

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

QUAN-EN YANG

Plaintiff

vs.

G&C GULF, INC., D/B/A G&G TOWING

Defendant

CIVIL ACTION NO.: 403885V

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Your Defendant, G&C Gulf, Inc., d/b/a G&G Towing, by and through counsel moves, pursuant to Maryland Rule 2-322(b)(2) to dismiss Counts IV, V and VI of Plaintiff's Complaint and to dismiss Plaintiff's claim for attorney fees and as grounds respectfully refers this Honorable Court to the accompanying Memorandum of Points and Authorities in Support of the Motion.

THE LAW OFFICES OF RONALD S. CANTER, LLC



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing was served upon the individual(s) listed below by First Class Mail, postage prepaid on this 8th day of July, 2015 to:

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rgordon@gwcfirm.com
Attorney for Plaintiff

A handwritten signature in black ink, appearing to read 'Ronald S. Canter', with a circled '81' to the right. The signature is written over a horizontal line.

Ronald S. Canter, Esquire
Attorney for Defendant

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**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
ITS MOTION TO DISMISS COMPLAINT**

I. PLAINTIFF'S COMPLAINT

On December 12, 2014, Plaintiff, Quan-En Yang ("Yang") parked his 2009 Honda on private business property owned by Walgreens Pharmacy ("Walgreens") in Rockville, Maryland (Complaint, ¶ 23).¹ Walgreens posts signs on this property warning that its parking lot is reserved for its customers and that persons who trespass on its property by parking a motor vehicle on its lot and then leaving the premises are subject to having their vehicle towed (¶ 33). The Plaintiff ignored this sign and left the premises. (¶¶ 27-28).

Walgreens contracts with Defendant G&C Gulf, Inc., d/b/a G&G Towing ("G&G") to remove unauthorized vehicles from its parking lot (¶ 25). Pursuant to this contract, G&G towed the Plaintiff's Honda from the space it illegally occupied on Walgreens property.

The Plaintiff alleges that his vehicle was improperly towed and that G&G charged him more than the law permits to recover his car. Based on Plaintiff's perception that he, and not Walgreens, was the victim of his conduct, he has filed a six count putative class action Complaint against G&G alleging violations of Maryland's Towing law (Md. Code Ann., Transp.

¹ All further references to the Complaint will be to paragraph number only.

§ 21-10A-01, et seq.) and the Montgomery County Tow law (Montgomery County Code, § 30-C-1, et seq.). Counts I and III of Plaintiff's Complaint are based on the assertion that Walgreens did not authorize the towing of the Plaintiff's vehicle. Count II alleges a violation of Maryland law, asserting that the Plaintiff was not provided immediate and continuous opportunity to retake his vehicle (§ 77).²

In Count IV, the Plaintiff complains that he was assessed a credit card processing fee by G&G (§ 89). He claims this fee violates § 30C-2(d) of the Montgomery County Code which provides that "a towing service must not charge for any act . . . unless that act was expressly requested by the vehicle owner." (§ 88) (emphasis added). Count V alleges a violation of Maryland's Towing Act which is premised on a violation of Montgomery County Code, § 30C-2(d). *See*, Md. Code Ann., Transp. § 21-10A-04(a). Finally, Count VI asserts a claim for money had and received based on the collection of the credit card processing fee.

As to all claims made, Plaintiff's prayer for damages asks for triple the amount he paid to G&G to retake possession of his vehicle, actual damages and reasonable attorney fees as to all counts. *See*, Complaint, [Wherefore Clause].

For the reasons set out below, the Plaintiff's Complaint fails to state a claim for relief as to the causes of action alleged in Counts IV through VI and further fails to state a claim for recovery of attorney fees. G&G therefore asks that this Honorable Court dismiss, with prejudice, Counts IV through VI and also dismiss Plaintiff's claims for attorney fees.

² G&G recognizes that it is bound to accept the factual allegations in Plaintiff's Complaint as true for the purposes of this Motion to Dismiss. However, G&G has provided conclusive evidence to Plaintiff's counsel that the tow was authorized in writing by Walgreens and has further provided photographic evidence that the Plaintiff recovered his vehicle immediately upon arriving at G&G's premises.

II. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, “a Court must assume the truth of, and view in a light most favorable to the non-moving party, all well pleaded facts and allegations contained in the Complaint.” *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643, 994 A.2d 430, 433 (2010). A dismissal is proper if “the allegations and permissible inferences, if true, would not afford relief to the Plaintiff, i.e., the allegations do not state a cause of action for which relief may be granted.” *Id.* at 643, 994 A.2d 433 (internal citations omitted).

III. NONE OF THE CAUSES OF ACTION PLED BY THE PLAINTIFF ALLOW FOR RECOVERY OF ATTORNEY FEES

“Maryland follows the common law ‘American Rule’ which states that, generally, a prevailing party is not awarded attorney fees ‘unless (1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of the defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against the malicious prosecution.’” *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.*, 405 Md. 435, 445 (2008), quoting *Thomas v. Gladstone*, 386 Md. 693, 699, 874 A.2d 434 (2005). Plaintiff’s Complaint does not refer to any statute or other basis under which he can recover attorney fees if he is successful in his lawsuit. Instead, his Wherefore Clause merely prays for reasonable attorney fees.

Plaintiff’s failure to identify any specific basis for his claims for attorney fees is understandable because no exception to the “American Rule” exists in this case. There is no contract between the parties whereby attorney fees would be payable to the prevailing party. . None of the statutory causes of action asserted in Counts I through V include a provision allowing a prevailing party to recover attorney fees. Likewise, the cause of action for money had

and received does not contain a fee shifting element. Moreover, the remaining two exceptions, that the wrongful conduct of the Defendant has forced the Plaintiff into litigation with a third party or that the Plaintiff has been forced to defend against the malicious prosecution are not present in this case.

Because there is no provision under Maryland law that would permit the Plaintiff to recover attorney fees, G&G asks that this Honorable Court enter an order dismissing all claims for attorney fees.

IV. THE MARYLAND TOWING ACT DOES NOT AUTHORIZED A LOCAL GOVERNMENT TO REGULATE THE METHOD OF PAYMENT THAT MUST BE ACCEPTED BY A TOWING COMPANY

A. The Maryland Towing Act Regulates the Methods of Payment That Must be Accepted by Towing Company

The Maryland Towing Act regulates the method of payment which must be accepted by a towing company and requires that a towing service must “accept payment for outstanding towing, recovery, or storage charges by cash or at least two major, nationally recognize credit cards; and if the storage facility accepts only cash, having an operable automatic teller machine available on the premises”. § 21-10A-05(c)(1)(emphasis added). Further, a towing company must accept a personal check for payment if the towing company is unable to process a credit card payment and does not have an operable automatic teller machine. *See*, § 21-10A-05(c)(2)(i).

Maryland’s Towing Act, § 21-10A-01(b)(2), further allows a local government to enact laws “relating to the registration or licensing of persons engaged in, or otherwise regulating in a more stringent manner, the parking, towing or removal, or impounding of vehicles” (emphasis added). However, this delegation of powers does not encompass any more stringent rules by local government regulating the method of payment that must be accepted by a towing company.

B. Montgomery County's Code Provision Regarding Payments to Towing Companies

Montgomery County Code § 30C-8(b) imposes more stringent rules on the payment methods imposed by state law by requiring a trespass towing service to accept either a credit card payment or a personal check in addition to cash payment, regardless of whether the towing company has an operable automated teller machine on site.

