STATE OF RHODE ISLAND **SUPERIOR COURT**
KENT, SC.

Girard Bouchard, in his capacity as	:	
President of the Board of Directors	:	
of the Central Coventry Fire District	:	
Plaintiff	:	
	:	K. B. No. 12-1150
vs.	:	
	:	
Central Coventry Fire District	:	
Defendant	:	

FURTHER OBJECTION OF JAMES SULLIVAN, REPRESENTATIVE PATRICIA MORGAN & SENATOR NICHOLAS KETTLE to the Central Coventry Firefighters' Verified Motion For Temporary Restraining Order, Pre-Judgment Attachment And Order Directing Issuance Of Fourth Quarter Tax Bills and to the MERS Motion to Compel Tax Levy and for Issuance of a Writ of Mandamus

In their capacity as taxpayers, electors and interested parties[1] regarding the within matter James Sullivan, Representative Patricia Morgan & Senator Nicholas Kettle for the reasons stated herein object to:

1. The Municipal Employee Retirement System (*See* RIGL 45-21-1 et. seq. (hereinafter 'MERS') Motion to Compel Tax Levy and for Issuance of a Writ of Mandamus,

2. And for the reasons further stated herein, further object to the Central Coventry Firefighters' (hereinafter 'CCFF') Verified Motion For Temporary Restraining Order, Pre-Judgment Attachment And Order Directing Issuance Of Fourth Quarter Tax Bills. [2]

Further, this Memorandum is also offered as a reply to the Court's request, in it's April 11, 2013 Order that parties address certain issues regarding potential taxpayer liability for the debts of the CCFD. All are addressed below.

[1] James Sullivan is a taxpayer and elector of the Central Coventry Fire District, Senator Kettle is an Elector and Representative Morgan represents approximately 3,000 residents of the District.
[2] James Sullivan and Nicholas Kettle already filed objection and memoranda opposing the relief sought by the Central Coventry Firefighters. See Objection and Memorandum dated April 4, 2013.

Background

Amidst the filing of the above-referenced CCFF and MERS motions the Court on April 11, 2013 Ordered:

> That, parties wishing to address the Court with regard to the following shall do so in writing, filed with the Court on or before 4:30p.m. on April 24, 2013:
> a. Whether or not the taxpayers of the District are liable for the debts of the District, and without limitation, the Court requests interested parties to address the following liabilities;
> i. Liabilities to Federal, State, local and quasi-governmental agencies
> ii. Liabilities to the Rhode Island Municipal Employees' Retirement System
> iii. Liabilities to firefighters under the collective bargaining agreement dated Aprill, 2012 to March 31, 2015
> iv. Liabilities to the Rhode Island Department of Labor and Training for unemployment benefits paid to firefighters
> v. Liabilities to secured lenders for any deficiency on debts
> vi. Liabilities to general unsecured creditors.

For the reasons stated below, and reserving, respectfully, on the propriety of this Court even asking the parties to weigh in on such issues, the Court should find that the taxpayers of Central Coventry bear no responsibility to any of the foregoing "Liabilities" posited by the Court in its Order.

1. **The Court's Order Inviting Parties to Address the Liability of District Taxpayers Can Only Lead to an Advisory Opinion**

None of the Union's or MERS' claims asserting that the taxpayers are responsible have been adjudicated: the Master has made no findings of fact or recommendations to the Court under Rule 53 as to any aspect of such claims. Nor has the Court in any way adjudicated other claims of creditors. Further still, the question of taxpayer liability is not even before the Court, because no party has made such a claim—nor can they, since the "taxpayers" have not been joined as a party to this action. MERS and CCFF have merely demanded tax bills issue. Any ruling by this Court would thus be an advisory ruling and to that extent, it would be improper and outside the scope of this Court's role. Even where the General Assembly has conferred jurisdiction on this

Court to resolve controversies between parties in a declaratory fashion, the Supreme Court has indicated that advisory opinions are strictly forbidden. The declaratory judgment statute "is not intended to serve as a forum for the determination of abstract questions or the rendering of advisory opinions.‖ Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967) (citation omitted). The Act "requires that there be a justiciable controversy [among the parties] and does not authorize [this] Court to give an advisory opinion upon hypothetical facts which are not in existence or may never come into being."‖ Berberian v. Travisono, 114 R.I. 269, 274, 332 A.2d 121, 124 (1975).

