COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 94-495

DENNIS TUPER, Plaintiff )
)
v. )
)
NORTH ADAMS AMBULANCE SERVICE, )
INC., et al., Defendants )

DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

Now come the defendants and move the court for summary judgment on the plaintiff's claims against them. As grounds, there are no genuine issues of material fact and the defendants are entitled to judgment as a matter of law.

More specifically, (1) the plaintiff has no reasonable expectation of proving his breach of contract claim, since he was terminated for good cause and has no remedy at law under the terms of that contract; (2) the plaintiff's defamation claim is not trialworthy because he was a public figure and lacks evidence of malice, the utterances about him were privileged, opinions and the subject of fair comment; (3) the plaintiff's lacks evidence to make out a prima facie claim of malicious interference with contract claim and the individual defendants alleged conduct was privileged.

WHEREFORE, the defendants respectfully request the court enter judgment on the plaintiff's claims.

NORTH ADAMS AMBULANCE SERVICE,
INC., et al., Defendants

By _____
JOHN B. STEWART (BBO #551180)
MORIARTY, DONOGHUE & LEJA, P.C.
1331 Main Street
Springfield, MA 01103
(413) 737-4319

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

## I. Procedural Background

This is an employment termination case. The plaintiff's original claim set forth claims for breach of contract, interference with contractual relations and defamation, naming the corporate defendant ("NAAS"), its administrative manager, Michael Tourjee, and its board members as party defendants. Responding to the defendants' motion, Judge Dohoney dismissed the breach of contract claims against the individual defendants. Following discovery upon the plaintiff's remaining claims, the defendants now move for summary judgment.

## II. Undisputed Facts

**Background**

The plaintiff began his employment with NAAS in about 1978. (Plaintiff's deposition, at I:19, appended hereto as Exhibit A). In about 1985, he became the manager. (Id., at I:24, 30-31). In about 1991, his emergency medical technician license was suspended by the Commonwealth of Massachusetts for one year, as a result of an administrative judge's determination that he forged a doctor's signature certifying that he had performed a requisite number of intubations. (Id., at I:65-67). During the period of his suspension, the plaintiff was not permitted to act as an EMT, but continued to function in his job as manager of NAAS. (Id., at 69).

In 1992, NAAS's board of directors embarked upon a reorganization. As reconfigured, the plaintiff's job as "manager" was eliminated. He unsuccessfully applied for the new top position of "administrative manager." The defendant Michael Tourjee was hired for that position. The reorganization created two supervisory "coordinator" positions; the plaintiff sought and was appointed to fill one of them. Part of the "coordinator" position was a responsibility for education and training of squad members. (Ex. B, at II:103; Ex. C, "EMT Coordinator Job Description").

**The Warning**

Six months before he was fired, the plaintiff received a reprimand/warning letter for twice violating a NAAS policy prohibiting squad members from meeting with board members without informing the manager. In the letter, Mr. Tourjee stated:

> At approximately 3:15 p.m. on December 26th <1992> you returned a call I had made to you earlier at the station. At that time I advised you that you would be reprimanded for this violation of policy. You told me that you had a right to do what you did, as a Subscriber. You are my employee first, Dennis, and I expect you to abide by my orders. I indicated that both your call to Bob <Moulton> and your insistence on your "right" to disobey my orders were insubordinate.
>
> Please note that according to Service Policy VIII.B.1.a, an employee may face immediate termination for "refusal to obey a direct order of the manager."
>
> . . .
>
> The purpose of this letter is to formally reprimand you for policy violations as detailed above. At this point in time, that is the only action I will take. However, I cannot overemphasize the importance of . . . (3) follow<ing> orders of the manager; (4) no further insubordinate behavior.
>
> * * *

(Ex. F).

**The Contract**

The plaintiff had an employment contract with NAAS for a term of two years, beginning January 1, 1993. Under the contract, the plaintiff agreed his conduct "shall conform with . . . instructions given by the Administrative Manager." (Ex. C, ¶11). His duties were those contained in his job description together with those assigned to him by the administrative manager. (Id., ¶7; "EMT Coordinator Job Description"). Further, the contract provided the plaintiff "may only be terminated for just cause . . . <he> may appeal such decision to the Board of Directors whose decision shall be final." (Id., ¶10).