C. Montgomery County's Regulation of the Methods of Payment Required To Be Accepted By Towing Services Conflicts With State Law

“Maryland’s state law may preempt local law in one of three ways: (1) preemption by conflict; (2) express preemption, or (3) implied preemption.” *Altadis, U.S.A., Inc. v. Prince George’s County, Maryland*, 431 Md. 307, 311 (2013). “A local ordinance is preempted by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law.” *Holiday Point Marina Partners v. Anne Arundel County*, 349 Md. 190, 210 (1998) (internal quotation and citation omitted). In this case, an express conflict exists because the state enabling statute limits local laws to regulating “the parking, towing or removal, or impounding of vehicles” § 21-10A-05(c)(1). Nothing in this grant of power allows a local ordinance to regulate the method of payment required to be accepted by a towing service, a matter directly addressed by Maryland’s Towing Act. Accordingly, the Montgomery County Code provision requiring a towing service to accept, in addition to cash, either a credit card payment or a personal check conflicts with the state law requirement that a towing company may require a cash payment provided that the towing service has an automated teller machine on premises and is therefore preempted by state law.

D. Effect of State Law Preemption

Because Montgomery County had no right to require G&G to accept a credit card payment, the County could not have the right to restrict a towing service's ability to recoup the credit card processing fee from the Plaintiff. For this reason, Plaintiff's claim that G&G violated the Montgomery County Code fails as a matter of law. Counts IV and V, which are premised on the assessment of this alleged improper fee are therefore subject to dismissal. The same result also follows as to Count VI, which is pled as a claim for money had and received, a cause of action that may lie to recover monies paid in excess of what is permitted by statute. *See, Bourgeois v. Live Nation Entertainment, Inc.*, 430 Md. 14, 50 (2013). Because G&G's recovery of its processing fee could not be permitted by the Montgomery County Code, Plaintiff's claim for money had and received therefore fails to state a cause of action for which relief may be granted.

V. EVEN IF STATE LAW DOES NOT PREEMPT THE MONTGOMERY CODE PROVISION REGULATING THE METHODS OF PAYMENT THAT MUST BE ACCEPTED BY A TOWING COMPANY, THE ASSESSMENT OF A CREDIT CARD PROCESSING FEE IS NOT AN "ACT" PERFORMED IN CONNECTION WITH A TRESPASS TOW

The Plaintiff voluntarily elected to pay G&G with his Visa credit card and was assessed a 3.35% credit card processing fee. Although private businesses generally have the right to limit payments to cash or other "good" funds, Montgomery County has enacted a local law requiring trespass tow services to accept the two most widely used credit cards. *See*, § 30-8(b)(3)(a), Montgomery County Code. However, this obligation is not subject to any limitation requiring G&G to absorb the fee assessed to it by the credit card issuer. Nonetheless, the Plaintiff claims in Count IV that G&G has violated § 30C-2 by assessing this charge, an assertion based on the

contention that the charging of this fee is an “act” in connection with the tow that was not “expressly requested by the vehicle owner.” (§ 88).

Assuming arguendo that Montgomery County had the power to enact a local law regulating the methods of payment a towing service must accept, this Court must determine if the charging of the credit card processing fee is an “act” as defined by § 30C-2. This term is not otherwise defined in this Code section. For this reason, this Court should employ well-established rules of statutory construction. In this effort,

[t]he first step in this inquiry is to examine the plain language of the statute, and ‘if the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express the plain meaning, [the Court] will give effect to the statute as it is written. . . . Thus, ‘where the statutory language is plain and free from ambiguity, and expresses a definite and similar meaning, Courts do not normally look beyond the words of the statute itself to determine legislative intent.’ Furthermore, ‘words may not be added to, or remove from, an unambiguous statute in order to give it a meaning not reflected by the words the legislature chose to use.’

Department of Human Resources, Baltimore City Department of Social Services v. Hayward, 426 Md. 638, 649-50 (2012) (internal quotations and citations omitted).

In construing terms not otherwise defined in a statute, a Court looks to the ordinary meaning of a word as defined in Black’s Law Dictionary. *See, e.g., Carol v. Konits*, 400 Md. 167, 194 (2007) [referring to the definition of “attest” in Black’s Law Dictionary (8th Ed. 1999) and concluding that the statutory language is clear and unambiguous as to the term used by the legislature]. The Court similarly looks to the Black’s Law Dictionary definition when interpreting the meaning of an otherwise undefined term found in a County Code. *See, WSG Holdings, LLC v. Bowie*, 429 Md. 598, 626 (2012).