But even assuming, *arguendo*, that a claim against taxpayers were brought before the Court, there is no basis in the law whatsoever to support such a claim.

2. <u>Taxpayers Do Not Bear Individual or Even Collective Responsibility for the Failure of Bodies Politic Created by the General Assembly, Until the General Assembly Says So</u>

It is undisputed that nearly all of the prospective claims within the scope of this Court's April 11 Order derive entirely from the peoples' refusal to appropriate any more money to the CCFD. There is no precedent whatsoever that the people of Rhode Island, or any group of them, bear personal responsibility for such a refusal. Neither is there any General Law or Court decision on point[3] which imposes liability upon taxpayers of a body politic.[4]

Both MERS and the Union have suggested, relying on <u>Cole v. E. Greenwich Fire Engine Co.</u>, 12 R.I. 202, 204 (1878) and its 1797 Legislative Charter that this Court can Order a tax of those

[3] MERS and the Union's misplaced reliance on <u>Cole v. E. Greenwich Fire Engine Co.</u>, 12 R.I. 202, 204 (1878) and its 1797 Legislative Charter has already been addressed.

[4] Black's Law Dictionary, Ninth Ed. (2009) defines a body politic as "[a] group of people regarded in a political (rather than a private) sense and organized under common governmental authority." For purposes of this Memorandum, therefore, the term is used as such.

people. This is wrong. In matters of taxation, the RI Constitution clearly and expressly gives the General Assembly the exclusive power to tax:

"[t]he general assembly shall, from time to time, provide for making new valuations of property, for the assessment of taxes, in such manner as it may deem best." R.I. Const. art. 6, sec. 12.

The Supreme Court has noted that:

We have interpreted this constitutional provision to mean that the power to tax is vested exclusively in the Legislature. *Ewing v. Tax Assessors of Jamestown,* 104 R.I. 630, 634, 247 A.2d 850, 853 (1968). That is, the Legislature decides what will be taxed, and the property may not be taxed unless the Legislature has passed a statute clearly subjecting it to taxation. *Newport Gas Light Co. v. Norberg,* 114 R.I. 696, 699, 338 A.2d 536, 538 (1975) Inn Grp. Associates v. Booth, 593 A.2d 49, 52 (R.I. 1991)

"The power to tax is vested primarily in the state, and may be lawfully exercised by the subordinate political bodies of the state only in so far as and in the manner in which said power is delegated to them by the Legislature." *In re Warwick Financial Council,* 39 R.I. 1, 12-13, 97 A. 21, 25 (1916).

The General Assembly delegated the power to tax to the people of central Coventry. The General Assembly specified the way by which they could levy, assess and collect taxes from themselves from within the jurisdictional boundaries of the Central Coventry Fire District. The people—not the District itself—always held the power to tax. The Charter of the District made this clear:

Sec. 7. TAXING AUTHORITY - TAX ASSESSOR
(a) Said qualified voters at any of their legal meetings shall have the power to order such taxes and provide for the assessing and collecting of the same on the taxable inhabitants and property in said district as they shall deem necessary for purchasing fire engines, and all other implements and apparatus for the extinguishing of fire; for the purchase of land and buildings for keeping same; for the purchasing, installation, operation and maintenance of a suitable alarm system; for making cisterns and reservoirs; for paying the salaries of district officers and employees…" P.L. 2006 ch. 405 section 7.

Thus only the voters of Central Coventry can impose a tax upon themselves. Further, as fire protection is quintessentially a governmental function, [5] the General Assembly's delegation of the taxing power to the people to have—or have not—fire protection cannot give rise to or be circumvented by a civil action against the people of the District for breach of contract or any type of equitable relief deriving from the peoples' failure to appropriate funds. In Central Coventry the legislature, exercising the taxing and police power authority of our state, delegated those powers to the "qualified voters" of Central Coventry. If they choose not to have fire taxes, and thus not to have a fire department, then the prosecution of purported civil remedies within the judicial branch of government, against the people for failing to have either (taxes or a fire department), is no more appropriate than an action against the General Assembly itself, for failure to directly appropriate money to Central Coventry to have a fire department. Simply put, absent a law expressly providing for liability, or empowering the Courts to impose a tax upon a fire district, the failure of the CCFD voters to appropriate funds does not give rise to liability[6] through a civil action in the judicial branch of government. The fact that the General Assembly has not provided any such remedy for firefighters in general, or to the District itself, can lead to only one conclusion: there isn't any remedy in the arena of taxation, unless and until the General Assembly enacts one.

