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I. A. THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST

The court should deny review because all the real issues are trust-related and are well-settled by prior decisions of this court. Common law has dealt with them for centuries. The First District's opinion merely applies long-existing Ohio law governing self-dealing by trustees of an express trust. It imposes a very high duty of undivided loyalty on trustees to begin with, and when they self-deal, a very high burden to prove beyond all doubt the perfect fairness and reasonableness of their transactions.

The First District properly reasoned that a self-dealing trustee cannot hide behind a release obtained from his beneficiaries and allow him to require a tender of the "consideration" because the whole transaction is "highly suspect" if not presumptively fraudulent and void. The First District further held that when trustees self-deal, it is their burden to conclusively prove that they acted with the utmost good faith and exercised the most scrupulous honesty toward the beneficiaries, placed the beneficiaries' interests before their own, did not use the advantage of their trustee positions to gain any benefit at the beneficiaries' expense, and did not place themselves in a position in which their interests might have conflicted with their fiduciary obligations.¹

The Koons Estate/Trustees attempt to water down the duties owed by trustees to their beneficiaries, likening them to a lesser standard, one they feel they can argue they have met. They hope to reduce their burden at trial to a mere *rebuttal* of the presumption of fraud, hoping to put the burden back on the beneficiaries they were supposed to protect – not cheat. But the

¹ *Cundall v US Bank*, 1st Dist. Nos. C-070081, 82, 2007-Ohio-7067 at ¶38, citing *Atwater v. Jones* (1902), 24 Ohio C.C. (N.S.) 328, 34 Ohio C.D. 605; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶¶ 29-30; *Schoch v. Bloom* (1965), 5 Ohio Misc. 155, 158, 212 N.E.2d 428; *In re Guardianship of Marshall* (May 26, 1998), 12th Dist. Nos. CA96-11-239 and CA96-11-244; 3 Scott, Trusts (5 Ed.2007) 1078, Section 17.2.

law of Ohio that applies to trustees is fairly derived of English common law and in accord with the Roman civil law, and a centerpiece of this jurisprudence is that: *“An agent for a seller can’t buy for himself.”* Thus, when a trustee self-deals and his conduct is called into question, the transaction is carefully scrutinized and the burden of showing its fairness is on the trustee. So it has been for centuries. The memorandum that follows addresses these two issues: (1) tender and (2) burden of proof.

B. THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED

Personal jurisdiction over the out-of-state Koons beneficiaries can be predicated on either the Ohio Trust Code or the long-arm/civil rule/due process analysis traditionally considered. Either way, constitutional requirements for personal jurisdiction are satisfied.

The jurisdiction issue as well as the statute of limitations arguments pertaining to unjust enrichment and constructive trust remedies, are issues raised by the Koons Beneficiaries² - both groups of Koons Beneficiaries. These issues are aptly addressed by the other Cundall appellees³ and this appellee, their father, adopts their arguments and is in full support and agreement with them.

II. STATEMENT OF THE CASE AND FACTS

In 1976 John F. Koons, Sr. and Ethel Bolan Koons set up a trust (the “Grandparents Trust”) for the benefit of their two children, John F. Koons III (“Bud”) and Betty Lou Cundall.⁴ They deposited 6,209 shares⁵ of their closely-held business, Central Investment Corporation

² See Family Chart attached as Exhibit L to Plaintiff’s Memorandum In Opposition to Defendants’ Motion to Disqualify the Law Firm of Drew & Ward and Nick Ward, T.d. 131.

³ Michael Cundall, Jr., Courtney Fletcher Cundall and Hillary Cundall are represented by William H. Blessing.

⁴ T.d. 124, at ¶6.

