

IN THE SUPREME COURT OF OHIO

YODER MACHINERY SALES COMPANY, ) Case No. 2008-0414  
)  
Plaintiff/Counter-Defendant-Appellant, ) On Appeal from the Court of Appeals of  
) Ohio, Sixth Appellate District, Lucas  
vs. ) County, Ohio  
)  
WELDON F. STUMP & CO., INC., ) Court of Appeals Case No. L-07-1139  
)  
Defendant-Appellee, )  
)  
and )  
)  
THE HUNTINGTON NATIONAL BANK, )  
)  
Defendant/Counter-Plaintiff-Appellee. )

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MEMORANDUM IN RESPONSE TO CLAIMED JURISDICTION OF APPELLEES

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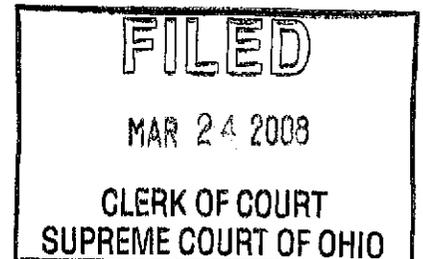


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I. EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

A. Applicable Legal Standard

Article IV, Section 2 of the Ohio Constitution provides:

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

*Ohio Constitution*, Art. IV, § 2(B)(2)(e). “If the case is not one of great public or general interest, the judgment of the Court of Appeals, although erroneous, is final and not subject to review.” *Kern v. Contract Cartage Co.*, (7<sup>th</sup> Dist.), 55 Ohio App. 481, 486. This inquiry is “distinguished from questions of interest primarily to the parties.” *Williamson v. Rubich*, (1960), 171 Ohio St. 253, 254. Whether there is a public or great general interest is resolved in the Court’s discretion. *See id.* at 254.

B. The Court of Appeals Affirmed the Trial Court Squarely Upon and in Deference to the Specific Facts Regarding the Parties, Not Issues of Law That Would Raise Public and Great General Interest

In its decision, the issues raised with the Court of Appeals by Appellant, Yoder Machinery Sales Company (“Yoder Machinery”) was whether the trial court erred in denying Yoder Machinery’s motion to appoint itself the winding up partner and granting Appellee, The Huntington National Bank’s (“Bank”) motion to intervene. Decision of Court of Appeals (“Decision”), pp. 1-2. Only the facts pertaining to the issues in those two motions were dispositive before the reviewing court.

The Court of Appeals deferred to the trial court’s findings of fact based on the evidence on the record. Decision, p. 5. The court recited the specific facts concerning the business and accounting practices of Yoder Machinery and Weldon F. Stump & Co. (“Stump Company”). Decision, pp. 2-5. These facts are also recited in this memorandum. Based on such facts, the

Court of Appeals affirmed the trial court's holding that Yoder Machinery wrongfully dissolved the partnership and could not be the winding-up partner. Decision, pp. 6-7. Wrote the court: "The record contains ample objective and credible evidence supporting the conclusion that appellant did not qualify as winding-up partner of Stump pursuant to R.C. 1775.36." Decision, p. 7.

Deferring to the same facts, the Court of Appeals affirmed that the Bank was entitled to intervene because it held a perfected security interest in the property that was the subject matter of the case and could not be adequately represented by the other parties. Decision, p. 8. Wrote the court: "Given the facts of this case, we need not belabor our analysis on this issue." Decision, p. 9.

The decision of the Court of Appeals, therefore, turned on specific facts involved in this case, not upon issues of law. The circumstances in this case and the interests being adjudicated primarily concern the interests only of the parties, not a public or great general interest.