[5] When a municipality enters into a lease for the use of property exclusively for fire protection and rescue services, it is performing a governmental function. See Buckhout v. City of Newport, 68 RI. 280,285,27 A.2d 317, 320 (1942) ("[t]here can be no question that a city is acting in its governmental capacity when it purchases and uses land ... for fire protection purposes"); Flynn v. King, 433 A.2d 172, 175 (RI. 1981) ("[f]ire protection is a governmental function that 'substantially affects' every resident and property owner"); Nunes v. Town of Bristol, 102 RI. 729, 734, 232 A.2d 775, 778 (1967) ("a municipality when engaged in the construction or expansion of a fire station, is performing in a governmental capacity")

[6] As noted previously in Sullivan et. als.' April 4, 2013 submission to this Court, it is only when the General Assembly, as the authority delegating the power to appropriate, specifically provides that a body politic must appropriate funding (notwithstanding the appropriating authority's failure or refusal to do so, that the result is any different. See e.g. Exeter-W. Greenwich Reg'l Sch. Dist. v. Exeter-W. Greenwich Teachers' Ass'n, 489 A.2d 1010, 1016 (R.I. 1985).

To hold otherwise, one would need to turn the relationship between the judiciary, the legislature and the people upside down: the judicial branch would supervise the continuity of legislative appropriations through its adjudicative powers, deciding which appropriations must be continued as a matter of law. The RI Constitution proscribes this, placing appropriating power in the hands of the General Assembly implicitly, if not explicitly.[7]

The Court should not give what is essentially an advisory opinion on the District voters' liability but if it does, the answer should be in the negative.

3. Imposing Liability on the Taxpayers or the District Would Violate Well-Established Law Limiting the Powers of The CCFD Board of Directors to One-Year Contracts

Both the Union/CCFF and MERS argue that the CCFD has long term obligations which have been breached and that the taxpayers (i.e. the qualified voters) themselves can and should be held responsible by this Court. But this assumes that the CCFD's obligations to the Union or MERS is beyond a period of one year. They are not, nor can they be. There is a well-established body of law pertaining to contracts with a governmental authority.

"any contract made by a governmental authority involving the performance of a governmental function that extends beyond the unexpired terms of the governmental officials executing the contract is void because such an agreement improperly ties the hands of subsequent officials." Rhode Island Student Loan Authority v. NELS, Inc., 550 A.2d 624,626 (RI. 1988) (emphasis added); Vieira v. Jamestown Bridge Commission, 91 RI. 350, 163 A.2d 18 (1960); Parent v. Woonsocket Housing Authority, 87 R.I. 444, 143 A.2d 146 (1958); see generally Casa DiMario, Inc. v. Richardson, 763 A.2d 607, 610 (RI. 2000) (citing Parent and noting that the town council did not have authority to bind future town councils by promising not to enforce yet-to-be enacted ordinances)

Section 3(b) of the CCFD charter limits the Directors' terms—as well as the electors' power to appropriate funds—to a period of one year:

[7] For example, under Article 6 section 11 of the Constitution provides:

Section 11. Vote required to pass local or private appropriations. -- The assent of two-thirds of the members elected to each house of the general assembly shall be required to every bill appropriating the public money or property for local or private purposes.

Commencing in 2007 and continuing annually thereafter, the district shall hold an annual meeting in a public place on the second Monday in September, at 7:00 P.M. at such place within the District as the Board shall determine, for the purposes of: (1) electing a Board of Directors; (2) authorizing the assessment of all the taxable personal and real property of the District; (3) authorizing the collection of taxes, as further set forth in Section 6 hereunder; (4) authorizing an annual budget to provide for the purchase and maintenance of equipment, apparatus, real and personal property, the payment of wages and salaries, and for such other expenditures deemed necessary by the qualified voters of the District; and (5) For such other lawful purposes deemed necessary and proper by either the Board of Directors or qualified voters of the district.