⁵ Typo in Cundall brief below created wrong number of 6,309 shares which was adopted by the

("CIC"), into the Grandparents Trust and directed that one-half of those shares should be held in Fund A for the benefit of Bud's children and grandchildren (the Koons Beneficiaries who are the beneficiaries of the trusts held by the Koons Trustees), and the other half should be held in Fund B for the benefit of Betty Lou Cundall and her children and grandchildren (the "Cundall Beneficiaries"). Bud was trustee of the Grandparents Trust from its inception in 1976 until his death on March 3, 2005.⁶

In 1984, when he was CEO and majority shareholder of CIC as well as the trustee of the Grandparents Trust, Bud sold all of the Fund B CIC shares back to CIC for \$210/share and also forced other Cundall family members to sell all of their individual holdings of CIC shares back to CIC for the same price.⁷ U. S. Bank, as Trustee of the Betty Lou Cundall Trust dated August 10, 1977, for the benefit of the Cundall Beneficiaries (the "1977 Cundall Trust"), also sold CIC shares held by the 1977 Cundall Trust back to CIC for this price.⁸ No court approval of these sales was sought or obtained; the price paid was for less than the fair value of the stock; Bud used fraud, duress and undue influence to obtain the Cundall family's consent to the sale; the sale violated a material purpose of the Grandparents Trust which was to hold the CIC shares for the benefit of Betty Lou Cundall's family until the death of the last to die of Betty Lou and her brother Bud; and Bud and the other Koons family members, including the Koons Beneficiaries,

Court of Appeals. Correct number is 6,209. See Grandparents Trust, Exhibit B, Schedule A at T.d. 60.

⁶ T.d. 124, at ¶6. In its opinion, the Court of Appeals stated that Michael had alleged that Bud had approached him and his siblings and "told them that he would stop distributing dividends and that the CIC shares would be worth nothing if they did not sell" and "Bud had the unfettered power to distribute income or principal as he saw fit." The court noted also that this \$210 purchase price was \$118 less per share than what another shareholder, Lloyd Miller, had previously received for his shares. *Cundall*, 2007-Ohio-7067 at ¶ 6.

⁷ T.d. 124, at ¶7.

⁸ Id.

were unjustly enriched by the sale by reason of the corresponding unfair increase in the value, increased dividends and continued ownership of their CIC shares.⁹

As individual owners of CIC as well as beneficiaries of Fund A, and of the other Ohio trusts subsequently established for their benefit, the Koons Beneficiaries have had substantial contacts with the State of Ohio. They have received disbursements from these trusts and dividends from CIC; engaged Ohio accountants, filed Ohio tax returns, and engaged in business transactions with financial institutions within the State of Ohio.¹⁰

Cross-Claimants are Cundall Beneficiaries¹¹ who were minors at the time of the sale.¹² They did not have guardians ad litem appointed for them and were otherwise unrepresented.¹³ In January, 2005, all of the outstanding shares of CIC stock, including the shares held in Fund A, were sold to PepsiAmericas, Inc.¹⁴

The 1976 Grandparents Trust provided for the initial trustee (Bud Koons) to be succeeded by three individual co-trustees or, failing that, U.S. Bank. All three co-trustees and the bank resigned or declined following Bud Koons death on March 3, 2005. Upon these failures, Michael sought appointment as Successor Trustee in September of 2005 and was

⁹ T.d. 124, at ¶ 7.

¹⁰ T.d. 156, at ¶ i-xi (Plaintiff's Second Amended Complaint). Michael filed a Motion for Leave to file a Second Amended Complaint, which was denied by the trial court. The trial court's denial was reversed by the Court of Appeals, which held that on remand the trial court should allow the Second Amended Complaint. *Cundall*, 2007-Ohio-7067 at ¶ 64.

¹¹ See Family Chart attached as Exhibit L to Plaintiff's Memorandum In Opposition to Defendant's Motion to Disqualify the Law Firm of Drew & Ward and Nick Ward, T.D. 131.

¹² T.d. 124, at Preamble.

¹³ *Id.*

¹⁴ T.d. 124, at ¶8. As the Court of Appeals recognized in its Opinion, PepsiAmericas bought CIC for approximately \$340 million. At the time of Bud's death in 2005, the Cundall Trust was valued at \$536,431. *Cundall*, 2007-Ohio-7067 at ¶ 8, ¶10.

appointed in case #A0507295 on November 23, 2005. He commenced the underlying trial court action of this matter on March 3, 2006.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW:

Proposition of Law No. 1: Tender Not Necessary - The Court of Appeals decision regarding the inapplicability of the tender rule to this case is based on the unique relationship between the trustee of an express trust and his beneficiaries and the trustee's duty to refrain from self-dealing. The decision does not apply to releases obtained by other fiduciaries and is consistent with the rule that tender is not required if at least the amount paid is owed, or where the court has the power to adjust the equities among the respective parties.