In this case, Black's Law Dictionary (10th Ed. 2014) defines "act" as "something done or performed." The County Code provision at issue, § 30C-2(b), defines certain acts performed in connection with a tow including: "(1) attaching the vehicle to be towed to the tow truck; (2) towing the vehicle to a storage site. . . . (3) storing the vehicle until it is redeemed; and (4) any other service needed to safely remove a vehicle". Further, § 30C-2(d) prohibits a towing service from charging "for any act not listed in this section unless the act was expressly requested by the vehicle owner." It is clear, as a matter of law, both with reference to the other acts defined in the Code provision and with reference to the Black's Law Dictionary definition of "act" that G&G, by accepting a credit card payment from the Plaintiff, did not "do" or "perform" any act in connection with the tow of the Plaintiff's vehicle. Therefore, the assessment of a credit card processing fee so as to make the towing company whole for the expense of accepting a credit card payment is not an "act" under § 30C-2.

Because the payment of a processing fee is not an "act" as defined by § 30C-2(d) of the Montgomery County Code, Count IV fails as a matter of law. The claim in Count V is similarly subject to dismissal because it is premised upon a violation of § 30C-2(d) of Montgomery County's Code.

The same result also follows as to Count VI. *See, Bourgeois*, 430 Md. at 50 (2013), *supra*.

VI. EVEN IF THE ASSESSMENT OF A CREDIT CARD FEE IS DEEMED AN "ACT" UNDER THE MONTGOMERY COUNTY CODE, IT WAS CONDUCT EXPRESSLY REQUESTED BY THE VEHICLE OWNER

The Plaintiff's Complaint is premised on G&G's assessment of a credit card processing fee purportedly in violation of § 30C-2, which prohibits the charge for any "act" that is "not expressly requested by the vehicle owner." To the extent that the Plaintiff

elected to present his credit card as a means of payment, this voluntary conduct would evidence the Plaintiff's "express request" as provided for by § 30C-2. For this reason, the claim in Count IV that G&G assessed a charge in violation of § 30C-2 fails as a matter of law. Counts V and VI, being derivative of the asserted violation of § 30C-2 then likewise fail as a matter of law.

VII. THE ASSESSMENT OF A CREDIT CARD PROCESSING FEE IS NOT AN ACT IN CONNECTION WITH THE TOWING OR REMOVAL OF A VEHICLE AS DEFINED BY § 21-10A-6 OF THE MARYLAND TOWING LAW

Count V of Plaintiff's Complaint asserts that G&G violated the Maryland Towing law by charging a credit card processing fee to the Plaintiff. Under the Maryland Towing law: (1) "any person who undertakes the towing or removal of a vehicle from the parking lot in violation of any provision of the subtitle . . . (2) shall be liable to the vehicle owner . . . for triple the amount paid to the owner or the owner's agent to retake possession of the vehicle." § 21-10A-6 (emphasis added). Alternatively, Count V also fails because the purported conduct was not in connection with the towing or removal of the vehicle from the parking lot. Instead, the alleged violation relates to G&G's right to be reimbursed for the fee it is charged for accepting payments by credit card. Therefore, the assessment of this fee is distinct from any act in connection with "undertaking the towing or removal of a vehicle from a parking lot" as this conduct took place after the towing and removal occurred. For this alternative reason, Count V fails to set forth a cause of action.

VIII. TO THE EXTENT THAT THERE IS ANY AMBIGUITY IN THE INTERPRETATION OF MONTGOMERY COUNTY'S CODE PROVISION RELATING TO PAYMENT BY CREDIT CARD, THIS COURT SHOULD GIVE DEFERENCE TO THE OPINION OF THE MONTGOMERY COUNTY OFFICE OF CONSUMER PROTECTION REGARDING THE VALIDITY OF THE CREDIT CARD PROCESSING FEE