**The Firing**

The plaintiff recounts the incident leading to his termination as beginning with Mr. Tourjee's request that he teach an educational class on the handling of multi-casualty emergency calls. "He made a request for education. I did not refuse the education. It told him it was not a good time to give that education. I wanted to do it at a subsequent time." (Ex. A, II:34-35). "I would like to put it off and talk to the people involved, see where, what we really needed to look at." Mr. Tourjee's rejoinder to him was "you'll do it."

The plaintiff concedes he knew his superior, Mr. Tourjee, was ordering him to teach this class before the end of his 8-hour shift, which had just begun. (Id., at II:38, 40). The plaintiff refused to teach the class during his shift because he wanted to do it his own way within his own time schedule. (Id., at II:35, 39-41).

At the time he refused to teach the class Mr. Tourjee's way on Mr. Tourjee's time schedule, the plaintiff (i) knew Mr. Tourjee had reprimanded him six months before for violations of policy and insubordination, and

insubordination, and warned no further insubordination would be tolerated; (ii) felt Mr. Tourjee was looking for any little thing to use as a pretext upon which to fire him; and (iii) believed that Mr. Tourjee was hired to fire him; (iv) believed he had been labelled a troublemaker and that NAAS' sponsoring hospital, North Adams Regional Hospital, wanted him to be fired. (Id., at II: 9-11, 68-70).

In addition, the plaintiff made no secret of the fact he disagreed with the reorganization plan, and felt he was more qualified for the administrative manager's position than Mr. Tourjee. (Id., II:12-14, 56-57). The plaintiff knew that his previous conduct in going behind Mr. Tourjee's back to complain about him to a board member would meet with Mr. Tourjee's disapproval, but he did it anyway. (Id., at II:55-56). Even after the firing, the plaintiff was unrepentant and says he was only bound to follow orders that were reasonable from his own viewpoint. (Id., at II:66-68).

The plaintiff admits receipt of the previous reprimand/warning letter and knowledge of its contents. (Id., at II:61). He concedes he did not take the warning about "no further insubordinate behavior" to heart, (Id., at II:67), and felt he only had to obey "reasonable and proper" orders of his superior. (Id., at II:64, 68).

The plaintiff's testimony continued:

Q: Did you have the sense he was ordering you to do it?

A: At that point, yes.

* * *

Q: Okay. Did you have a response to him?

A: Yes.

Q: What did you say?

A: As I already told you, that I wanted to wait a little bit, talk to the people and I was going to do it on my basic time schedule . .

(I_d_._, at II:37).

On July 25, 1992, Michael Tourjee, on behalf of NAAS, terminated the plaintiff's employment for insubordination cause under ¶10 of the contract. The plaintiff exercised his right to appeal to the NAAS board of directors, which convened a hearing and thereafter affirmed Mr. Tourjee's personnel action. The plaintiff does not dispute he was terminated by a written notice from the administrative manager, and that he was granted an appeals hearing before the board of directors. (Ex. B, at II:26-27)

**The News Reports**

The plaintiff has identified two newspaper articles that he claimed libeled him.[1/] The North Adams Transcript published an article on July 26, 1993, under a headline "Tuper fired from ambulance service." (See Exhibit C, appended hereto). The text stated:

> Dennis Tuper, coordinator of North Adams Ambulance Service, has been fired, Robert Moulton Jr., vice president of the NAAS board of directors, confirmed this morning.
>
> Tuper . . . refused to comment on the firing this morning.
>
> Michael Tourjee, general manager of NAAS who is in charge of hiring and firing, would not confirm or deny the dismissal. Tourjee said he cannot discuss personnel decisions.
>
> 'I received a phone call this morning,' said Moulton, but he would not elaborate on the reasons for the personnel change.

* * *

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[1] Responding to the defendant's Rule 34 request for true copies of all newspaper reports which he claims were defamatory, the plaintiff produced only the two articles discussed. (See Ex. A, at I:86).