Appellant cites Executive Order 2008-04S, "Implementing Common Sense Business Regulation," for the proposition that the Court should follow in the steps of administrative agencies in Ohio by accepting this appeal to assess the impact of its judicial decision-making upon the business environment in this state. Appellant argues this appeal would foster predictability and certainty in the rulings of the Ohio courts as to existing business law. The opposite, however, would be the case by imposing a new standard for review on appeal. The Executive Order does not seek to alter the long held standards of review on appeal. Specifically, the appeals court was required to determine if the decision of the trial court in applying the partnership statutes was supported by some competent, credible evidence<sup>1</sup> or did the trial court's

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<sup>1</sup> *Rivercrest Farm, Inc. v. Taber*, (Ohio App 3<sup>rd</sup> Dist. 1998) 1998 WL 305362; *Klaene v. Minnick*, (Ohio App. 12 Dist. 1997), 1997 WL 795673.

decision granting the motion for intervention constitute an abuse of discretion.<sup>2</sup> The Court of Appeals was not asked nor was it required to consider the impact of its decision on the state's economic welfare.

Yoder Machinery is unable to point to any specific impact that the Court of Appeals decision will have on the economic welfare of the state. The economic welfare of Yoder Machinery is not a basis for a claim that this is a case of public or great general interest.

Whether or not the Court of Appeals erred in its ruling, its decision should not be subject to review.

## II. APPELLEES' COUNTER-STATEMENT OF THE CASE AND FACTS

### A. Background

On March 25, 2004, the Bank filed its Complaint against the Stump Company and Robert Stump, its sole shareholder, based on cognovit notes and guarantees ("Original Case"). The cognovit notes had matured and the Stump Company and Robert Stump were in default as of October 1, 2003. Judgment was entered in favor of the Bank against the Stump Company in the amount of \$2,676,832.93. Appointment of a receiver was a remedy that Stump Company had agreed to in the loan documents. By Order entered on April 6, 2004, Patricia Fugée was appointed as the receiver.

On June 29, 2004, Yoder Machinery filed its partnership dissolution complaint against the Stump Company seeking to dissolve its alleged partnership or partnerships with the Stump Company and act as the winding up partner pursuant to the Uniform Partnership Act, Ohio Revised Code ("R.C.") § 1775.01, *et seq.* ("Yoder Case"). Yoder Machinery's motion to be

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<sup>2</sup> *Petty v. Kroger Food & Pharmacy*, (10th Dist. 2005) 165 Ohio App 3d 16, 19; *Myers v. Basobas*, (10th Dist 1998), 129 Ohio App 3d 692, 696.

named winding up partner was based on R.C. 1775.36. The Yoder Case was subsequently consolidated with the Original Case.

Evidence in the litigation showed that Yoder Machinery, not Stump Company, wrongfully dissolved the partnerships prior to the appointment of the receiver. Indeed, Yoder Machinery has and continues to breach its obligations as a partner. Despite the trial court's order denying its motion to be named as winding up partner, Yoder Machinery is continuing to wind up the partnerships.

The Stump Company is presently a debtor in a Chapter 7 bankruptcy case pending in the United States Bankruptcy Court, Northern District of Ohio, Case No. 05-32505, before the Honorable Richard L. Speer. John Graham is the Chapter 7 Trustee for the Stump Company. The case is pending because liquidation of Stump Company assets is not completed. The Stump Company is still in existence.

The Bank is the principal secured creditor of the Stump Company and has a valid and perfected security interest in, among other things, accounts and general intangibles. Any proceeds, representing Stump Company's share of the putative partnerships between the Stump Company and Yoder Machinery, are accounts subject to the Bank's security interest. Any proceeds recovered after the Bank's judgment is satisfied would be available to unsecured creditors in the Stump Company bankruptcy case.

Because the actions which Yoder Machinery proposed to take in the Yoder Case would impair or impede the Bank's ability to protect its security interest in the proceeds generated from the sale of property that were now due and payable to the Stump Company, the Bank is entitled to intervene as a matter of right under Civ. R. 24(A)(2).

B. Facts

1. Stump Company purchased used machinery with various companies

Stump Company and Yoder Machinery were engaged in the business of used machinery sales. The Bank is and has been a secured creditor of the Stump Company. The Stump Company granted a security interest to the Bank in, among other things, accounts and general intangibles to secure repayments of loans that have been outstanding since at least 1999.