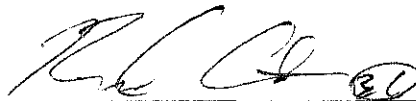
On January 29, 2013, Doug Numbers, investigator for the Office of Consumer Protection informed G&G of the settlement of a class action lawsuit allowing merchants to assess a credit card processing fee. *See*, Exhibit 1. The County Office of Consumer Protection is the agency delegated with administering Montgomery County's Tow law. *See Generally*, § 30C, Montgomery County Code. To the extent that any ambiguity exists as to whether the charging of a credit card processing fee is deemed an "act" under the Montgomery County's Code, the opinion of the Office of Consumer Protection, as reflected in Mr. Number's e-mail, should be accorded deference by this Court. *See, e.g., Maryland Transportation Authority v. King*, 369 Md. 274, 286 (2002). For this additional reason, Defendant's Motion should be granted.³

IX. CONCLUSION

For the reasons set forth herein, Defendant asks that this Honorable Court dismiss Counts IV, V and VI with prejudice and that this Court further dismiss all demands for attorney fees.

³ To the extent this Court is inclined to consider this alternative argument based on matters outside of the pleadings, Rule 2-322 (c) permits this Court to convert this part of the motion as one for summary judgment under Rule 2-501.

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Attorney for Plaintiff



Ronald S. Canter, Esquire
Attorney for Defendant

EXHIBIT 1

Ronald Canter

From: BSher8@aol.com
Sent: Monday, June 22, 2015 4:41 PM
To: Ronald Canter
Subject: Fwd: FW: Extra Credit Card Fees from Stores
Attachments: checkout_fees.pdf

found this in my emails.

From: Doug.Numbers@montgomerycountymd.gov
To: BSher8@aol.com
Sent: 1/29/2013 1:50:30 P.M. Eastern Daylight Time
Subj: FW: Extra Credit Card Fees from Stores

Bryan,

Per our telephone conversation, attached and below is the information that I have received about along passing along credit card fees. This is all from a national court settlement between merchants and Visa and MasterCard.

Doug Numbers, Investigator

Office of Consumer Protection

240-777-3675

x

Joe Raedle / Getty Images file

Year Dominguez charges the credit card of Reynaldo Rodriguez as he pays for items at Lorenzo's Italian Market in Miami in this file photo. Starting Sunday, merchants who accept Visa and MasterCard will be allowed to tack on surcharges to purchase prices.

It could soon cost you more to shop with a credit card at some stores. As of this Sunday, Jan. 27, merchants who accept credit cards issued by Visa and MasterCard will be allowed to add a service charge to the purchase price.

Visa and MasterCard had always prohibited merchants from doing this. They agreed to change the rules and allow the surcharge as part of the settlement of an antitrust suit brought by retailers.

The surcharge is supposed to equal the actual cost of processing the credit card transaction, which is typically 1.5 to 3 percent. Under the agreement, the fee is capped at 4 percent. The surcharge can vary based on the type of card. For example, it could be higher for a rewards card or premier card.

Merchants still cannot add a surcharge to debit card transactions.

The big question is: Will any stores do this? Should you worry about paying a credit card surcharge?

“We have discussed the settlement with many, many merchants, and not a single merchant we have spoken to plans to surcharge,” Craig Sherman, spokesman for the National Retail Federation (NRF), said in a statement. The NRF was not involved in the class action lawsuit.

NBC News contacted some of the country’s largest retailers. Wal-Mart, Target, Sears and Home Depot said

they have no plans to add a credit card surcharge.

Credit card surcharges are banned by law in 10 states: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma and Texas.

Visa and MasterCard have rules that require retailers to handle credit cards the same way in all of their stores across the country. That means a chain with stores in any of the 10 states where a surcharge is banned would not be able to have a surcharge at any of its stores.

The National Retail Federation points out that under terms of the settlement, a merchant who adds a surcharge to purchases on a Visa or MasterCard would have to do the same with American Express cards. But AMEX prohibits surcharge fees. So a merchant who accepts American Express as well as Visa/MasterCard would not be able to surcharge any of those cards.

