreement itself purports to bind that party. *See, e.g., id.* at 509 (refusing to “accept the circular reasoning that [a partner] was bound by the agreement by virtue of the agreement’s requirement that partners be bound by it.”)

Here, neither James Creekmore nor Opposer signed the Settlement Agreement or agreed to be bound by the Settlement Agreement. (*See* Decl. of James Creekmore, attached as Exhibit A, ¶¶ 4-5.) Neither James Creekmore nor Opposer even is named in the Settlement Agreement. Because neither James Creekmore nor Opposer are parties to the Settlement Agreement or the License Agreement, they are not bound by the Settlement Agreement.

Furthermore, there can be no dispute of fact with respect to this question. The Settlement Agreement, together with the License Agreement¹ executed on the same date, constitutes the entire agreement between VPI&SU and the Clients. (Ex. A to Weisbein Decl. attached to Motion to Compel at 2.) The Board therefore “should look no further than the four corners” of the Settlement Agreement and the License Agreement in interpreting the agreement between VPI&SU and the Clients. *Pocahontas Min. LLC v. CNX Gas Co., LLC*, 666 S.E.2d 527, 531 (Va. 2008). Summary judgment against VPI&SU on its Affirmative Defenses therefore is appropriate.

1. The License Agreement is attached to the Declaration of James Creekmore, which is in turn attached to this Motion as Exhibit A. Opposer does not contend that any language in the License Agreement is relevant to this Motion; rather, the License Agreement is attached solely so that the Board will have the entire agreement between VPI&SU and the Clients before it, so as to be able to determine what lies within the “four corners” of that agreement.

3. Neither James Creekmore Nor Opposer Authorized the Clients to Execute the Settlement Agreement on Their Behalf, So Summary Judgment is Appropriate.

VPI&SU appears to allege that when the Clients executed the Settlement Agreement, they did so as agents of James Creekmore (who was acting as their lawyer at the time) and were authorized to bind him contractually to that Settlement Agreement. Indeed, this would appear to be the only way that James Creekmore could be bound by the Settlement Agreement, as he did not himself sign the Settlement Agreement.

The general rule of agency is that authority in the agent is created by written or spoken words of the principal or by conduct of the principal. Restatement (Second) of Agency § 26 (1958). Apparent authority is created as to third persons by the principal's written or spoken words or conduct that cause the third person reasonably to believe that the principal consents to the agent's performance of the acts on behalf of the principal. *Id.* § 27.

“The party who alleges an agency relationship has the burden of proving it.” *Hartzell Fan, Inc. v. Waco, Inc.*, 505 S.E.2d 196, 200 (Va. 1998). Here, VPI&SU offers no evidence whatsoever that James Creekmore authorized the Clients to act as his agents, or that any words or conduct of James Creekmore made it reasonable for VPI&SU to believe that the Clients were acting as agents of James Creekmore. Indeed, it is not usual for the client of a lawyer to act as agent for the lawyer; rather, usually the reverse is true. James Creekmore himself has declared that the Clients never have been authorized to act as his agents. (*See* Decl. of James Creekmore, attached as Exhibit A, ¶ 6.) Furthermore, neither of the Clients were authorized to act as agents of Opposer in executing the Settlement Agreement, because Opposer did not exist at that time. (*See id.* ¶ 7.)

Because neither of the Clients were authorized to act as agents of James Creekmore or of Opposer, the execution of the Settlement Agreement by the Clients does not bind James

Creekmore or Opposer. Summary judgment against VPI&SU on the Affirmative Defenses therefore is appropriate.

4. VPI&SU's Interpretation of the Settlement Agreement Would Render it Illegal.

VPI&SU tries to interpret the Settlement Agreement as binding upon James Creekmore because he was acting as the “attorney” for the Clients, and because the Settlement Agreement purports to restrict the rights of the “attorneys” of the Clients. However, an agreement that restricts the right of a lawyer to practice law is unethical. *See* Virginia Rule of Professional Conduct 5.6(b). If the Settlement Agreement is to be interpreted as VPI&SU proposes, then it is in violation of law and therefore void. *See Blick v. Marks, Stokes and Harrison*, 360 S.E.2d 345, 348 (Va. 1987). Furthermore, there can be no dispute of fact with respect to this question, as the Board need “look no further than the four corners” of the Settlement Agreement and the License Agreement in deciding it. *Pocahontas Min. LLC v. CNX Gas Co., LLC*, 666 S.E.2d 527, 531 (Va. 2008). Summary judgment against VPI&SU on its Affirmative Defenses therefore is appropriate.

