

IN THE SUPREME COURT OF OHIO

CASE NO. 07-1821

**BERTHA LOUDEN EXECUTRIX; MARY J. BORDER, EXECUTRIX**  
**Plaintiff-Appellants,**

-vs-

**A.W. CHESTERTON CO.; INGERSOLL-RAND CORP., et al.**  
**Defendant-Appellees.**

**ON APPEAL FROM CUYAHOGA COUNTY**  
**COURT OF APPEALS CASE NO. 90185**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF**  
**PLAINTIFF-APPELLANTS**

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SUPREME COURT OF OHIO

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## STATEMENT OF PUBLIC AND GREAT GENERAL INTERESTS

Courts throughout Ohio, and elsewhere, are methodically moving toward paperless dockets. For years, the federal courts in this State have relied entirely upon electronic filing systems. In the state judicial system complex dockets involving hundreds of thousands of nearly identical mass tort lawsuits, such as the asbestos docket in Cuyahoga County, now exist solely in cyberspace. It is, without a doubt, inevitable that paper filings will eventually become relics of the past in every courtroom in Ohio.

This appeal presents this Court with an opportunity to determine whether Ohio is going to cling to the outdated notion that paper documents that have been time-stamped in ink are still indispensable. At issue here is a Notice of Appeal that was filed electronically by Plaintiff-Appellants, Bertha Loudon, Executrix and Mary Border, Executrix. In compliance with the standing order that had been issued in the Cuyahoga County Court of Common Pleas with respect to the management of asbestos claims, they submitted the notices through the File & Serve system, just like every other pleading (save for the original Complaint), answer, motion, response, and notice had been processed throughout the litigation. There is nothing in the text of Civ. R. 3(A) or 4(A) which suggests that electronic Notices of Appeal are unacceptable, yet this is precisely what the Eighth District held. *See Exhibit A, appended hereto.* Defendant-Appellee, Ingersoll-Rand Corp., has yet to cite any rules or judicial opinions which should have alerted Plaintiffs that only a manual filing would suffice.

Unless this court intervenes, countless unwitting litigants (plaintiffs and defendants alike) are going to discover to their dismay that paper Notices of Appeal are still required in Cuyahoga County, and potentially elsewhere, only after a dismissal has been ordered. While the Eighth District has established detailed requirements for the handling of electronic dockets and filings

through Loc. App. R. 11, there is no provision that the undersigned attorneys have been able to uncover warning that only manually filed Notices of Appeal will be accepted. The three-sentence preliminary decision that was issued in the instant case on August 1, 2007 is unlikely to be published either in the Ohio Official Reports or in any database such as Westlaw or Lexis-Nexis. A gaping trap for the unwary will thus remain and will undoubtedly ensnare one litigant after another who justifiably believes that he/she is dutifully following the requirements for mandatory electronic filing.

In order to prevent the same grave injustice from being repeated over-and-over again, this Court should take this opportunity to establish that an electronic filing submitted in accordance with the trial court's prior directives is to be afforded precisely the same status and effect as a paper filing. The only meaningful distinction between the two methods of filing is that electronic systems save courts considerable time, effort, and expense. Substantively and procedurally there is no sound reason for preferring one format over the other. Litigants should not have to fear that the materials they are submitting through an electronic medium will be rejected several months later as a result of some unwritten or obscure rule requiring certain documents to be physically presented to a Clerk employee for time-stamping. Even if some tribunals are inclined to retain such requirements, a directive from this Court confirming that electronic filings are still to be afforded the same force and effect as manual submissions would ensure uniformity and consistency across the State. For these reasons, this appeal presents issues of public and great general importance that merit this Court's careful consideration.

## STATEMENT OF THE CASE AND FACTS

The wrongful death claims of the two (2) Plaintiff-Appellants are largely identical. Wayne Border, Deceased, had worked for American Electric Power (AEP) from approximately 1967 through 1996. Roger Loudon, Deceased, was employed at the Cleveland Electric Illuminating (CEI) Plant in Ashtabula from roughly 1977 through 2000. Both men were maintenance workers and were regularly exposed over their careers to asbestos laden products manufactured by Defendant-Appellee, Ingersoll-Rand Corp. Both workers eventually died of mesothelioma.