For at least thirty years, Stump Company jointly purchased used machines with various companies, including Yoder Machinery. Certain machines were owned by Yoder Machinery, Stump Company and other parties. The custom in the industry was that one of the joint owners would pay the entire purchase price for the piece of equipment, invoice the other joint owners and would retain possession of it until it was resold. Then the possessory owner would distribute proceeds, net of the co-owner's pro rata share of the purchase price and costs, to the co-owner or co-owners.

2. The dissolution and winding up of the Yoder Machinery-Stump Company partnerships

i. Yoder Machinery has been dissolving and winding up the partnerships on an ongoing basis without benefit of a court order

Yoder Machinery has been winding up the partnerships in which Stump Company, Yoder Machinery and third parties have an interest on an ongoing basis despite the denial of its motion to be named as winding up partner. Yoder Machinery distributes the sales or partnership proceeds regularly to all partners *except* the Stump Company. Yoder Machinery is liquidating the assets of the partners and retains the Stump Company's share of the sales proceeds without the consent of the Chapter 7 Trustee or providing an accounting to the Chapter 7 Trustee.

ii. Stump Company modifies its records to indicate that Yoder Machinery owned equipment that had been previously shown as partnership property

Before the Bank filed the Original Case, a number of events occurred which indicate that Yoder Machinery unilaterally or in concert with Stump Company or in concert with Robert Stump terminated the partnerships between Yoder Machinery and Stump Company.

On or about October 20, 2003, five months before the Bank filed suit against Stump Company, Stump Company began to change the coding in its books and records on certain pieces of machinery and equipment in which Yoder Machinery had an interest. A Stump Company employee, responsible for maintaining the Stump Company books and records, testified that a purchase order and invoice were always issued for machines in which Stump Company had an ownership interest. Stump Company records initially indicated that certain machines, which were jointly owned with Yoder Machinery, were part of Stump Company's inventory. This practice was typical of machines in which Stump Company had a partnership interest.

The employee testified that she modified the records of Stump Company so that certain machines in which Yoder Machinery had a joint interest with the Stump Company were now coded in the Stump Company books and records as being solely owned by Yoder Machinery. The employee could not provide an explanation for her actions. The revisions to the Stump Company records are evidence that at least some of the Stump Company/Yoder Machinery partnerships may have been terminated as early as October 20, 2003.

iii. Robert Stump hires Stump Company employees to work for Yoder Machinery

Yoder Machinery wrongfully dissolved the partnerships before the appointment of the Receiver for the Stump Company when Robert Stump, after entering into an agreement with

Yoder Machinery, terminated his employment with Stump Company. According to Mr. Stump, an agreement was reached with Yoder Machinery to hire almost all the Stump Company employees.

On or about March 31, 2004, a week after the Bank had taken judgment and a week before entry of the Order appointing the Receiver, Robert Stump and almost all of the employees left Stump Company and went to work for Yoder Machinery, thereby crippling the ongoing operations of the Stump Company. The former employees also took Stump Company's customer lists and inventory records to Yoder Machinery. Using such information, Yoder Machinery established contacts with Stump Company's customers.

3. Yoder Machinery modifies its records to remove Stump Company's interest

In April, 2004, consistent with Stump Company's alteration of its records, Yoder Machinery modified its records as to certain machines to remove any reference to Stump Company's partnership interest.

4. Yoder Machinery files the partnership dissolution suit

On June 29, 2004, after removing reference to the Stump Company's interest in various machines, Yoder Machinery commenced suit seeking dissolution of the partnership and an order appointing Yoder Machinery as the "winding up" partner. Stump Company is the only defendant. No other partners are named. Yoder Machinery alleges that by "operation of Ohio law" the Receiver Order dissolved the partnership.