5. The Term “Attorneys” in the Settlement Agreement Does Not Mean “Attorneys-at-Law.”

VPI&SU's argument is based upon the theory that the Clients, by agreeing to release claims on behalf of their “attorneys,” somehow also released claims on behalf of James Creekmore, who was acting as their lawyer at the time. However, the term “attorney” does not necessarily mean “attorney-at-law” or “lawyer.” Black's Law Dictionary contains the following two definitions of the term “attorney”:

- attorney.**
1. Strictly, one who is designated to transact business for another; a legal agent. — Also termed *attorney in fact*; *private attorney*.
 2. A person who practices law; *LAWYER*. — Also termed (in sense 2) *attorney-at-law*; *public attorney*.

Black's Law Dictionary 138 (8th ed. 2004). The term "attorney" in the Settlement Agreement should be interpreted in accordance with the first definition above, rather than the second. This is especially true because (as detailed in Section 4 above) to interpret "attorney" as meaning "attorney-at-law" or "lawyer" would make the Settlement Agreement illegal as a violation of Virginia ethical rules applying to attorneys. *See Merriman v. Cover, Drayton, & Leonard*, 51 S.E. 817, 818 (Va. 1905) ("Where two constructions may be given a contract . . . , one of which would render it valid and the other of which would destroy it, the former construction will be given it if reasonable, for in such a case . . . the contracting parties will [not] be held to have intended to do that which they had no right to do.") Furthermore, there can be no dispute of fact with respect to this question, as the Board need "look no further than the four corners" of the Settlement Agreement and the License Agreement in deciding it. *Pocahontas Min. LLC v. CNX Gas Co., LLC*, 666 S.E.2d 527, 531 (Va. 2008). Summary judgment against VPI&SU on its Affirmative Defenses therefore is appropriate.

6. VPI&SU's Interpretation of the Settlement Agreement Would Render it Void for Lack of Consideration.

Even if the Settlement Agreement somehow could be construed to apply to James Creekmore, it would be void for lack of consideration. Nothing in the Settlement Agreement (or in the License Agreement, for that matter) purports to provide anything of value to James Creekmore. Indeed, James Creekmore is not even mentioned in the Settlement Agreement. The Settlement Agreement therefore is void as applied to James Creekmore. *See, e.g., Carnegie Trust Co. v. Security Life Ins. Co.*, 68 S.E. 412, 416 (Va. 1910) (an "agreement . . . without consideration [is] void"). Furthermore, there can be no dispute of fact with respect to this question, as the Board need "look no further than the four corners" of the Settlement Agreement and the License Agreement in deciding it. *Pocahontas Min. LLC v. CNX Gas Co.*,

LLC, 666 S.E.2d 527, 531 (Va. 2008). Summary Judgment on the Affirmative Defenses therefore is appropriate.

7. Even if the Settlement Agreement Binds James Creekmore, It Does Not Apply to This Proceeding.

Even if the Settlement Agreement somehow bound James Creekmore, it does not apply to this proceeding. The language upon which VPI&SU bases its Affirmative Defenses provides as follows:

Each of the Parties for themselves, their employees, officers, directors, attorneys, representatives, successors and assigns, hereby unconditionally releases, acquits and forever absolutely discharges each other, the other's respective vendors, customers and agents, and the respective employees, officers, directors, attorneys, representatives, agents, servants, successors and assigns of each of the foregoing, from any and all actions, causes of actions, claims, debts, defenses, disabilities, accounts, demands, damages, claims for indemnification or contributions, costs, expenses or fees whatsoever, whether arising in the United States or elsewhere, whether known or unknown, certain or speculative, asserted or unasserted on account of or in any way concerning the Hokie Real Estate name or mark, the HOKIES Marks (as defined in the License Agreement executed pursuant to paragraph 3 of this Agreement) the Color Scheme (as defined in the Amended Complaint filed in the Civil Action), the hokiereal estate.com domain name, or the Civil Action and *occurring prior to the Effective Date of this Agreement*.