In a timely manner, wrongful death actions were commenced in the Cuyahoga County Court of Common Pleas on behalf of the beneficiaries of both Decedents. *Case Nos. 590044 & 592502*. Both actions were assigned to the Common Pleas Court's asbestos docket and consolidated with numerous similar lawsuits. By standing order, all filings were required to be processed through a system known as "File & Serve".<sup>1</sup> This computerized docket management system permits motions, memoranda, notices, and other materials to be submitted to the clerk, and ultimately to the judge, by means of the internet. Electronic copies are also served upon all counsel of record. The system completely eliminates the need for any paper documentation. One judge who has been handling exclusively asbestos cases in Cuyahoga County has remarked that:

Under the system that we have been functioning, the CLAD, Complex Litigation Automatic Docket, for the last few years, has the overriding principle that filing paper with the clerk is no longer necessary or advisable. We have substituted the computer for the desk of the clerk's office. So all pleadings other than the original complaint have been filed with CLAD since its implementation.  
[emphasis added]

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<sup>1</sup> This system is also known as the Complex Litigation Automatic Docket or "CLAD".

*Shesler v. Consolidated Rail Corp.*, 8<sup>th</sup> Dist. No. 83656, 2004-Ohio-3110, 2004 W.L. 1353086 ¶ 14.

Defendant submitted a summary judgment motion through the File & Serve system which simultaneously challenged the claims of several asbestos claimants, including those being pursued by Plaintiffs. Plaintiffs submitted their timely “master” opposition brief electronically which addressed the Defendant’s general arguments as well as a shorter “specific” response pertaining to the unique features of their own claims. In an Order and Entry of Judgment that was issued on April 5, 2007, the trial judge granted the Defendant’s Motion.<sup>2</sup> *See Exhibit B, appended hereto.* Included therein was “no just reason for delay” language in accordance with Civ.R. 54(B).

Defendant has acknowledged that on May 4, 2007 Plaintiffs submitted a Notice of Appeal through the File & Serve System.<sup>3</sup> At the same time, Plaintiffs electronically filed a Notice of Appeal with respect to co-Defendant, Gould’s Pumps, Inc.<sup>4</sup> The submissions were accepted by the File & Serve System and Plaintiffs’ counsel was never warned by the Clerk or anyone else in the weeks that followed that there was any problem.

When the Clerk had not served the May 4, 2007 Notice of Appeal in accordance with App.R. 3(E), Plaintiffs manually filed Notices of Appeal on July 24, 2007. At the same time, they submitted Motions to Determine Timeliness of their appeal. Defendant opposed both applications. For the first time in the proceedings, the manufacturer took the position that the

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<sup>2</sup> Plaintiffs submitted a Civil Rule 60(B) Motions for Relief from Order Granting Summary Judgment on April 13, 2007. This request was denied on May 7, 2007. *See Exhibit C, appended hereto.*

<sup>3</sup> *See Defendant-Appellee, Ingersoll-Rand Corp., Brief in Opposition to Plaintiffs/Appellants Motion to Determine Timeliness of Appeal and Motion to Dismiss Appeal, p. 2.*

<sup>4</sup> That appeal proceeded under Case No. 90184. Simultaneously herewith, Plaintiffs are filing a Notice of Appeal and Memorandum in Support of Jurisdiction with respect to the dismissal of that action on August 20, 2007.

appeal was untimely solely because Plaintiffs had submitted the Notice electronically instead of manually. *See Appellee Ingersoll-Rand Corp.'s Brief in Opposition to Appellants' Motion to Determine Timeliness of Appeal filed August 1, 2007.* On the same day that Defendant submitted this Brief in Opposition, an Entry was issued by the appellate stating that:

Motion by appellant to determine timeliness of [Ingersoll-Rand's] appeal is denied as moot. *Sua sponte*, the appeal is dismissed per App.R. 3 and App.R. 4. Appellant failed to timely comply with this court's requirements, therefore the appeal is dismissed per App.R. 4(A). \*\*\*

Plaintiffs moved for reconsideration on August 10, 2007, which Defendant again opposed. This request was summarily denied in a decision that was rendered on August 20, 2007. *Exhibit A, appended hereto.*

Plaintiffs now seek further review of the Eighth District's dismissal order, which has implicated issues of public and great general importance.