The plaintiff identified a second article, which appeared the next day in the Pittsfield Eagle under the headline "Ambulance service coordinator fired in North Adams" as defamatory. (See Exhibit D, appended hereto). It stated:

> Dennis Tuper, coordinator of the North Adams Ambulance Service . . . was fired abruptly Monday for reasons no one connected with the service would discuss yesterday.
>
> Barbara Wagner, president of the board of directors, said it was General Manager Michael Tourjee's decision to fire Tuper, not the board's. She said she was reluctant to comment because he can appeal the decision to the board.
>
> 'This is sensitive,' she said. 'We know some of the particulars but we don't have all the information we need right now.'
>
> Tuper . . . referred all questions to his lawyer, . . . who could not be reached for comment.
>
> Sources at the ambulance service said Tuper was surprised at the firing. . . . His wife . . . said she would not comment.
>
> Tourjee referred all questions about the the firing to the board, saying he could not discuss personnel matters. He said that as coordinator Tuper supervised ambulance service staff and that he, in turn, supervised Tuper.

* * *

In addition, the plaintiff claims a radio broadcast slandered him. The broadcast about the firing consisted the reporter's narrative and sound clips of the plaintiff and NAAS's board chairman, Barbara Wagner.

The reporter testified his story stated[2/] board members, who asked not to be identified, told him there may have been some "personality issue" involved in the firing, or that "reliable sources have indicated there may be more behind this dismissal than what the <NAAS> chairman had said.

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[2] The actual news scripts were innocently discarded prior to the commencement of this suit. Id. at 11. The plaintiff's response to the defendants' request for documents and things confirmed that he has no audio recordings of any such broadcasts in his possession, custody or control of the plaintiff.

(Id., at 12, 16). There was no mention of insubordination, or a failure to follow a direct order in the radio news report. (Id., at 24, 25). It was reported that, according to Ms. Wagner, the plaintiff may have violated a board policy but she was not any more specific. (Id., at 25). The NAAS manager, Michael Tourjee, was not a source for the story about the plaintiff's firing. (Id., at 17-18).

The plaintiff testified that this reporter's broadcast said he was fired from his employment at NAAS for violating a direct order, and his firing was justified or for just cause. (Ex. A, at I:94-95).

**The Plaintiff's Public Profile**

The radio reporter indicated he believed the plaintiff was a public figure "to some degree . . . because of his profile and his position that he held at the time." His name was one most people would recognize. He also believed the story about his firing was newsworthy because NAAS received some monetary support from the City of North Adams. (Ex. A, I:14-15).

The plaintiff testified that he perceived part of his job as promoting the ambulance service to the public. He spoke about NAAS at Kiwanas Clubs, Chamber of Commerce meetings, schools, AARP and senior citizens club meetings. (Id., at I:76). As a result of his position and activities, he got his name in the newspaper "a lot." (Id.). He would frequently go on the local radio station to do public service announcements, subscription drives, and talk shows in connection with his work for NAAS. (Id., at 77).

**The Loan Application**

The pre-trial record indicates that on or about July 20, 1992, or about two days before the incident precipitating his dismissal, the plaintiff applied for a business loan at the First National Bank of the

Berkshires. In connection with his loan application, the plaintiff made certain representations about his financial position and the success of the side-line business for which he was seeking financing. On July 27, 1992, the bank issued a loan denial based on insufficient income. (Exhibit I).

The bank and the plaintiff did not consummate a loan agreement prior to his firing. At the time of the plaintiff's firing, his loan application was still under consideration. When bank personnel read in the newspaper the plaintiff was fired, that development "added to the other reasons why we did not grant a loan. It was not the sole reason." (Ex. H, at 9). In fact, the loan was not granted because (1) his debt service, (assuming his continued employment at NAAS) would have been 44%, well above the industry standard of 36%; (2) he represented his sales receipts for his business were $36,000 in the preceding year, when in fact they had only been $6,900; and (3) the business was not generating any profit. (Id., at 10-14).