(Ex. A to Weisbein Decl. attached to Motion to Compel at 1 (emphasis added).) As indicated by the language above in italics, the Settlement Agreement only releases claims "occurring prior to the Effective Date" of the Settlement Agreement. The Effective Date of the Settlement Agreement was August 5, 2011. (*Id.*). This opposition proceeding arises from an application for registration filed by VPI&SU some six months after the Effective Date, on February 2, 2012. This opposition proceeding itself did not commence until more than a year after the Effective Date, on November 7, 2012. Indeed, this opposition proceeding could not have been brought on the Effective Date, because at that point in time VPI&SU had not yet filed the application for registration that is the subject of this opposition proceeding. Accordingly, this opposition proceeding, and the facts giving rise to it, cannot be described as "occurring prior to

the Effective Date” of the Settlement Agreement, and therefore the Settlement Agreement does not apply to this proceeding. Because the Affirmative Defenses are based upon the theory that the Settlement Agreement somehow applies to this proceeding, summary judgment against VPI&SU on its Affirmative Defenses is appropriate. Furthermore, there can be no dispute of fact with respect to this question, as the Board need “look no further than the four corners” of the Settlement Agreement and the License Agreement in deciding it. *Pocahontas Min. LLC v. CNX Gas Co., LLC*, 666 S.E.2d 527, 531 (Va. 2008).

For the foregoing reasons, Opposer requests that the Affirmative Defenses raised by VPI&SU be stricken pursuant to Federal Rule of Civil Procedure 12(f), or, in the alternative, that summary judgment be granted against VPI&SU with respect to the Affirmative Defenses.

HOKIE OBJECTIVE ONOMASTICS SOCIETY LLC

By:



Keith Finch (VSB No. 37599)
THE CREEKMORE LAW FIRM PC
Attorney for Opposer
318 N. Main Street
Blacksburg, Virginia 24060
(540) 443-9350 – Telephone
(540) 443-9352 – Facsimile
keith@creekmorelaw.com

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2014, I served the foregoing by first-class mail upon the following, with a courtesy copy via e-mail:

Norm J. Rich, Esq.
Robert S. Weisbein, Esq.
FOLEY & LARDNER LLP
3000 K Street, N.W., Suite 600
Washington, DC 20007-5109



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v.)	Opposition No. 91207895
)	
VIRGINIA POLYTECHNIC INSTITUTE)	Serial No. 85-531,923
AND STATE UNIVERSITY,)	
)	
Applicant.)	

**DECLARATION OF JAMES CREEKMORE IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT ON
VPI&SU'S AFFIRMATIVE DEFENSES**

The undersigned does hereby declare as follows:

1. I am an adult citizen and resident of the Commonwealth of Virginia and am competent to make this declaration.
2. I make this declaration both in my personal capacity and (where indicated) on behalf of Opposer Hokie Objective Onomastics Society LLC ("Opposer"), in my capacity as Manager of Opposer.
3. I refer to the Settlement Agreement attached as Exhibit A to the Declaration of Robert S. Weisbein filed in connection with Applicant's Motion to Compel filed in this matter on March 24, 2013 (the "Settlement Agreement").
4. I did not sign the Settlement Agreement or agree to be bound by the Settlement Agreement.
5. On behalf of Opposer, I declare that Opposer did not sign the Settlement Agreement or agree to be bound by the Settlement Agreement, as Opposer did not exist at the time of execution of the Settlement Agreement.



6. I have never authorized Hokie Real Estate, Inc. or John Wilburn to act as my agents. In particular, I never authorized either of them to act as my agent so as to bind me contractually when they executed the Settlement Agreement.
7. On behalf of Opposer, I declare that Opposer has never authorized Hokie Real Estate, Inc. or John Wilburn to act as Opposer's agents. In particular, Opposer never authorized either of them to act as Opposer's agent so as to bind Opposer contractually when they executed the Settlement Agreement, as Opposer did not exist at the time of execution of the Settlement Agreement.
8. Attached hereto as Exhibit 1 is a copy of the executed License Agreement referred to in paragraphs 3 and 8 of the Settlement Agreement. The Settlement Agreement and the License Agreement together constitute the entire agreement between Applicant, Hokie Real Estate, Inc. and John Wilburn.
9. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 8th day of April, 2014

By: 
James Creekmore

LICENSE AGREEMENT

THIS AGREEMENT is made and entered into as of August 5, 2011 (the “Effective Date”), by and between Virginia Polytechnic Institute and State University (“Virginia Tech”) on the one hand, and Hokie Real Estate, Inc. and John Wilburn (Hokie Real Estate, Inc. and John Wilburn are collectively referred to as “HRE”) on the other hand (each a “Party” and collectively referred to as the “Parties”).