## ARGUMENT

**PROPOSITION OF LAW: WHEN THE TRIAL COURT HAS ORDERED THAT ALL FILINGS MUST BE SUBMITTED TO THE CLERK ELECTRONICALLY, A NOTICE OF APPEAL FILED ELECTRONICALLY IN ACCORDANCE THEREWITH WITHIN THIRTY DAYS OF THE ENTRY OF JUDGMENT SATISFIES THE REQUIREMENTS OF APP. R. 3(A) AND 4(A).**

The Eighth District's decision of August 20, 2007 plainly places form over substance. As previously noted, Defendants do not dispute that Notice of Appeal was processed through the File & Serve System within thirty (30) days of the summary judgment ruling of April 5, 2007 (*Exhibit B*). As a practical matter, there is no meaningful distinction between such electronic submissions and a notice that has been printed and presented to a clerk employee for time-stamping. It seems to have been forgotten in these proceedings that courts are expected to resolve legitimate disputes whenever possible upon the merits instead of procedural grounds. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644, 647; *National Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14, 15, 505 N.E.2d 980, 981; *Barksdale v. Van's Auto Sales, Inc.* (1988), 38 Ohio St.3d 127, 128, 527 N.E.2d 284, 285.

Plaintiffs fully appreciate that the thirty (30) day deadline established by App.R. 4(A) is both mandatory and jurisdictional. *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 322, 649 N.E.2d 1229, 1231. There is nothing, however, within App. R. 3 or 4, or Loc. App. R. 3, which suggests that an electronic notice is unacceptable.<sup>5</sup> Submitting court documents

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<sup>5</sup> App. R. 3(A) provides simply that:

**Filing the notice of appeal.** An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action

through such mediums is now widely accepted and has been recognized and addressed in many procedural rules. *See e.g.* Civ. R. 10(E) (confirming that the requirements established therein for pleadings, motions, briefs, and other papers include “those filed by electronic means”); Civ. R. 33 (requiring an “electronic copy” of interrogatories); Civ. R. 51 (allowing jury instructions to be reduced to an “electronic” medium). Interestingly, App. R. 18(B) was revised effective July 1, 2001 to provide that:

\*\*\* If the court by local rule adopted pursuant to App.R. 13 permits electronic filing of court documents, then the requirements for filing copies [of appellate briefs] with the clerk required in this division may be waived or modified by the local rule so adopted.

Appellate courts are thus no strangers to electronic filing.

For those courts prepared to take such a step, electronic filing has been approved in Rule 27 of the Rules of Superintendence for the Courts of Ohio. A Temporary Provision specific to Cuyahoga County imposes certain requirements for electronic filing, but fails to suggest that notices of appeal must always be presented manually. *Id.* Perhaps more significantly, Civ. R.

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as the court of appeals deems appropriate, which may include dismissal of the appeal. \*\*\*

Likewise, App. R. 4(A) states that:

**Time for appeal.** A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Finally, Loc. App. R. 3(B)(1) directs that:

The notice of appeal must individually name each party taking the appeal and must have attached to it a copy of the judgment or order appealed from (journal entry) signed by the trial judge and bearing the clerk’s stamp “Received for Filing” with the date of receipt by the clerk and a copy of Affidavit of Indigency where relevant. The subject attachments are not jurisdictional but their omission may be the basis for a dismissal.

5(E) (“filing with the court defined”) has been revised to add certain requirements for electronic filings throughout Ohio, without including any exceptions for which only printed documents will be allowed.

What is most strikingly unfair about the Eighth District’s “paper only” ruling is that no one could have reviewed the applicable rules and anticipated that electronically filing a notice of appeal would be unacceptable. To the contrary, the Court had clearly provided a procedure for transferring electronic dockets to the appellate court through Loc. App. R. 11 (eff. Aug. 1, 2005). Noticeably absent from this detailed Rule is any suggestion that the Notice of Appeal must be filed manually. *Id.* Any reasonable person consulting the Local Appellate Rules of Procedure would logically be drawn to the conclusion that not only has electronic filing been embraced in the Eighth District, but also that the Common Pleas Court’s standing order prohibiting manual filing of paper documents (following the complaint) applied with equal force to Notices of Appeal. Such notices are, of course, submitted in the first instance to the trial court and not the appellate court. *App. R. 3(A).*

In the proceedings below, Defendant failed to cite a single rule supporting the antiquated view that there is somehow something more preferable, and indispensable, about a piece of paper bearing the inked impression of a clerk’s time stamp. One of the authorities that was cited, *State v. Domers* (1991), 61 Ohio St.3d 592, 575 N.E.2d 832, was decided sixteen (16) years ago when the internet was still in its infancy (Al Gore had just invented it). In a two-sentence ruling, all this Court held was that no final appealable order existed because the judgment entry had not “been filed-stamped by the trial court clerk.” The more recent Eighth District decision that Defendant has identified, *Shesler*, 2004-Ohio-3110, involved the electronic asbestos docket through which “all filings” must be processed in Cuyahoga County. *Id.*, p. \*3. Far from holding

that manual submissions were necessary, the panel simply concluded that post-judgment interest began to accrue on the date that the clerk entered the judgment in the journal in accordance with Civ. R. 58(A). *Id.*, p. \*2.