On January 23, 2007, Yoder Machinery filed its Renewed Motion for Appointment as Winding Up Partner for Existing Stump Company-Yoder Machinery Partnerships. The trial court denied this motion, based on the factual findings raised on appeal to the Court of Appeals.

5. On December 11, 2006, the Trial Court Grants the Bank's Motion to Intervene

On or about January 3, 2006, the Bank filed a Motion for Leave to Intervene in the Yoder Case. The Bank provided uncontroverted evidence that it is the principal secured creditor of the Stump Company and has valid and perfected security interests in, among other things, accounts and general intangibles. Any proceeds which might be distributed to Stump Company from the liquidation of the putative partnerships between the Stump Company and Yoder Machinery are subject to the Bank's security interest. The bankruptcy trustee, the legal representative of the Stump Company, cannot advance the Bank's position since he is a fiduciary representing the interests of the bankruptcy estate and is prohibited from representing the interests of any single creditor. The Bank was therefore entitled to intervene as a matter of right under Civ. R. 24(A)(2) or Civ. R. 24(B)(1) and (2). In an entry dated December 11, 2006, the trial court granted the Bank's motion.

III. APPELLEE'S ARGUMENT REGARDING PROPOSITIONS OF LAW

A. Applicable Standards of Review

The proper standard of review is that the reviewing court will not disturb the decision of the trial court in cases involving application of the partnership statutes if the decision is supported by some competent, credible evidence. See *Rivercrest Farm, Inc. v. Taber*, (Ohio App 3 Dist. 1998), 1998 WL 305362; *Klaene v. Minnick*, (Ohio App. 12 Dist. 1997), 1997 WL 795673.

The proper standard of review of a decision granting a motion for intervention is abuse of discretion. See *Petty v. Kroger Food & Pharmacy*, (10 Dist. 2005), 165 Ohio App 3d 16, 19; *Myers v. Basobas*, (10 Dist 1998), 129 Ohio App 3d 692, 696. In order to find an abuse of discretion, the reviewing court must determine that the trial court's decision was unreasonable,

arbitrary, or unconscionable and not merely an error of law or judgment. *See Blakemore v. Blakemore*, (1983), 5 Ohio St. 3d 217, 219.

Response to Proposition of Law No. 1: A partner who has not wrongfully caused the dissolution of a partnership is entitled to wind up its affairs. Revised Code Section 1775.36.

B. The Court of Appeals Did Not Err Because The Trial Court's Denial of Appellant's Motion Is Supported by Competent, Credible Evidence

1. Yoder Machinery has wrongfully dissolved the Partnerships and has been winding up the Partnerships without benefit of a court order

The trial court's decision that Yoder Machinery not be named as winding up partner is amply supported by uncontroverted evidence, to which the Court of Appeals deferred. The evidence presented by the Appellees to the trial court consisted almost entirely of the sworn testimony of the employees and representatives of Yoder Machinery.

Yoder Machinery's motion to be appointed as winding up partner as presented to the trial court relied on R.C. 1775.36, which provides:

"Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representatives of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs. Any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court. In the case of the death of a partner, the right of the survivors to wind up is subject to sections 1779.01 to 1779.08, inclusive, of the Revised Code."

To decide which partner wrongfully dissolved the partnership, the acts causing dissolution must be considered.

R.C. 1775.28 defines dissolution of a partnership.

"The dissolution of a partnership is the change in the relation of the partners caused by the partner's ceasing to be associated in the carrying on as distinguished from the winding up of the business."

In addition, a partner can express its will to dissolve the partnership in a number of ways, including simply stating a desire to “get out.” See *Thomas v. American National Bank*, (Tex. 1986) 704 S.W.2d 321, 323-4, and the cases cited therein.