WHEREAS, Virginia Tech extensively has used and promoted for decades the HOKIES Marks (as defined below) in connection with its athletic teams, educational programs, and a wide variety of goods and services;

WHEREAS, Virginia Tech extensively has used and promoted for decades its maroon and burnt-orange color scheme in connection with its athletic teams, educational programs, and related goods and services (the “Color Scheme”);

WHEREAS, HRE uses the name HOKIE REAL ESTATE and a maroon and orange color scheme in connection with offering real estate services in the New River Valley area; and

WHEREAS, HRE and Virginia Tech freely enter into this License Agreement in the spirit of cooperation, notwithstanding their respective personal and professional beliefs;

NOW, THEREFORE, in consideration of the mutual promises, covenants, and conditions contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. *Definition.* The term “HOKIES Marks” means the HOKIES mark and any lawful derivative thereof (e.g., HOKIE), including any application or registration thereof, such as U.S. Trademark Registration No. 2,351,364.
2. *Ownership of the Trademarks.*
 - 2.1. HRE acknowledges that Virginia Tech is the owner of the HOKIES Marks. Nothing in this Agreement transfers or conveys to HRE any ownership interest in any of the HOKIES Marks.
 - 2.2. On May 2, 2011, Hokie Real Estate, Inc. obtained a Virginia trademark registration for the HOKIE REAL ESTATE mark, which registration is scheduled to expire on May 2, 2016 (the “State Registration”). Hokie Real Estate, Inc. shall not take any action to renew, extend, or otherwise maintain the State Registration, and shall allow the State Registration to expire automatically as scheduled. Hokie Real Estate, Inc. shall not file any new applications to register a trademark (at the state or federal level) including the term HOKIE or HOKIES.
3. *License.*
 - 3.1. Grant of License. Virginia Tech grants to Hokie Real Estate, Inc. an exclusive license (a) to use the HOKIE REAL ESTATE mark alone and in connection with the Color

Scheme (the “Licensed Marks”) as a service mark in connection with real estate brokerage, sales, and leasing services (the “Licensed Services”). Hokie Real Estate, Inc. acknowledges that all uses of the Licensed Marks by Hokie Real Estate, Inc. shall inure to the benefit of Virginia Tech.

3.2. Agreement Not to License Third Parties.

3.2.1. During the term of this license, Virginia Tech shall not grant a third party the right to use (a) the mark HOKIE REAL ESTATE (or a confusingly-similar variation thereof) in connection with real estate services (*e.g.*, real estate brokerage, sales, construction, remodeling and leasing), or (b) the mark HOKIE as part of a business name in connection with the Licensed Services.

3.2.2. Nothing in this Agreement or in Paragraph 3.2.1 shall prevent or limit Virginia Tech from (a) using or licensing the HOKIE HOMES mark in connection with real estate goods and services, or (b) using or licensing any of the HOKIES Marks for internal purposes (*i.e.*, uses by Virginia Tech or by its students, faculty, or employees), such as student-housing placement.

3.3. Term of License. This License shall remain in effect so long as Hokie Real Estate, Inc. is licensed by the Virginia Real Estate Board of the Virginia Department of Professional and Occupational Regulation (the “VA Real Estate Board”), and shall be terminable only if the VA Real Estate Board revokes Hokie Real Estate, Inc.’s real estate brokerage license.

3.4. Quality Control. The Parties agree that the Licensed Services offered under the Licensed Marks must be of a high quality to maintain the reputation and distinctive quality of the Licensed Marks and the goodwill of Virginia Tech associated therewith. Virginia Tech acknowledges and agrees that the non-revocation of Hokie Real Estate, Inc.’s license as a real estate brokerage by the VA Real Estate Board is sufficient to establish that Hokie Real Estate, Inc. is offering such high-quality services. Therefore, upon request, Hokie Real Estate, Inc. will provide Virginia Tech proof that its real estate brokerage license has not been revoked by the VA Real Estate Board.

3.5. Assignment. Virginia Tech has the right to approve any assignment of this License should John Wilburn sell, transfer, or otherwise dispose of all of his interest in Hokie Real Estate, Inc. to a third party, but approval will not be withheld unreasonably.

4. Indemnification.

4.1. Hokie Real Estate, Inc. agrees to indemnify and hold harmless Virginia Tech and its successors, assigns, parent, subsidiaries, affiliates, and co-ventures, and all other parties associated with the Licensed Marks, and its respective directors, officers, employees, and agents from and against all third-party claims (including settlements entered into in good faith with Hokie Real Estate, Inc.’s consent), liabilities and expenses (including reasonable attorneys’ fees) resulting directly from Hokie Real Estate, Inc.’s use of the Licensed Marks (a “Claim”). This duty of indemnification shall only be triggered upon

a finding (by a court or jury) of liability on such a claim. This duty of indemnification shall survive this Agreement.