The arguments against deeming obligations of the District to be anything beyond one year are two-fold: the directors clearly had no authority to bind the District beyond one year and the people, in any event, had no obligation (or, more to the point, authority) to fund any such multi-year contract beyond one year.

a. The Firefighters' Arbitration Act Does Not Apply to the CCFD Contract

The Union's claim that the duration of their contract is, as a matter of law, more than a year. The Union's argument is misplaced. The Firefighter's Arbitration Act or the Municipal Employees Arbitration Act—the only means by which the contract could be deemed effective for more than one year—do not apply. Both Acts allow, in certain circumstances, the extension of agreements to three and five years. But careful examination of both the Municipal Employees' and Firefighter's Arbitration Acts demonstrates that neither Act even applies to the CCFD Firefighters' contract.

§ 28-9.1-6 Obligation to bargain. – It shall be the obligation of the city or town, acting through its corporate authorities, to meet and confer in good faith with the representative or representatives of the bargaining agent within ten (10) days after receipt of written notice from the bargaining agent of the request for a meeting for collective bargaining purposes. This obligation shall include the duty to cause any agreement resulting from the negotiations to be reduced to a written contract, provided that no contract shall exceed the term of one year, unless a longer period is agreed upon in writing by the corporate authorities and the bargaining agents, but in no event shall the contract exceed the term of three (3) years unless a budget commission or a receiver has been appointed for a municipality pursuant to Chapter 45-9, in which case the contract shall not exceed the term of five (5) years.

The Town of Coventry cannot and does not "act" through the CCFD board. The CCFD Board was not a "corporate authority" of the Town of Coventry. The Town and the CCFD are separate bodies politic, elected by different constituencies, answering to different charters. The only reasonable way to construe the Firefighter's Arbitration Act and, in particular, section 6 thereof, is to conclude that it applies only to cities and towns, and not to fire districts within cities and towns established pursuant to separate and distinct legislative charters. Otherwise, the CCFD Board (as well as many other Fire District Boards in our state, and there are more than 30 of them) can legally bind the town of Coventry and all of *its voters* to a multi-year contract. This would be an absurd way to construe the statute and would, self-evidently, lead to chaotic results. The only way to properly read the Firefighter Arbitration Act is that it does not have the effect of lengthening the CCFD-CCFF contract beyond one year.[8]

b. <u>The Municipal Employees' Arbitration Act Does Not Apply</u>

The only remaining collective bargaining act which could possibly apply to the instant matter (i.e. have the effect of lengthening the efficacy of the CCFD/CCFF contract) is the Municipal Employee Arbitration Act, G.L. 28-9.4-1 et. seq.. Section 2 of that Act broadly defines "Municipal Employer" as

[8] There are compelling arguments that the Firefighters' Arbitration Act does not apply to the CCFD or the members of the CCFF bargaining unit <u>at all</u>. Section 28-9.1-3 of the General Laws defines the entities regulated by the Act. It defines "corporate authorities" as:

> (1) "Corporate authorities" means the <u>proper officials</u> within any city or town whose duty or duties it is to establish the wages, salaries, rates of pay, hours, working conditions, and other terms and conditions of employment of fire fighters, <u>whether they are the mayor, city manager, town manager, town administrator, city council, town council, director of personnel, personnel board or commission, or by whatever other name or combination of names they may be designated.</u>

Here again, it is axiomatic that the CCFD Board cannot be among the "proper officials" of or even "within" Coventry if the duty to bargain is imposed, as it is explicitly in section 6 of the Firefighter's Arbitration Act, upon the <u>city or town itself.</u> The Act as a whole is inapplicable to the CCFD and its firefighter employees.

"(c) …. any political subdivision of the state, including any town, city, borough, district, school board, housing authority, or other authority established by law, and any person or persons designated by the municipal employer to act in its interest in dealing with municipal employees.

Yet the Act explicitly excludes "firefighters" from the definition of a "Municipal Employee." See G.L. 28-9.4 -2(b). Thus the CCFD Firefighters are not 'Municipal Employees" and cannot rely on the Municipal Employees Act to lengthen the efficacy of their agreement with the CCFD.

4. <u>The "Qualified Voters" of the CCFD Have Never Approved the Collective Bargaining Agreement or the Funding of It</u>

Even if the CCFF could establish that their contract could be extended beyond one year under the collective bargaining laws of our state, the Union would face another, and even more insuperable obstacle: the failure of the appropriating authority—that is, the "qualified voters" of the CCFD—to approve the extended term of the contract. Absent such an approval, the contract is essentially an executory contract from one annual appropriation to another annual appropriation, by the qualified voters. As such, the contract, although approved by the board of directors, remains subject to the annual approval of the voters, and is renewable on an annual basis if and only if the voters of Central Coventry decide to fund it.