The undisputed facts are that as early as October 20, 2003, Stump Company was taking actions inconsistent with what appears to have been the practice between Stump Company and Yoder Machinery with regard to partnership property. The actions of modifying the books and records by removing machinery from Stump Company’s inventory in favor of Yoder Machinery is evidence that the partnership may have been dissolved on or before that date. Yoder Machinery’s wholesale gutting of the Stump Company work force on March 31, 2004, prior to the entry of the Receiver Order and intentional interference with the operation of the Stump Company, with the active assistance of Robert Stump, is strong evidence of Yoder Machinery’s intent to dissolve the partnerships. After hiring the Stump Company employees and stealing Stump Company’s business records, Yoder Machinery then modified its records to remove reference to Stump Company’s ownership interest in certain machines, consistent with the Stump Company’s own modifications.

A partner who has wrongfully dissolved the partnership cannot be named as “winding up” partner. R.C. 1775.28. Yoder Machinery’s attempt to shut down the Stump Company by hiring away Stump Company employees, taking customer lists and obtaining a list of Stump Company inventory are evidence of wrongful dissolution of the partnerships by Yoder Machinery. R.C. 1775.31(A)(3) and (4). The actions of Yoder Machinery as detailed in the Stump Company’s counterclaim support a claim for wrongful dissolution by Yoder Machinery under R.C. 1775.30(B) and 1775.31(A)(3) and (4).

Furthermore, Yoder Machinery has acted contrary to the acknowledged agreement between partners by failing to obtain the consent of the Chapter 7 Trustee to a sale and then refusing to remit the proceeds from the sale of machinery to the Stump Company or provide an accounting to the Chapter 7 Trustee or the Bank, the secured creditor of the Stump Company, upon sale of the machinery in which Stump Company has an interest.

2. Yoder Machinery is not the only entity that can be designated to wind up the partnerships

R.C. 1775.36 provides, in relevant part, “Any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.” The Court can appoint any partner or his legal representative “upon cause shown” as winding up partner.

Yoder Machinery’s argument that only a partner can be appointed to wind up the partnerships is contrary to the routine practice of the courts to appoint non-partners, i.e. receivers, to liquidate assets of a partnership. *See, e.g. Geiser Durst v. Durst*, (Ohio App 3 Dist. 2003), 2003 WL 1918577; *Hill v. Hill*, (Ohio App 10 Dist. 2002), 2002 WL 243294; *Cortell v. Koch*, (Ohio App 11 Dist. 1986), 1986 WL 14580; *Hammond v. Hammond*, (Ohio App 2 Dist. 1984), 1984 WL 4112.

Response to Proposition of Law No. 2: The statutory remedy afforded a creditor of an individual partner under Rev. Code Section 1775.27(A) supersedes the procedural provisions of Civil Rules 24(A) and (B) in partnership dissolution actions.

C. The Trial Court Did Not Abuse Its Discretion In Granting The Bank’s Motion To Intervene

Civ. R. 24(A) and (B) provide:

(A) Intervention of right

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the

property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(B) Permission intervention

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Case law in Ohio clearly favors intervention. *See, e.g., Dept. of Adm. Ser., Office of Collective Bargaining v. State Emp. Relations Bd.*, (1990), 54 Ohio St. 3d 48 (Civ. R. 24(A)(2) should be liberally construed to permit intervention). Case law supports allowing a party claiming an interest in the assets which are the subject matter of litigation to intervene. *See, e.g., Jamestown Village Condominium Association Owners Assn. v. Market Media Research, Inc.*, (1994), 96 Ohio App 3d 678, 694; *Lalic v Chicago, Burlington & Quincy RR Co.*, (N.D. Ill. 1967), 263 F. Supp. 987.

In this case, by virtue of the Security Agreements, the Bank has a security interest in the Stump Company's assets including its accounts and general intangibles. As set forth in the Uniform Commercial Code, secured transactions, "Account" means "a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of...." R.C. § 1309.102(A)(2)(a). "General intangible" means "any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods,

instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. ‘General intangible’ includes payment intangibles and software.” R.C. § 1309.102(A)(42).