Both *Domers* and *Shesler* stand only for the proposition that a judgment entry must still be signed and journalized in accordance with Civ. R. 58(A). In *Shesler*, the Eighth District was very careful to distinguish between “dockets” and “journals”. *Id.*, 2004-Ohio-3110, pp. \*3-4. After holding that the “entry of judgment” still needed to be recorded upon the journal, the panel explained that:

The January 7, 1999 trial court order directing that all filings in asbestos cases be made on the CLAD system does not change this result. The January 7, 1999 order pertains only to “filings” in asbestos cases; it does not change the separate and independent requirement of Civ. R. 58(A) that, to be effective, judgments must be entered by the clerk upon the journal. [emphasis added].

*Id.*, p. \*2. At the risk of overstating the obvious, the Notice of Appeal that Plaintiffs filed electronically on May 4, 2007 was a “filing” and not a “judgment.” Under the Eighth District’s own precedent, the notice should have been recognized as proper since it complied with the trial court’s standing order that all “filings” in asbestos cases need to be submitted solely through the computerized system.

Other than the jurisdictional thirty (30) day deadline (which Plaintiffs maintain they have satisfied), Ohio courts have never afforded a strict and unyielding construction to App.R. 3 & 4. Quite the contrary, “the Ohio Supreme Court has consistently adhered to a policy of liberally construing App.R. 3(D) in order to prevent the right of appeal from being lost due to a mere technicality.” *Belcher v. Lesley* (Dec. 12, 1995), 10<sup>th</sup> Dist. No. 95APE05, 1995 W.L. 739898, p. \*2, citing *Maritime Manufacturers, Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 258.

436 N.E.2d 1034. See also *Barksdale*, 38 Ohio St.3d at 128 (“[C]ases should be determined on their merits and not on mere procedural technicalities.”).

In *Hanson v. City of Shaker Hts.* (8<sup>th</sup> Dist. 2003), 152 Ohio App.3d 1, 2003-Ohio-749, 786 N.E.2d 487, the court rejected a similar argument to the one posited by Defendants here. In that case, the defendants argued that the trial court lacked appellate jurisdiction over an appeal from a board of zoning appeals decision where the board received notice via facsimile and certified mail, rather than an “original” notice. Writing for the court, the late Judge Anne L. Kilbane forcefully rejected that contention where the operative statute did not require an “original” notice and where the board indisputably received timely notice of the appeal: “[I]t is ridiculous to base a dismissal upon the petty gripes raised here.” *Id.*, 70 Ohio App.3d 1, 5.

Similarly, here, Defendant was sufficiently and timely apprised of the Notice of Appeal filed in the proceedings below. A refusal to entertain the Plaintiffs’ appeal simply because the timely filed notice occurred electronically, consistent with local standing order for receiving filings, not only elevates form over substance, but also visits an unduly harsh result on litigants who made every reasonable effort to comply with the operative rules. The Eighth District would have been well-advised to follow instead the sound logic expressed by Judge Kilbane in *Hanson*, 152 Ohio App.3d 1.

The bottom line is that the days of voluminous, unsearchable, and unmanageable paper dockets are drawing to a close. Few courts possess the space for such ever-growing files and are no longer inclined to employ the personnel necessary to collect, index, store, and retrieve countless manual filings. In order to both facilitate and encourage electronic filing, this Court should take the opportunity to confirm that such submissions will not be afforded “second tier” status. Until the “paper prevails” mentality is eradicated, no plaintiff, defendant, relator,

claimant, or respondent can ever be completely confident that an electronic filing will satisfactorily respond to a pending dispositive motion, preserve a vital affirmative defense, satisfy an applicable statute of limitations, or – as here – timely commence an appeal.

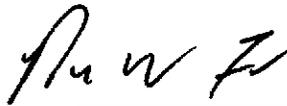
**CONCLUSION**

For the foregoing reasons, this Court should accept the Proposition of Law that has been set forth herein and resolve the issues of public and great general importance that permeate this appeal.