In *Haller v. Borrer Corporation*,¹⁵ the court held that if a release obtained in the course of the settlement of an intentional tort claim against a former employer is procured by fraud in the factum, the release is void and tender is not required, but if it is procured by fraud in the inducement, the release is voidable and the party is required to tender any consideration received in return for the release before filing suit. In *Cundall*, the Court of Appeals held that the differentiation of types of fraud in *Haller* did not apply because *Haller* was a personal injury case involving an arms-length transaction where there was no fiduciary relationship between the parties.¹⁶ The court declined to create a tender requirement "when a fiduciary has allegedly breached its duty by self-dealing."¹⁷

The Koons Estate/Trustees argue that the Court of Appeals ruling is inconsistent with *Haller* and with rulings from the Eighth and Fourth Districts applying the tender rule to cases involving suits by minority shareholders who had entered into settlement agreements with

¹⁵ *Haller v. Borrer Corporation* (1990), 50 Ohio St.3d 10, 552 N.E.2d 207

¹⁶ *Cundall*, 2007-Ohio-7067 at ¶ 21- ¶ 22.

¹⁷ *Cundall*, 2007-Ohio-7067 at ¶ 25.

majority shareholders.¹⁸ They also cite cases from other jurisdictions involving law partners and joint venturers.¹⁹ They are misguided.

The Court of Appeals based its decision, however, on its views regarding the unique duty owed by a trustee to the beneficiaries of a trust: “Self-dealing – when trustees use the trust property for their own personal benefit – is considered ‘particularly egregious behavior.’ And any direct dealings between a trustee and a beneficiary are ‘viewed with suspicion.’”²⁰ The court reasoned that a trustee has a duty of loyalty arising from the trustee-beneficiary relationship, and that the duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.²¹ The court noted that “when a fiduciary – or an entity connected with a fiduciary – ends up with property originally in the trust, bells ring and sirens wail.”²²

Given the narrow basis for the court’s decision, there is no reason why the decision should conflict with the decisions of the Eighth and Fourth Districts or be extended, as the Koons Estate/Trustees suggest, to “joint venturers, majority and controlling shareholders, directors, agents, partners, attorneys, and all other fiduciaries.”²³ The Court of Appeals decision is also

¹⁸ Koons Estate/Trustee Memorandum, at 5-9, citing *Weisman v. Blaushild*, 8th Dist. No. 88815, 2008-Ohio-219; *Lewis v. Mathes* 4th Dist., 161 Ohio App.3d 1, 2005-Ohio-1975.

¹⁹ Koons Estate/Trustee Memorandum, at 9. The Koons Estate/Trustees’ assumption that the court’s narrow holding may be applied to all fiduciary relationships is analogous to the assumption made by the trial court in *Cassner* 2004-Ohio-3484, at ¶ 43, where the trial court applied the cause-of-action accrual date applicable to ordinary non-trust-related breaches of fiduciary duty to a breach of fiduciary claim against a trustee. In reversing the trial court, the Court of Appeals recognized that causes of action against trustees are unique.

²⁰ *Cundall*, 2007-Ohio-7067 at ¶ 32 (citations omitted).

²¹ *Cundall*, 2007-Ohio-7067 at ¶ 26.

²² *Cundall*, 2007-Ohio-7067 at ¶ 31.

²³ Koons Estate/Trustee Memorandum, at 1. In a related argument, the Koons Estate/Trustees argue in their Proposition of Law No. 2 that the Court of Appeals erred in stating that a presumption of fraud applied to the trustee’s self-dealing. Koons Estate/Trustees Memorandum,

consistent with the rule under Ohio law that if there is no question that at least the amount originally paid upon the execution of a release is owed, there is no reason to require repayment of the original amount when the release is challenged and an additional amount is sought.²⁴