Nowhere is this more apparent than in the CCFD charter itself, which provides unambiguously in section 3 of the Charter that the District "shall hold an annual meeting" for the purpose of "authorizing an <u>annual</u> budget to provide for the….the payment of wages and salaries, and for such other expenditures <u>deemed necessary by the qualified voters</u> of the District."

Here, the voters chose three times not to fund the Collective Bargaining Agreement and for that, they can be held no more legally responsible than the authority from whom their

appropriation power is derived—that is, the General Assembly. Here again, any other construction places the judiciary in the role of an appellate tribunal of the appropriating authority—a role the Court should not and cannot assume.

5. G.L. 45-15-6&7 Do Not Apply to Fire Districts

The CCFF argues that it may collect on a judgment against the fire district pursuant to the terms of G.L. 45-15-6&7. This is incorrect. Those sections of the law apply to cities and towns only. The latter section cited by the Union, G.L. 45-15-16—the precise language of which the Union skips over effortlessly and conveniently—is for indemnity and applies only to situations where city, town or fire district officials

> "….by reason of any intentional tort or by reason of any alleged error or misstatement or action or omission, or neglect or violation of the rights of any person under any federal or state law, including misfeasance, malfeasance, or nonfeasance or any act, omission, or neglect contrary to any federal or state law which imposes personal liability on any police officers, firefighters …"

The section does not even make reference to G.L. 45-15-6&7 which by their terms, apply only to cities and towns. Section 45-15-16 itself does not create any liability against a fire district unless and until a member of the CCFF is first held responsible in some fashion for an intentional tort, malfeasance, or an act or omission involving the claim of a third party.

As the Court has noted:

there are three elements to a claim for equitable indemnity. These three elements are first, the party seeking indemnity must be liable to a third party, second, the prospective indemnitor must also be liable to the third party, and third, as between the prospective indemnitor and indemnitee, equity requires the obligation be discharged by the potential indemnitor.

Wilson v. Krasnoff, 560 A.2d 335, 341 (R.I. 1989).

The indemnity section (G.L. 45-15-16) does not apply to a choice by the voters not to appropriate funds to pay for the Union's collective bargaining agreement, where there is no third

party asserting liability. Nor can G.L. 45-15-16 be even further transmogrified into an act entitling the Union to force the voters to appropriate funds for a collective bargaining agreement. The Union's argument is without merit.

6. The "Qualified Voters" of CCFD Are Not Responsible to MERS

Title 45 chapter 21 of the General Laws does not impose any liability upon the voters of a "municipality" for failure to appropriate funds to the retirement system. It is undisputed that chapter 21 contemplates a variety of collection mechanisms for "municipalities" including fire districts, who do not meet their obligations to MERS.[9] But that is not the issue. As explained in sections 1 through 5 of this memorandum, unless and until the General Assembly passes an Act forcing the taxpayers of Central Coventry to meet the obligations created by the failure of the fire district to meet its obligations under the law, the voters cannot be held responsible by this Court. Nor can the Court impose a tax or issue writs of mandamus under its common law authority or pursuant to G.L. 45-15-6 or 7. In short, the remedy for MERS is with the General Assembly, not this Court.

7. All powers Not Textually Committed under RI's Constitution Are Now Reserved to the People of RI, Whose Failure to Appropriate Cannot Give Rise to Civil Liability

In 2004 pursuant to Article XIV section 1 the people of Rhode Island amended their Constitution so as to eliminate Article VI section 10[10] in its entirety. This was significant, since

[9] Several days before submitting this memorandum the undersigned counsel requested from counsel for MERS a copy of the resolution of the governing body of CCFD, along with any resolutions approved by the "qualified voters" of the CCFD opting to include any of its employees in MERS. See G.L. 45-21-4. No reply was ever received. For purposes of this memorandum and reserving all rights upon obtaining a copy of the documents requested, the undersigned counsel has assumed that all formalities set forth in 45-21-4 were complied with.