“The bottom line is that very few retailers would be able to surcharge under the settlement, and that the vast majority don’t want to surcharge even if they could,” the NRF’s Sherman said.

Ed Mierzwinski, Director of Consumer Programs at [U.S. PIRG](#) agrees.

“In the brick-and-mortar world, no one who does any sort of volume business is going to want to surcharge because it will drive their customer crazy and slow down transactions,” Mierzwinski said.

In fact, most consumer advocates believe that except for some small retailers, a credit card surcharge is a non-issue in the short-term.

But Edgar Dworsky, founder of [ConsumerWorld.org](#), worries that over time surcharges will gain traction.

“It’s predictable what’s going to happen,” he said. “We’re at the top of the hill and we’re going to start going down that slippery slope.”

Dworsky points out that stores factor in the cost of processing credit cards when they price their merchandise. Charging for that again, he said, would be double-dipping, unless stores rolled back their prices – which no one expects them to do.

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“We shouldn’t have gotten to the point, but unfortunately because of the court settlement we have,” Dworsky told me. “There’s no one standing up for consumers and saying that this is really bad.”

Dworsky points to Australia, where surcharging credit card use began in 2003. At first, few merchants charged the fee. His research shows that approximately one-third of the sellers there – including some hotels, supermarkets, department stores and utilities – now charge extra to use a credit card.

What about disclosures?

The advocacy group [Consumer Action](#) has published a booklet on [credit card checkout fees](#). It warns shoppers to be on the lookout for these fees and advises them to express their dissatisfaction. “Customers shouldn’t stand for it,” said Ruth Susswein Consumer Action’s deputy director of national priorities. “Our advice is to tell them you don’t like the fee and this makes you want to take your business elsewhere.”

The new rules from Visa and MasterCard require retailers who apply a credit card surcharge to [post a notice](#) at

the store's entrance. The exact percentage of the surcharge does not need to be disclosed until the point of sale. The customer receipt must list the amount of the surcharge.

Online stores with a surcharge will not be required to have a notice on the home page. They only need to alert shoppers about this when they reach the page where credit cards are first mentioned. In most cases, that means the final step of checkout when the purchase is being completed.

Not the end of this story

The settlement that allows merchants to impose a surcharge is only preliminary. The court has yet to issue its final ruling in this case. That's expected later this year.

Once that happens, various retailers and business groups plan to challenge the settlement. That could drag into late 2014.

For now, the possibility that the settlement could be modified will probably keep most businesses of any size from instituting credit card fees.

"We're not convinced this is going to be an issue," Consumer Action's Susswein told me. "They may never do it, but as individual consumers we need to be aware."

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Defendant

CIVIL ACTION NO.: 403885V

ORDER

Upon consideration of Defendant's Motion to Dismiss Complaint, and any opposition, it is this _____ day of _____, 2015;

ORDERED, that the Motion be, and hereby is **GRANTED**, and it is further,

ORDERED, that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

JUDGE

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QUAN-EN YANG

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Defendant

CIVIL ACTION NO.: 403885V

REQUEST FOR HEARING

Defendant G&C Gulf, Inc., d/b/a G&G Towing, by and through counsel, requests a hearing in open court on its Motion to Dismiss.

THE LAW OFFICES OF RONALD S. CANTER, LLC

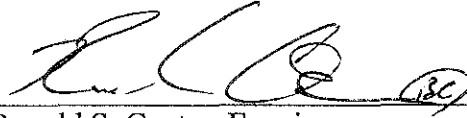


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing was served upon the individual(s) listed below by First Class Mail, postage prepaid on this 8th day of July, 2015 to:

Richard S. Gordon, Esquire
Gordon, Wolf & Carney, Chtd.
102 West Pennsylvania Avenue, Suite 402
Towson, Maryland 21204
rgordon@gwcfirm.com
Attorney for Plaintiff

A handwritten signature in black ink, appearing to read 'R. S. Canter', with a circled '13C' to the right. The signature is written over a horizontal line.

Ronald S. Canter, Esquire
Attorney for Defendant