

IN THE SUPREME COURT OF OHIO

ROBERT E. MARTIN	:	
	:	Case No. 06-2340
Appellant,	:	
	:	On Appeal from the Franklin
v.	:	County Court of Appeals,
	:	Tenth Appellate District
AL MINOR & ASSOCIATES, INC.	:	
	:	Court of Appeals
Appellee.	:	Case No. 06 AP-217

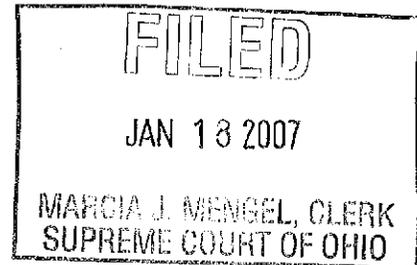
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**APPELLEE AL MINOR & ASSOCIATES, INC.'S RESPONSE  
IN OPPOSITION TO APPELLANT ROBERT E. MARTIN'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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Samuel N. Lillard (0040571)  
Elizabeth J. Birch (0042490)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: (614) 469-8000  
Fax: (614) 469-4653  
[slillard@mwncmh.com](mailto:slillard@mwncmh.com)  
[ebirch@mwncmh.com](mailto:ebirch@mwncmh.com)  
Counsel for Appellant Martin

Barry A. Waller (0013010)  
Fry, Waller & McCann Co., L.P.A.  
35 East Livingston Avenue  
Columbus, Ohio 43215  
Phone: (614) 228-2300  
Facsimile: (614) 228-6680  
E-mail: [bwaller@fwmlaw.com](mailto:bwaller@fwmlaw.com)  
Attorney for Appellee Al Minor & Associates, Inc.



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### **Why this Case is not of Public and Great General Interest<sup>1</sup>**

This case involves specific facts relating to Appellant Martin's misappropriation of Appellee Al Minor & Associates, Inc.'s client list which was found to be a trade secret.

The Tenth District Court of Appeals, in affirming the trial court, correctly determined that a trade secret can be misappropriated by memory. In this case, the court below found that Mr. Martin misappropriated Appellee's customer list by use of his memory.

A review of the cases cited by Appellant reveal that the issue of memorization of a customer list was really not dispositive of any of those cases. The facts in the instant case were well developed at trial and the court below merely interpreted the Ohio Trade Secret Act and determined that there was no limitation on whether or not a misappropriation of a trade secret could be done by memory as opposed to actual taking of a physical asset or object.

The statutory interpretation is consistent with the plain reading of the Ohio Trade Secret Act and thus, this case does not involve a question of public and great general interest.

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<sup>1</sup> Appellant's Memorandum in Support of Jurisdiction references a "substantial constitutional question" in his heading on page 1. However, nowhere in Appellant's memorandum is a constitutional question addressed or argued.

### **Statement of the Case and Facts**

Al Minor & Associates, Inc. (hereinafter “Appellee”) filed a complaint against Robert E. Martin (hereinafter “Appellant”) and Martin Consultants, LLC on March 10, 2003 alleging that Appellant misappropriated Appellee’s trade secrets. This matter proceeded to a bench trial before Magistrate Thompson on June 6, 2004. Magistrate Thompson found in favor of Appellee and thereafter objections filed by both parties were overruled by the Franklin County Court of Common Pleas. A judgment against Appellant was entered in the amount of \$25,973.00 plus costs and interest on February 6, 2006. Thereafter Appellant appealed to the Tenth District Court of Appeals with a single assignment of error. On November 9, 2006 the Tenth District Court of Appeals overruled Appellant’s single assignment of error and affirmed the decision of the trial court. While affirming the decision of the trial court, the Tenth District Court of Appeals found that Appellee’s client list was an intangible asset that Appellee acquired by devoting considerable time and resources over a 20 year period. This finding by the Tenth District Court of Appeals is identical to that of both the trial court and the magistrate who had also reviewed this case. At every stage of litigation, it has been found that Appellee’s client list is a trade secret under Ohio Revised Code 1333.61 and Appellee’s client list is not readily ascertainable to the public.