Some decisions have alternatively looked at the broad powers inherent in a court for fashioning equitable remedies and suggested that the restoration concept behind the tender rule can be addressed by adjusting the equities or giving a credit or set-off against the amount the wrongdoer is ordered to pay.²⁵

at 9-10. The Court of Appeals decision is consistent with Ohio law, which provides that self-dealing transactions by a fiduciary are presumed to be invalid. *Rudloff v. Efstathiadis Fletcher*, 11th Dist. No. 2002-T-0119, 2003-Ohio-6686, at ¶ 10; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶ 30; *Trust of Broh-Kahn v. Broh-Kahn*, 8th Dist. No. 53606, 1988 Ohio App. LEXIS 1088; See *Yost v. Wood*, 5th Dist. No. 7357, 1988 Ohio App. LEXIS 2791, *8 (“Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation which gives one the opportunity to take undue advantage of or exercise undue influence over another.”)

²⁴ *In Re Gray's Estate* (1954), 162 Ohio St. 384, 123 N.E.2d 408, (holding that successor fiduciary was not required to tender back the amount received from surety before pursuing its remedies because there was no dispute that at least the amount previously paid was due); *Hoppel v. Hoppel*, 7th Dist. No. 88-C-59, 1990 Ohio App. LEXIS 2246, *4-*5 (holding that where the plaintiff had previously obtained a payment and was entitled to it irrespective of the validity of the settlement, there was no reason why the plaintiff should be compelled to repay the payment to the defendant when requesting rescission of the settlement.)

²⁵ *Magee v. Troutwine* (1957), 166 Ohio St. 466, 143 N.E.2d 581 (holding that in a chancery action a trial court has plenary jurisdiction to render a decree in conformity with the equities of the matter); *Schultz v. Sullivan* (1993), 92 Ohio App.3d 205, 634 N.E.2d 680 (holding that courts applying equity are not bound by formula or restrained by any limitation that tends to interfere with or limit their just exercise of discretion. “Rather, we seek only to protect the equitable interests of all parties to this litigation.”); *Kley v. Healy* (1891), 127 N.Y. 555, 28 N.E. 593 (holding that where plaintiff had only “that which, without dispute, belonged to her, restoration or the offer thereof was not necessary prior to the commencement of the action, for such conditions as might be essential to the protection of the defendant could be inserted in the judgment ultimately rendered.”); *Remediation Services, Inc. v. Georgia-Pacific Corp.* (1993), 209 Ga. App. 427, 433 S.E.2d 631 (holding that tender not necessary where unreasonable, where defendant made it impossible or where plaintiff is entitled to keep what he has – reasoning that the restoration rule is flexible and pragmatic and requires that neither party may retain an unfair advantage).

There can be no question that the Cundalls are owed at least the amount they received from the stock sale in 1984. The Koons are not arguing that the CIC stock was worth less than the amount the Cundalls were paid. Ohio law does not compel the Cundalls to repay this amount before challenging the release and seeking an additional amount.

The tender rule was addressed by the Ohio Supreme Court in *In re Gray's Estate*.²⁶ It was also discussed in *Bebout v. Bodle*²⁷ and *Manhattan Life Ins. Co. v. Burke*.²⁸ All three cases acknowledge that "tender" is "unnecessary" under circumstances where there is an amount due equal to the amount paid. As set forth in *Bebout*: "We reply, why should Mrs. Bodle return this money to William A. Bebout, when there is no dispute that there was due from him to her many times the amount so paid? He was entitled to credit for the amount, but not for a return of the money."²⁹

Similarly, in *Manhattan Life Ins. Co. v. Burke*,³⁰ the rule stated in *Bebout* was reiterated: "[R]estoration is not necessary where the money received by the party was due him in any event and if returned could be recovered back."³¹

A comprehensive analysis of the cases where restoration has been considered is set forth in A.M. Srarhout, Annotation, *Return or tender of consideration for release or compromise as condition of action for rescission or cancellation, action upon original claim, or action for*

²⁶ *In re Gray's Estate* (1954), 162 Ohio St. 384, 123 N.E.2d 408

²⁷ *Bebout v. Bodle* (1882), 38 Ohio St. 500, 1882 WL 110 (Ohio)

²⁸ *Manhattan Life Ins. Co. v. Burke* (1903), 69 Ohio St. 294, 70 N.E. 74

²⁹ *Bebout v. Bodle* (1882), 38 Ohio St. 500, 1882 WL 110 (Ohio)

