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HENRICO COUNTY CIRCUIT COURT
JUDGES CHAMBERS

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December 29, 2021

VIA OVERNIGHT DELIVERY

Hon. Lee A. Harris, Jr., Chief Judge
Circuit Court for Henrico County
P.O. Box 90775
Henrico, VA 23273-0775

Re: Patel v. POLITICO, LLC, et al., No. CL19-6745

Dear Judge Harris:

Thank you for the opportunity to provide this memorandum regarding Plaintiff's motion for a nonsuit at the conclusion of the December 10, 2021 hearing in the above-referenced action.

Counsel for Mr. Patel is correct that Virginia law allows a plaintiff to take one nonsuit as of right, even if service has not been effected on any defendant for more than one year. *See, e.g., Waterman v. Halverson*, 261 Va. 203, 208 (2001). That does not dispose of the issue in this case, however.

The nonsuit statute, Va. Code § 8.01-380, "contains a number of limitations on a party's absolute right to take a voluntary nonsuit." *Wells v. Lorcom House Condominiums' Council of Co-Owners*, 237 Va. 247, 251 (1989). Among them is the rule that a party cannot suffer a nonsuit after "the action has been submitted to the court for decision." *Id.* (quoting Va. Code § 8.01-380(A)). Thus, a "motion to dismiss under the one-year service rule bars the taking of a nonsuit after submission of the parties' briefs to the court and completion of oral argument on the motion." *Berry v. F&S Fin. Mktg.*, 271 Va. 329, 333 (2006) (citing *Atkins v. Rice*, 266 Va. 328, 331-32 (2003)). Significantly, it is not necessary for the Court to announce its decision for the bar to apply; a motion to dismiss has been submitted for decision when briefing is complete and "arguments have been made before the trial court by both parties, with no further evidence to be presented or arguments to be made." *Atkins*, 266 Va. at 329.

Here, on September 15, 2001, Defendants filed a written motion to dismiss for failure to effect service within one year. Plaintiff chose not to submit a written brief in opposition. As Your Honor will recall, at the motions hearing on December 10, 2021, counsel for both sides presented their arguments regarding the motion to dismiss and responded to clarifying

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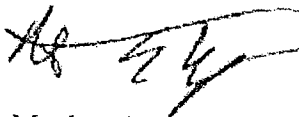

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Henrico Clerk, Henrico Circuit Court

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questions from Your Honor. At the conclusion of oral argument, when Your Honor indicated you agreed that Defendants had not waived service and Mr. Patel had failed to attempt service in the two years since this suit was filed – in other words, once it was obvious that argument was over and Your Honor would grant the motion to dismiss – Plaintiff's counsel interjected with an *ore tenus* motion for a nonsuit. At that point, it was clear that "nothing further was expected from the parties, and the matter had been submitted for decision." *Atkins*, 266 Va. at 332. Plaintiff's motion for nonsuit therefore was untimely and should be denied.¹ Doing so would serve the purpose of the relevant limitation in Section 8.01-380(A), which prevents the waste of judicial resources that would otherwise occur were a plaintiff allowed to effectively nullify a dispositive ruling at the last minute.

I may be reached at 202-276-0371 or kelleym@ballardspahr.com if any follow-up is necessary.

Sincerely,



Matthew E. Kelley
Counsel Appearing Specially for Defendants
Politico, LLC, Natasha Bertrand and Robert L. Allbritton

Cc: Steven S. Biss, Counsel for Plaintiff Kashyap "Kash" Patel

¹ Section 8.01-277(B) does not require a different result. The relevant provision states that "[n]othing herein shall prevent the plaintiff from filing a nonsuit under Code § 8.01-380 before the entry of an order granting a motion to dismiss pursuant to the provisions of this section." The explicit reference to Section 8.01-380 incorporates the prohibition in Section 380(A) on granting a nonsuit once a motion to dismiss has been submitted to the Court for decision.