All of the partnerships in the case before this Court must be or have been dissolved pursuant to R.C. § 1775.30, which provides that dissolution is mandated when any of the partners declares bankruptcy or when the object of the partnership is achieved, whichever occurs first. Upon dissolution, each partner is entitled to have the partnership property applied to discharge partnership liabilities so that the surplus may be paid in cash to the partners. R.C. § 1775.37(A). Upon dissolution of a partnership, therefore, individual creditors are entitled to the partner’s share of profits and surplus. *See Buckman v. Goldblatt*, (1974), 39 Ohio App.2d 1, 4. Yoder Machinery argues that the Bank cannot claim a security interest in the machinery owned by the partnerships. Ohio’s Uniform Partnership Act, R.C. § 1775.01 *et seq.*, does state that partnership property is not available to creditors of individual partners, but it also provides that a partner’s share of profits and surplus is the “personal property” of the partner. *See R.C. § 1775.25.*

It is important to note that each partnership can be dissolved and, with regard to many machines, has been wound up separately without winding up all the partnerships.

The testimony provided by Raymond Darr, former Chief Financial Officer of the Stump Company and former employee of Yoder Machinery, and Timothy Yoder, officer and owner of Yoder Machinery, is that “partnerships” have been formed and are dissolved or “wound up” on an ongoing basis. It is not a single “partnership” as Yoder Machinery contends for purposes of this appeal, but many “partnerships” as Yoder Machinery has previously acknowledged and as evidenced by the testimony of Raymond Darr and Timothy Yoder. The Complaint which Yoder

Machinery filed in this case includes equipment jointly owned by Yoder Machinery, Stump Company and third parties not named in this suit.

R.C. § 1775.39 sets out the rules for settling accounts between the partners after dissolution as follows:

“In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(I) Where a partner has become bankrupt or the partner's estate is insolvent the claims against the partner's separate property shall rank in the following order:

- (1) Those owing to separate creditors;
- (2) Those owing to partnership creditors;
- (3) Those owing to partners by way of contribution.”

R.C. § 1775.39 (I). (Emphasis added).

The Bank's interest as a secured creditor in proceeds held by Yoder Machinery representing Stump Company's share has priority over Yoder Machinery's interest as an unsecured creditor in those proceeds.

As a secured creditor, the Bank's interests are different than those of the Chapter 7 Trustee, who is the representative of the estate. Case law supports intervention by a party whose ability to protect its interests might be impaired or impeded if it were not permitted to intervene, whether by right or by leave of the court. *See, e.g., J.C. Wyckoff & Assoc., Inc. v. Aetna Casualty & Surety Co.*, (Bankr. E.D. Mich. 1984), 41 B.R. 791.

Yoder Machinery incorrectly argues that the Bank's only remedy as a creditor of the Stump Company is to seek a charging order against the debtor's partner's interest. The Bank, however, is a secured creditor of the Stump Company with a priority over Yoder Machinery's unsecured claims against the Stump Company. To the extent that Yoder Machinery has already wound up certain partnerships and not distributed those sales proceeds to Stump Company, the

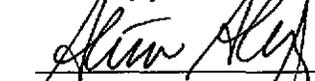
Bank has a security interest in those proceeds. It is on that basis that the Bank's Motion to Intervene was granted.

#### IV. CONCLUSION

The issues in this case turn upon facts relating to the wrongful dissolution by Yoder Machinery of its partnership with the Stump Company. Such fact-intensive issues demonstrate this case only speaks to the interest of the parties, not to a public or great general interest. This Court should decline to accept jurisdiction of the appeal. The Court of Appeals correctly deferred to the trial court's findings of the specific facts in this case, which sufficiently supported its rulings denying Yoder Machinery's motion to appoint itself winding up partner and granting the Bank's intervention.

Respectfully submitted,

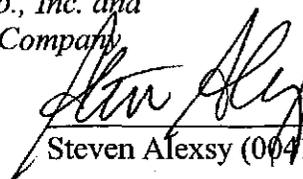
  
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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response to Claimed Jurisdiction was sent by first class U.S. mail, this 21st day of March, 2008, to the following parties:

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