[10] "The general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution"

that provision had been the textual underpinning of more than 100 years of jurisprudence declaring the General Assembly to be the repository of all sovereign power not textually committed elsewhere:

"Unlike the United States Congress, the Rhode Island General Assembly does not look to our State Constitution for grants of power. *In re Advisory Opinion to the House of Representatives,* 485 A.2d at 553; *Payne & Butler*, 31 R.I. at 316, 77 A. at 154. Accordingly, this court has consistently adhered to the view that the General Assembly possessed 'all of the powers inhering in ***63** sovereignty other than those which the constitution textually commits to the other branches of our state government and that those that are not so committed * * * are powers reserved to the general assembly.' *Nugent v. City of East Providence,* 103 R.I. 518, 525–26, 238 A.2d 758, 762 (1968).

In re Advisory Opinion to the Governor, 732 A.2d 55, 62-63 (R.I. 1999) (also commonly referred to as the 'Ethics Commission case')

The elimination of Article VI section 10, by the people in 2004 meant that Rhode Island government was no longer "that of a quintessential system of parliamentary supremacy." Id at 64 (R.I. 1999). The power once possessed by the General Assembly, to the extent it has not been delegated, textually, to the executive and judicial branches of our state government, now resides in the people of Rhode Island. This notion is supported not only by a plain reading of the Ethics Commission case, *supra,* but also by a plain reading of the constitution itself. Article I section 24 provides unequivocally:

> **Section 24**. Rights not enumerated -- State rights not dependent on federal rights. -- The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people. The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States

This constitutional shift of power to the people of Rhode Island is important. The Court has inquired "Whether or not the taxpayers of the District are liable for the debts of the District." Three times the people exercised the power delegated to them by the General Assembly under the charter [P.L. 2006 ch. 405, supra] on whether to appropriate and tax themselves, or not. The powers retained by the people since 2004—before the CCFD Charter was created—reinforces the notion that the people's refusal to appropriate money for a body politic (the CCFD) created for their own public safety is their right under the CCFD charter. But their refusal to appropriate was also an exercise of their Constitutional rights under Article I section 24—that is, the rights "retained by the people". As such, it is constitutionally inappropriate for this Court to impose any civil liability upon the people of Central Coventry for exercising either the right to tax, or not, as delegated by the General Assembly, or their "retained rights" under Article 1 section 24, when they refused to appropriate funds for the CCFD.

Conclusion

The people of Central Coventry do not have personal liability to any creditor or claimant secured or unsecured, of the CCFD.

James Sullivan, Representative Patricia Morgan and Senator Nicholas Kettle
By their attorney,

/s/ Nicholas Gorham

Nicholas Gorham (#4136)
Gorham & Gorham
PO Box 46 (25 Danielson Pike)
North Scituate, RI 02857
(401) 647-1400 Fax: (401) 647-1446
nickgorham@gorhamlaw.com
April 24, 2013

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to the following attorneys/ agents of record this 24th day of April 2013:

Michael P. Robinson, Esq.
Schectman Haperin Savage, LLP
I 080 Main Street
Pawtucket, RI 02860
mrobinson@shslawfirm.com

James C. Atchison, Esq.
Schectman Haperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860
jgatchison@shslawtirm.com

John H. McCann, Esq.
Schectman Haperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860
jmccann@shslawfirm.com

Arthur M. Read II, Esq.
Solicitor, Town of Coventry
amr@amresq.com

Frederick R. Tobin, Esq.
Asst. Solicitor, Town of Coventry
fred@fgtesq.com

Patricia Archambault
Beacon Mutual Life Insurance Company
One Beacon Centre
Warwick, RI 02886
Parchambault@BeaconMutual.com

National Grid
c/o John McCoy, Esq.
Bengtson & Jestings, LLP
40 Westminster Street, Ste 300
Providence, RI 02903
imccoy@benjestlaw.com

Kent County Water Authority
I 072 Main Street
PO Box 192
West Warwick, RI 02893
Fax: 401-823-4810

Rhode Island Secretary of State
John Fleming, Administration
148 W. River Street
Providence, RI 02904
jfleming@sos.ri.gov

RI Department of Labor & Training
Legal Counsel
1511 Pontiac A venue
Cranston, RI 02920-4407
Fax: 401-462-8666

RI Dept. of Environmental Management
Legal Services
235 Promenade Street
Providence, RI 02908
mary.kay@dem.ri.gov

David Sullivan, Esq.
RI Division of Taxation
One Capitol Hill
Providence, RI 02908
David.Sullivan@tax.ri.gov

Walter F. Richardson

Centreville Bank
1218 Main Street
West Warwick, Rl 02893
401-827-5248
WJichardson@centrevillebank.com