³⁰ *Manhattan Life Ins. Co. v. Burke* (1903), 69 Ohio St. 294, 70 N.E. 74

³¹ *Id.* citing *Bebout*, *supra* and *Kley v. Healy* (1891), 127 N.Y. 555, 28 N.E. 593, and noting that: "The law does not require an idle ceremony;" See also, *Miller v. Woods* (1871), 21 Ohio St. 485, 1871 WL 81 (holding partial payment of cash and new promissory note does not require tender before suing on old note.)

damages sustained by the fraud inducing the release or compromise, 134 A.L.R.6 (1941). Many of these cases identify various equitable situations where the “tender” rule is just not applicable.

None of the Ohio cases cited in this annotation, however, involved facts pertaining to a trustee of an express trust, though several cases involving the claims against decedents’ estates dispensed with the tender requirement on the basis that no return was necessary for what the plaintiff was undoubtedly entitled to keep.³²

Generally, in the “high duty” setting of a trustee of an express trust, “tender” is an uncommon issue, because the ordinary scrutiny over any “interested” transaction is so high that questionable ones don’t happen. They get stopped! Court supervision is required,³³ or sought.³⁴ In this case, for various reasons, it was not possible for the interested transaction to be resisted and, humanly, taken advantage of. This theme of “human frailty” is a recurring one throughout the decisions and is cited as the basis of the rules.³⁵

³² *Reggio v. Warren* (1911), 207 Mass 525, 93 N.E. 805 (holding “He need not go through the vain ceremony of repaying or offering to repay these sums, when it at once would become the duty of the trustees to return to him the amount of these payments with a much larger additional sum.”); *White v. Hewitt* (1910) 86 S.C. 576, 68 S.E. 820 (holding “As plaintiffs received only what belonged to them without the settlement, they were not bound to tender it back.”); *Strong v. Strong* (1886), 102 N.Y. 69, 5 N.E. 799, (holding, “[P]laintiff could either (1) restore what she had received on the settlement and claim restoration to the position occupied by her prior thereto, or (2) keep what she had received and prosecute the defendant for damages sustained by her on account of the fraud.); *Nimey v. Nimey* (1935), 182 Wash 194, 45 P.2d 949 (holding “[O]ne injured by fraudulent compromise may, instead of restoring the benefit received, retain what he has received and sue for whatever damages he has sustained as the result of the deceit by which the compromise was obtained; or, if he rescinds the transaction on the ground of fraud, he is not required to restore that which in any event he would be entitled to retain.”)

³³ R.C. § 2109.44; R.C. §5808.02 (B)(2); RESTATEMENT (THIRD) TRUSTS §65 (2003)

³⁴ *Central National Bank of Cleveland, Trustee v. Brewer, et al.* (1966), 8 Ohio Misc. 409, 220 N.E.2d 846

³⁵ *Atwater, Magee*, *supra*

Early Ohio law recognized the time-tested lesson of this case: “An agent may not buy for himself.” Put another way, “An agent may only serve his principal.” This is the *uberrima fides* of the Roman law.³⁶

“The policy of the rule is to shut the door against temptation in cases where this relationship exists; it is of itself deemed sufficient to create the disqualification. The sale will be set aside, not because there *is* fraud, but because there *may* be fraud. ‘However innocent the purchaser in the case, it is poisonous in its consequences.’

There may be fraud, and the party not able to prove it. It is to guard against the uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule permits the *cestui que trust* to come at his option and without showing actual injury, and insist on the experiment of having another sale. This is a remedy which goes deep and touches the root of the evil. *Devoue v. Fanning*, 2 John’s Ch. 252; *Barrington v. Alexander*, 6 Ohio St.189; *Riddle v. Roll*, 24 Ohio St.572; *Michoud v. Girod*, 4 How, 503.

These principles are too well settled to be disturbed. They rest upon a foundation that can not be shaken.

They are adopted in the courts in every civilized land, and deserve to be maintained with unswerving fidelity.”³⁷

For the foregoing reasons, tender is not applicable in the present case other than possibly as an equitable consideration at trial and the opinion of the First District is in keeping with existing Ohio law.