**ARGUMENT IN OPPOSITION TO APPELLANT'S ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law: The memory of an employer's clients cannot be a protected trade secret.**

A client list compiled by a former employee's memory can be the basis of a trade secret violation as stated by the Tenth District Court of Appeals. A review of the case relied upon by Appellant clearly shows that the issue relating to memorization was not essential to any part of their decision. The Eighth District in *Ellison and Assoc. v. Pkarek* Cuyahoga App., No. 49560, 1985 Ohio App. (September 26, 1985) involved an accounting firm who attempted to enjoin its former billing clerk from soliciting her former employers billing clients after forming her own business. What differentiates and distinguishes *Ellison* is the fact that this case involved an injunction hearing which was consolidated with a trial on the merits, where neither side was afforded a great deal of notice, and the Eighth District reversed the judgment of the trial court on the basis that the court consolidated a preliminary injunction hearing with the hearing on the merits without advising the parties. The Eighth District's only reference to an ex-employee using nothing more than memory was in dicta and was not dispositive of the case nor is it binding authority. The Eighth District's dicta regarding use of memory by an ex-employee had no effect in the decision of the court. In reaching its decision the Eighth District cited *Michael Shore and Company v. Greenwald*, 1985 Ohio App. Lexis 10447. An examination of that case reveals that the Eighth District held that "A review of the trial court's memorandum reveals that it made no finding regarding the use of trade secrets or confidential information. Further, the record indicates that neither was involved in the case subjudice."

Appellant also referenced *Commonwealth Sanitation Company of Cleveland Inc. v. Commonwealth Pest Control*, 1961 Ohio App. Lexis 816. This case also is easily distinguishable

upon the facts. In *Commonwealth Sanitation*, the clients that were the subject of the litigation, and claimed to be a trade secret, were well known either through a city directory or telephone directory and readily accessible by the public. This fact alone distinguishes *Commonwealth Sanitation* from the current case. The present case and present ruling by the Tenth District Court of Appeals involves very specific, and unchallenged, factual findings that Appellee's client list was a protected trade secret under O.R.C. § 1331.61 and that Appellee's client list was not readily ascertainable to the public.

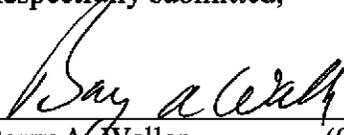
The Tenth District Court of Appeals properly construed the plain meaning of O.R.C. § 1331.61. Failure to provide protection to companies from departing employees' memories would lead to an unthinkable result. As the statute clearly reflects, client lists are protected. If one is allowed to circumvent the statute by use of memory, there is nothing that would prevent an employee from Coke or any other company from memorizing an important recipe or formula, starting their own company and thereby circumventing the trade secret protection O.R.C. § 1333.61 was designed to provide.

On the other hand, in the instant case, the Tenth District, based upon a well established fact pattern, found that the trade secret statute could be violated by use of memory.

### **Conclusion**

For the foregoing reasons, Appellant Martin's Memorandum in Support of Jurisdiction should be found not well taken and this court should find that the proposition of law proposed by Appellant Martin is not of great public importance.

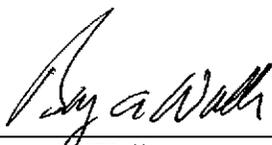
Respectfully submitted,

  
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Barry A. Waller (0013010)  
**Fry, Waller & McCann Co., L.P.A.**  
35 East Livingston Avenue  
Columbus, Ohio 43215  
Phone: (614) 228-2300  
Facsimile: (614) 228-6680  
E-mail: [bwaller@fwmlaw.com](mailto:bwaller@fwmlaw.com)  
Attorney for Appellee

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of Appellee Al Minor & Associates, Inc.'s Response in Opposition to Appellant Robert E. Martin's Memorandum in Support of Jurisdiction was served upon the following person(s) by U.S. mail, postage prepaid, this 18<sup>th</sup> day of January, 2007:

Samuel N. Lillard, Esq.  
McNees, Wallace & Nurick LLC  
Fifth Third Center  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215

  
\_\_\_\_\_  
Barry A. Waller (0013010)