Lisa Reid
Centreville Bank
1218 Main Street
West Warwick, Rl 02893
401-827-5244
lreid@centrevillebank.com

Karen S.D. Grande, Esq.
Edwards Wildman Palmer, LLP
2800 Financial Plaza
Providence, RI 02903
401-455-7608
kgrande@edwardswildrnan.com

Lisa S. Holley, Esq.
Chief Legal Counsel
Dept. Public Safety
311 Danielson Pike
N. Scituate, RI 02857
401-444-1121
lholley@risp.dps.ri.gov

William J. Conley Jr., Esq.
The Law Office of William J. Conley Jr.
670 Willett Avenue
East Providence RI 02915
401-437-0905
wconley@wjclaw.com

Marc B. Gursky, Esq.
Gursky Law Associates
420 Scrabbletown Road, Ste. C
N. Kingstown, RI 02852
401-294-4700

mgursky@rilaborlaw.com

Elizabeth A. Wiens, Esq.
Gursky Law Associates
420 Scrabbletown Road, Ste. C
N. Kingstown, RI 02852
401-294-4700
ewiens@rilaborlaw.com

Theodore Orson, Esq.
Orson & Brusini, Ltd.
144 Wayland Ave
Providence, RI 02906
401-223-2100
torson@orsonandbrusini.com

David Gorman
Union Representative
c/o Station 4
240 Arnold Road
Coventry, RI 02816
president@local3372.org

*U.S. Bancorp Equipment Finance inc.
PO Box 230789
P01tland, OR 97281

John R. Assalone
!ALiena Rose Way
Coventry, Rl 02816
peopleplaces@hotmail.com

Carmine Olivieri
lA Liena Rose Way
Coventry, RI 02816
carmine@assalone.com

Lauren E. Jones, Esq.
Jones Associates
72 South Main Street
Providence, Rl 02903-2907
ljones@appeallaw.com

Mark Tourgee, Esq.
Inman Tourgee & Williamson
1193 Tiogue Avenue
Coventry,Rl 02816
jsmallridge@itwlaw.com

Senator Leo Raptakis
sen-raptakis@rilin.state.ri.us

Senator Nicholas D. Kettle
Nkettle10@gmail.com

Representative Michael Chippendale
rep-chippendale@rilin.state.ri.us

Representative Lisa Tomasso
rep-tomasso@rilin.state.ri.us

Representative Jared Nunes
rep-nunes@rilin.state.ri.Us

Representative Patricia Morgan
rep-morgan@rilin.state.ri.us

Representative Scott Guthrie
rep-guthrie@rilin.state.ri.us

Board of Directors:
John Bonn, President
1333 Hill Farm Road
Coventry, Rl 02816
joeyb331@verizon.net

Anna Mae Lapinski, Vice President

9 Crestwood Road
Coventry, Rl 02816
alapinski@verizon.net

R. David Jervis, Director
300 Abbotts Crossing Road
Coventry, Rl 02816
Bbman1@cox.net

Loraine Houle, Tax Collector
Town of Coventry
I 691 Flat River Road
Coventry, RI 02816
CcfdtaxcollectorO 1 @firehousemail.com

Chief Andrew Baynes
Central Coventry Fire District
240 Arnold Rd
Coventry, Rl 028 I 6
bcbavnes@yahoo.com

Thomas R. Hoover
Coventry Town Manager
1670 Flat River Road
Coventry, RI 02816
thoover@coventryri.org

Nicholas Gorham, Esq.
Gorham & Gorham Associates, Inc.
25 Danielson Pike, P.O. Box 46
North Scituate, RI 02857
nickgorham@gorhamlaw.com

David D'Agostino, Esq.
Gorham & Gorham Associates, Inc.
25 Danielson Pike, P.O. Box 46
North Scituate, RI 02857
Daviddagostino@gorhamlaw.com

Steve Morris, Esq.
Depmiment of Health
3 Capitol Hill
Providence, RI 02903
Steve.morris@health.ri.gov

J. Eric Atherholt
Vice President- Legal Services
*CoActiv Capital Pminers, Inc.
655 Business Center Drive
Horsham. PA 10944
ratherholt@lleaseserv.com

Arthur G. Capaldi, Esq.
Capaldi & Boulanger
I 035 Main Street
Coventry, RI 02816
agc@cblaw.necoxmail.com

/s/ Nicholas Gorham

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