Proposition of Law No. 2: Burden of Proof – A self-dealing trustee of an express trust always bears the burden of proving beyond all reasonable doubt the perfect fairness and honesty of the transaction.

The prohibition against self-dealing has been recognized throughout immemorial antiquity. Its roots are nicely recapitulated in *Michoud v. Girod*.³⁸ *Michoud* identified the prohibition against self-dealing as an immutable rule of both Roman ‘civil’ and English

³⁶ *Piatt v. Longworth’s Devisees* (1875), 27 Ohio St. 159, 1875 WL 159; citing *Devoue v. Fanning* (1816), 2 John’s Ch. 252; *Barrington v. Alexander* (1856), 6 Ohio St. 189, 1856 WL 38; *Riddle v. Roll* (1874), 24 Ohio St. 572, 1874 WL 12; *Michoud v. Girod* (1846), 45 U.S. 503, 11 L.Ed 1076, 4 How. 503

³⁷ *Id.*

³⁸ *Michoud v. Girod* (1846), 45 U.S. 503, 11 L.Ed 1076, 4 How. 503

'common' law. "In New York there has been no relaxation of it, since the decision in the case of *Devoue v. Fanning*, 2 John's Ch. 252." The principle was further traced to France,³⁹ Holland and Spain and the *Michoud* court concluded: "We have thus shown, that those purchases are fraudulent and void, from having been made *per interpositam personam*, and if they were not so on that account, that they are void by the rule in equity in the courts of England, and as it prevails in the courts of equity in the United States."⁴⁰

It is the prohibition against self-dealing by a trustee of an express trust that not only renders the "tender" rule inapplicable, but also puts the burden of proof to uphold a completed transaction on the trustee. "[T]he burden of proof lies upon the party filling the position of active confidence or possessing the power or influence, as the case may be, to establish, beyond all reasonable doubt the perfect fairness and honesty of the transaction."⁴¹

The reason that a high burden of proof has always been imposed upon a trustee of an express trust is because he is always in a position to be in total control of his subject-beneficiaries. Just like Bud Koons was. "Having special facilities for committing fraud upon the party whose interests have been entrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable."⁴²

Keeping the burden of proof on the self-dealing trustee comports with the special

³⁹ Id. quoting Robert Joseph Pothier, the noted French jurist (1699-1772) and citing Tr. Du Contrat de vente, part, 1, n. 13

⁴⁰ *Michoud* at 560

⁴¹ *Atwater v. Jones* (1902), 24 Ohio C.C. (N.S.) 328, 34 Ohio C.D. 605; *Monaghan v. Rietzke* (1949), 85 Ohio App. 497, 89 N.E.2d 159, citing *Atwater*, supra, *Kime v. Addlesperger* (1903), 2 Ohio C.C. (N.S.) 270, 277, 14 Ohio C.D. 397; *Peterson v. Mitchener* (1947), 79 Ohio App. 125, 133, 71 N.E.2d 510.

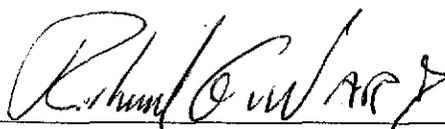
⁴² *Atwater*, supra.

integrity demanded of this type of fiduciary and is appropriate “because of the danger of imposition and the presumption of fraud, inaccessible to the eye of the court.”⁴³

IV. CONCLUSION

The Court of Appeals decision does not present issues of general public interest because it is consistent with existing Ohio law. Equitable principles and established case law control the issues and there is no substantial constitutional question. Accordingly, Plaintiff-appellees, Michael K. Cundall respectfully request that this court deny jurisdiction.

Respectfully Submitted,



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⁴³ *Piatt*, supra

CERTIFICATE OF SERVICE

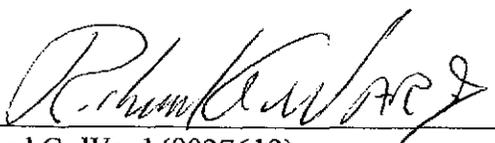
I hereby certify that a copy of the foregoing *Plaintiff-Appellees' Memorandum in Response* was served this 12th day of March, 2008 via ordinary mail upon the following:

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