**The Board Members**

The plaintiff maintains claims for interference with contractual relations and slander against board members Barbara Wagner, Robert Moulton, Michael Laversa, Thomas Manuel, Edward Nimmons, James Whitney, Louis Scalise, Edward Newman and John Leu. The plaintiff has taken depositions of Ms. Wagner, and Messrs. Moulton, Manual and Newman. The depositions are devoid of evidence that the conduct of any of these individuals engaged in any activities with respect to the plaintiff's dismissal outside of the scope of roles as board members. (See Ex. J, K, L, M, generally). The plaintiff acknowledged that part of Ms. Wagner's role (as board president) was to communicate with the press, and in her absence that responsibility fell to Mr. Moulton (board vice president). (Ex. A, at I:99).

## III. Argument and Authority

### A. THE PLAINTIFF'S DEFAMATION CLAIMS ARE NOT TRIALWORTHY

#### (i) Introduction

"Summary judgment procedures are especially favored in defamation cases. . . Allowing a trial to take place in a meritless case would put an unjustified and serious damper on the freedom of expression. . . . Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship." Dulgarian v. Stone, 420 Mass. 843, 846 (1995) (citations omitted).

As was shown above, the plaintiff's defamation claims have been narrowed to the following statements:

1. Robert Moulton (board vice president): "confirming" plaintiff had been fired;

2. Barbara Wagner (board president): stating the plaintiff may have violated a board policy; or the plaintiff was fired for just cause for violating a direct order.

As shown below, the plaintiff's defamation claim must fail as matter of law on a number of separate, alternative bases.

#### (ii) The statements about the plaintiff were not defamatory

To be actionable, statements concerning a plaintiff must both false and be "reasonably susceptible to defamatory connotation." Jones v. Taibbi, 400 Mass. 786, 791 (1987). Here, the statements attributed to the defendants cannot be considered defamatory. An opinion that the plaintiff "may have violated a board policy" does not smack of ridicule nor does it treat the plaintiff with contempt. Moreover, a mere announcement that an adverse personnel action had been taken against the plaintiff would not imply "the wrongdoing or incompetence of the employee." Goldhor v.

Hampshire Coll., 25 Mass. App. Ct. 716, 723 (1988) (announcement of suspension of employee not defamatory).

(iii) The statements about the plaintiff were opinions

The focal utterances about the plaintiff are that he was fired for disobeying a direct order and he was fired for just cause. It is not even open to debate--these statements must be considered opinion according to controlling S.J.C. precedent. In 1982, the court ruled a statement to the media conveying that the plaintiff had been fired for "misconduct and insubordination" was "opinion" as a matter of law and therefore not actionable. Cole v. Westinghouse Broadcasting Co., Inc., 386 Mass. 303, cert. denied 459 U.S. 1037 (1982).

The facts of the plaintiff's case are strikingly similar to those in Cole--in both the statements about the plaintiff were the result of press inquiries into a disputed dismissal. In fact, the utterances about Cole were potentially more egregious than those purportedly made about the plaintiff. A spokesperson for the defendant elaborated on her "misconduct and insubordination" statement by adding, after qualifying her further remarks as "unofficial," that Cole was fired for "sloppy and irresponsible reporting" and a "history of bad reporting techniques." Id., at 310. In that context, they could only be taken as opinion. "The determination of whether statement is one of fact or opinion is generally considered a question of law." Id., at 309.

(iv) The plaintiff must be considered a public figure

The plaintiff is a self-acknowledged public figure. Reasonable minds cannot disagree that he thrust himself into a public comment and controversy by virtue of his high-visibility position with NAAS. In order to recover in an action for defamation, a public figure must show actual

malice (knowing falsity or reckless disregard for truth of falsity) by clear and convincing proof. Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 870-871 (1975). See also, New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). The defendants have demonstrated a legitimate subjective basis for the plaintiff's dismissal--his (self-acknowledged) refusal to meet the obey the terms of his boss's command. Since it is unlikely the plaintiff will be able to prove the defendants acted with actual malice at trial of this action, the plaintiff's claim is subject to summary disposition.