Respectfully submitted,

John I. Kittel (per authority)  
John I. Kittel, Esq. (#0071817)  
Brian A. Calandra, Esq.  
**MAZUR & KITTEL, P.L.L.C.**

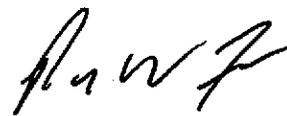
Attorneys for Plaintiff-Appellants

  
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**[Counsel of Record]**  
**PAUL W. FLOWERS CO., L.P.A.**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Memorandum** was served by regular U.S. Mail on this 3<sup>rd</sup> day of October, 2007 upon:

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Attorneys for Plaintiff-Appellants

AUG 20 2007

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

BERTHA LOUDEN, EXECUTOR, ET AL.

Appellant

COA NO.  
90185

LOWER COURT NO.  
CP CV-590044  
CP CV-592502

COMMON PLEAS COURT

-vs-

A.W. CHESTERTON COMPANY, ET AL.

Appellee

MOTION NO. 399333

Date 08/01/07

Journal Entry

SUA SPONTE, APPEAL IS DISMISSED PER ENTRY NO. 399175.

**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

**AUG 20 2007**

**AUG -1 2007**

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

Judge JAMES J. SWEENEY, Concurs

[Signature]  
Administrative Judge  
FRANK D. CELEBREZZE, JR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

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VOL 64 | PG 668

**EXHIBIT**  
A

IN THE COURT OF COMMON PLEAS  
COUNTY OF CUYAHOGA, OHIO  
ASBESTOS DOCKET

IN RE:

KITTEL GROUP 7

MARY K. BORDER, fiduciary of the estate of )  
WAYNE BORDER )

CASE NO. 592502

Plaintiff, )

JUSTICE FRANCIS E. SWEENEY

-vs- )

ORDER AND ENTRY OF  
JUDGMENT

AEP OHIO, et al. )

Defendants )

This matter came before the Court upon an oral hearing on Defendant, Ingersoll Rand Company's motion for summary judgment, and the arguments and authority filed by the parties in support and in opposition thereto. This Court finds said motion to be well-taken.

It is therefore ordered, adjudged and decreed that Defendant, Ingersoll Rand Company, is entitled to judgment in its favor as a matter of law pursuant to Civ.R. 56. Judgment is entered in favor of Ingersoll Rand Company on all of Plaintiff's claims.

THERE IS NO JUST REASON FOR DELAY PURSUANT TO CIV.R. 54(B).

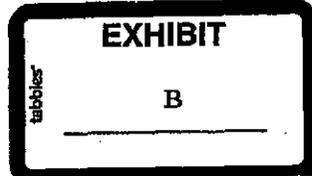
IT IS SO ORDERED.

*Francis E. Sweeney*  
JUSTICE FRANCIS E. SWEENEY

\*Pursuant to Civ.R. 58(B), the Clerk is instructed to serve all parties not in default for failure to appear.

APR 05 2007

GERALD E. FUERST, CLERK  
By *G. Furst* Deputy



#918837

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

ROGER LOUDEN )

Plaintiff, )

v. )

A.W. CHESTERTON, INC., et al. )

Defendants. )

CASE NO. 590044

JUSTICE FRANCIS E. SWEENEY

ORDER AND ENTRY OF  
JUDGMENT

On December 4, 2006, Defendant, Ingersoll-Rand, filed its Motion for Summary Judgment. Plaintiffs, Wayne Border and Roger Louder, filed their Master Response on January 26, 2007, and their specific response on January 29, 2007. Ingersoll-Rand filed its Reply Brief on February 12, 2007, and its Notice of Supplemental Authority on March 20, 2007. This Court heard oral arguments on Defendant's Motion for Summary Judgment on March 22, 2007, and granted Defendant's Motion on April 2, 2007. Plaintiffs filed their Civil Rule 60(B) Motion for Relief from Order Granting Summary Judgment in Favor of Ingersoll-Rand on April 13, 2007.

In granting Defendant's Motion for Summary Judgment, the Court relied on Vince v. Crane Co. (2007), No. 87955, March 15, 2007, Goldman v. Johns-Manville Sales Corp. (1987), 33 Ohio St.3d 40, and Lindstrom v. A.W. Chesterton, et al., 424 F.3d 488 (6<sup>th</sup> Cir.). Accordingly, Plaintiffs' Civil Rule 60(B) Motion for Relief from Order Granting Summary Judgment in Favor of Ingersoll-Rand is denied. IT IS SO ORDERED.

*Francis E. Sweeney*  
JUSTICE FRANCIS E. SWEENEY

\*Pursuant to Civ.R. 58(B), the Clerk is instructed to serve all parties not in default for failure to appear.

RECEIVED FOR FILING

MAY 07 2007

GERALD E. FUERST, CLERK  
By *[Signature]* Deputy

EXHIBIT

C

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