- 4.2. The indemnification obligation described in Paragraph 4.1 will arise only if Virginia Tech notifies Hokie Real Estate, Inc. of the Claim within ninety (90) days of becoming aware of the Claim, and further Hokie Real Estate, Inc. will, at its sole option, have the right to take over full and exclusive control of the defense and/or settlement of the Claim at its expense, except that Hokie Real Estate, Inc. may not settle or compromise the Claim without Virginia Tech's consent (which consent may not be unreasonably withheld or delayed) if (a) injunctive or other equitable relief would be imposed against Virginia Tech as a result thereof, (b) the settlement or compromise does not contain a full and final release of claims against Virginia Tech, (c) the settlement or compromise imposes any monetary obligations or other liabilities upon Virginia Tech other than those with respect to which Virginia Tech is entitled to indemnification from Hokie Real Estate, Inc. pursuant to the provisions of this Paragraph, or (d) the settlement or compromise requires Virginia Tech to admit liability or wrongdoing. Hokie Real Estate, Inc. agrees to keep Virginia Tech fully informed of the defense of the Claim. In any litigation involving Hokie Real Estate, Inc. and arising from or relating to this Agreement, the Licensed Marks, or the Licensed Services, Virginia Tech will cooperate with Hokie Real Estate, Inc., including the providing of any information or evidence that is reasonably necessary.
- 4.3. The obligations of Hokie Real Estate, Inc. under this Section 4 will not require Hokie Real Estate, Inc. to expend funds in excess of insurance policy limits provided that (a) Hokie Real Estate, Inc. maintains insurance covering the Claim and Virginia Tech, (b) the applicable policy limits are at least \$1 million, and (c) Hokie Real Estate, Inc. is not found to have acted intentionally, recklessly, or with gross negligence.
5. *Notices.* All notices under this Agreement must be in writing in order to be effective, and shall be deemed to have been duly given or made (i) on the date delivered in person, (ii) on the date indicated on the return receipt if mailed postage prepaid, by certified or registered U.S. Mail, with return receipt requested, or (iii) if sent by Federal Express, U.P.S. Next Day Air or other nationally recognized overnight courier service or overnight express U.S. Mail with service charges or postage prepaid, on the next business day after delivery to the courier service or U.S. Mail (if sent in time for and specifying next day delivery). In each case (except for personal delivery) such notices, as well as all requests, demands, and other communications shall be addressed as follows, unless otherwise indicated in a notice duly given:

To Virginia Tech: Kay Heidbreder
University Legal Counsel
VIRGINIA POLYTECHNIC INSTITUTE AND
STATE UNIVERSITY
236 Burruss Hall
Blacksburg, VA 24060

With a copy to: R. Charles Henn Jr.
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309

To HRE: John Wilburn
Hokie Real Estate, Inc.
318 N. Main Street
Blacksburg, Virginia 24060-3990

With a copy to: The Creekmore Law Firm PC
106 Faculty Street
Blacksburg, Virginia 24060
Attention: Keith Finch

5. *Warranties and Representations.* The Parties acknowledge that no person or any other entity has made any promise, representation, or warranty whatsoever, expressed, implied or statutory, not contained herein, concerning the subject matter hereof, to induce the execution of this instrument, and the Parties acknowledge that they have executed this instrument without reliance on any promise, representation, or warranty not contained herein. The Parties have read and understand all terms and conditions of this Agreement.
6. *Force and Effect of Agreement.* This Agreement shall be binding upon and inure to the benefit of the Parties and each of their respective owners, directors, officers, agents, employees, stockholders, and representatives.
7. *Governing Law.* This Agreement shall be governed by and construed in accordance with laws of the Commonwealth of Virginia, without regard to its conflicts of law provisions.
8. *Waiver.* The waiver of any breach of any term of this Agreement by any Party shall not be deemed a waiver of any subsequent or prior breach. No Party shall be deemed to have waived any breach of any term of this Agreement, except as set forth in writing.
9. *Entire Agreement and Modification.* This Agreement represents the entire agreement between the Parties and supersedes all prior agreements between the Parties, including but not limited to the Sketch Settlement executed before Judge Crigler on June 28, 2011.

Dated: August 10, 2011

VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY

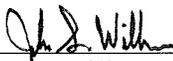
By: M. Dwight Shelton, Jr.
Name: M. Dwight Shelton, Jr.
Title: VP for Finance & CFO

[Signatures continue on following page]

[Signatures continue from preceding page]

Dated: 08/05/2011

HOKIE REAL ESTATE, INC.

By: 

Name: John Wilburn

Title: President