B. THE MALICIOUS INTERFERENCE WITH CONTRACT CLAIMS MUST FAIL AS A MATTER OF LAW

(i) The plaintiff cannot prove all the elements required to maintain a claim for malicious interference with contract

To establish a claim for intentional interference with contractual relations, a plaintiff must prove that:

(1) he had a contract with a third party;

(2) the defendant knowingly induced the third party to break that contract;

(3) the defendant's interference, in addition to being intentional, was improper in motive or means; and

(4) the plaintiff was harmed by the defendant's actions.

Wright v. Shriners Hospital For Crippled Children, 412 Mass. 469, 476 (1992); G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 272 (1991).

The plaintiff's claim must fail as a matter of law due to the absence proof of each of the elements set forth above.

First, there is no evidence that there was a loan contract between the bank and the plaintiff at any time prior to his termination. In discovery, the plaintiff was asked to produce any agreement between himself and the bank and was unable to do so. A deposition of the bank officer confirmed

no loan agreement was ever consummated.

Second, there is no evidence the bank breached any agreement it had with the plaintiff to loan him money. An agreement to lend the plaintiff money was never reached. Further, there is no evidence that anyone connected with NAAS knowingly induced the bank to repudiate any agreement to loan the plaintiff money. (See Ex. H, generally).

Third, the plaintiff is unable to supply any proof that his firing was calculated at depriving him of bank loan. The plaintiff has conceded as much:

> Q: Do you feel that NAAS fired you purposely to deprive you of that loan?
>
> A: They did not fire me purposely to deprive me of the loan, . . .

(Ex. B, at II:86).

The decision to fire the plaintiff was made by Michael Tourjee, and no evidence exists that he knew the plaintiff had applied for a loan at the First National Bank of the Berkshires. (Ex. B, at II:89).

Fourth, the bank refusal to extend a loan to the plaintiff was because his income was insufficient before he was fired. He had overestimated his income, misrepresented his receipts, and his debt load--even assuming he continued to be employed at NAAS--was too heavy. The loan officer stated that plaintiff's debt load (had he remained employed at NAAS) would have been 44% of his income; bank policy requires the loan is not made if that debt load exceeds 36%.

(ii) The individual board members are immune from suit

General Laws chapter 231, §85W provides in pertinent part:

> <N>o person who serves . . . as an officer, director or trustee of any nonprofit charitable organization . . . shall be liable for any civil damages as a result of any acts or omissions relating solely to the performance of his duties as an officer, director or trustee; provided however, that the immunity conferred by this section shall not apply to any acts or omissions intentionally designed to harm or to any grossly negligent acts which result in harm to a person.

The plaintiff alleged in his complaint that NAAS was a charitable corporation. According to the statute set forth above, the plaintiff's claims must fail unless he can sustain his burden of proving the board members' actionable conduct was outside the scope of the performance of their duties as board members. The plaintiff's claim must fail as a matter of law, since the only conduct alleged is that the board members failed to vote his way. Moreover, there is not even an allegation of grossly negligent or intentional conduct.

The plaintiff cannot rest on mere assertions at the summary judgment stage, and frankly lacking at present is any evidence that the board members did anything other than exercise their duties and responsibilities as board members. The manifest intent of the §85W is to comfort individuals who contemplating service on a boards of non-profit organizations that they will not be sued; otherwise persons may be unwilling to serve. It is anticipated the plaintiff will be unable to show the court any evidence sufficient to avoid the immunity conferred by §85W, and accordingly summary judgment is appropriate on the remaining claims against the board members.

C. THE PLAINTIFF'S BREACH OF CONTRACT CLAIM IS SUBJECT TO BREVIS DISPOSITION

(i) The plaintiff's firing was for good cause

As set forth above, the plaintiff's contract provided his employment could not be terminated except for "just cause." (Ex. C, ¶10). The Supreme Judicial Court has defined the words "just cause" contained in employment contracts as follows:

> <T>here existed (1) a reasonable basis for the employer dissatisfaction with a<n> . . . employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business. Discharge for "just cause" is to be contrasted with discharge on unreasonable grounds or arbitrarily, capriciously, or in bad faith.

G & M Employment Service, Inc. v. Commonwealth, 358 Mass. 430, 435 (1970), appeal dismissed, 402 U.S. 968 (1971).

Since the plaintiff was a management employee, NAAS' subjective dissatisfaction with his job performance--regardless of the reasonableness of NAAS' view--permits his discharge for just cause. Stated otherwise, a discharge of a management employee may properly be based upon an employer's subjective judgment that grounds for discharge exist. Goldhor v. Hampshire College, 25 Mass. App. Ct. 715, 722-723 (1988) (for higher level jobs, just cause "necessarily" permits "some scope" for employer's subjective judgment). See also, Klein v. Harvard Coll., 25 Mass. App. Ct. 204 (1987).

The "just cause" language in a manager's employment contracts has been likened to contracts for personal services, where the subjective dissatisfaction of the employer is sufficient to permit termination. The only requirement is that the defendant's conduct be in good faith, and was not actuated by some ulterior motive. See Fried v. Singer, 242 Mass. 527, 530-531 (1922) ("<e>ven if the work performed would be satisfactory to the reasonable <person>, if the <defendant>, acting in good faith, was

dissatisfied with it, the plaintiff cannot recover").

NAAS' dissatisfaction with the plaintiff's perceived (and admitted) insubordinate behavior more than satisfies the legal standard. Here, the plaintiff was an admitted troublemaker who had been admonished that further insubordination would not be tolerated. He was ordered to teach a class to squad members and he refused; responding he wanted to do it how he wanted to do it when he wanted to do it. He believed that he was only obligated to follow orders that he considered reasonable. Based on all the foregoing, no rational jury could fault the subjective judgment of NAAS that there was good cause to terminate the plaintiff.

(ii) The board's decision that the plaintiff was terminated for just cause was final

At the inception of his employment, the plaintiff agreed that any appeal of the administrative manager's determination that there was "just cause" to fire him could be appealed to the NAAS board, and thereafter the board's ruling on that appeal would be final. (Ex. C, ¶ 10). NAAS now submits that the dispute resolution clause contained in the plaintiff's contract ought to be enforced in accordance with its terms.

The plaintiff should not be permitted to agree that the board would be the final arbiter of whether his termination was for just cause and then change his mind for the simple reason that he now disagrees with the board's decision. The plaintiff has not pleaded mutual mistake or prayed for reformation, and in any event there is no indicia that he is prepared to prove there was an agreement other than what was set forth in the employment agreement by clear and convincing evidence. See LaFleur v. C.C. Pierce Co., 398 Mass. 254, 262 n. 10 (1986); Mickelson v. Barnet, 390 Mass. 786, 792 (1984). Plaintiff readily acknowledges that his contract was a

result of negotiation and that he was represented by counsel.

"It is well settled that a written agreement unambiguous in its terms, in the absence of fraud or mistake <neither of which was pleaded by the plaintiff>, is conclusively presumed to express the whole intent of the parties and cannot be modified by extrinsic evidence." Nelson v. Hamlin, 258 Mass. 331, 340 (1927). The plaintiff has conceded the contract was unambiguous, (Ex. B, at II:28), that the contract was a product of negotiation and that he was represented by counsel.

The courts have routinely upheld parties' dispute resolution provisions, which are encouraged under the law. In such circumstances, the presence the provision that the NAAS board of directors' ruling would be final would seem to oust the jurisdiction of this court. See Quirk v. Data Terminal Systems, Inc., 379 Mass. 762, 767 (1980). The defendants have not waived this point by failing to raise it until now; they are entitled to raise a lack of subject matter jurisdiction at any point in the proceedings. General Accident Ins. Co. v. Bank of New England-West, N.A., 403 Mass. 473, 474 (1988).

## IV. Conclusion

For all the foregoing reasons, the defendants respectfully request the court to enter summary judgment in their favor on the plaintiff's claims against them.

NORTH ADAMS AMBULANCE SERVICE,
INC., et al., Defendants

By _____
JOHN B. STEWART (BBO #551180)
MORIARTY, DONOGHUE & LEJA, P.C.
1331 Main Street
Springfield, MA 01103
(413) 737-4319