IN THE SUPREME COURT OF OHIO

NATIONAL INTERSTATE CORP., ET AL.,	][	**Case No. 2008-0757**
Plaintiffs / Appellees	][	On Appeal From the Summit County Court of Appeals, Ninth Appellate District
vs.	][	Court of Appeals Case No. 07-CA-23877
ANDREW WEST, ET AL.,	][	
Defendants / Appellants.	][	

APPELLEES' RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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I. THIS APPEAL DOES NOT RAISE QUESTIONS OF PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTIONS.

The Ninth District Court of Appeals dismissed Appellants' appeal of three preliminary discovery orders because it found that the orders were not final and appealable under R.C. § 2505.02(B)(4). That decision by the Court of Appeals is the only decision Appellants can request this Honorable Court to review, and that decision does not raise questions of public or general interest or substantial constitutional questions. Therefore, the Court should not accept jurisdiction over this appeal.

At issue before the Court of Appeals were three interrelated discovery orders. In the first order, the trial court (1) denied Appellants' Motion for Protective Order to prevent discovery regarding (a) certain entire categories of documents, specifically including the RIS Appellants'[1] business plans, operating agreements, subscription plans and other financial documents and (b) Appellants' computers and other electronic communications devices and (2) ordered Appellants to produce and allow inspection of the above-stated items pursuant to the terms of two protective orders, which the court issued soon thereafter. (*See* Aug. 10, 2007 Order, attached to Appellees' Mem. in Opp. to Mot. to Stay Pursuant to S. Ct. R. II, §2(A)(3) ("Appellees' Opp. to Mot. to Stay") as Exhibit F.)[2] The second two orders were protective orders: one providing a flexible protocol whereby alleged trade secrets and proprietary information being produced could be marked as confidential and treated as "attorney's eyes only," (*see* Order Regarding Protection of Confidential Information dated Aug. 27, 2007

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[1] For purposes of this Memorandum, "RIS Appellants" refers to Appellants RIS Holdings, LLC; Recreation Insurance Specialists, LLC; RIS Risk Management Services, LLC; and RIS Holdings Corporation.

[2] This order was not included in the Appendix of Appellants' Memorandum in Support of Jurisdiction (hereinafter "Appellants' Jurisdictional Memorandum").

(hereinafter "Confidentiality P.O.")),[3] and the other providing a detailed protocol for conducting electronic discovery. (*See* Protective Order Governing Imaging, Inspection of Computers and Electronic Devices, Production of Confidential and Privileged Information and Preservation of Privilege in the Event of Inadvertent Production of Privileged Material dated Aug. 27, 2007 (hereinafter "Electronic Discovery P.O.").)[4] The combined effect of the three orders, as described by the Court of Appeals, is to "allow[] discovery to proceed subject to general protections while maintaining the parties' ability to object in the case of specific documents." (*See* Decision and Journal Entry dated March 12, 2008 (hereinafter "Journal Entry") at ¶ 12.)

In concluding that it lacked jurisdiction to review the three discovery orders, the Court of Appeals explained as follows:

> The trial court's orders have allowed discovery of a class of documents subject to protection without making a determination with respect to any. **The protective orders currently in place preserve RIS's ability to designate materials as trade secrets while maintaining the parties' rights to object, <u>whether those materials are produced in hardcopy form or in an electronic medium</u>.**

(*See id.* at ¶ 11) (emphasis added.) The Court of Appeals recognized that the protective orders set forth a general framework for electronic and non-electronic discovery to proceed with adequate safeguards to protect confidential, trade secret or other sensitive information. (*See id.* at ¶¶ 9-12.) The Court of Appeals also recognized the orders do not compel the unprotected disclosure of Appellants' purported trade secrets because the trial court has never even had the opportunity to determine whether Appellants have any trade secrets to protect. (*See id.* at ¶¶ 5 and 11.) Thus, the Court of Appeals held that the orders were "provisional remedies," but that they did not "determine[] the action with respect to" or "prevent a judgment in the action in favor

[3] Attached to Appellants' Jurisdictional Memorandum at Appx. 20-28.

[4] Attached to Appellants' Jurisdictional Memorandum at Appx.12-19.

of the [Appellants] with respect to" a provisional remedy as is required under R.C. § 2505.02(B)(4) to vest jurisdiction in the Court of Appeals.

Appellants now urge this Court to review the Court of Appeals' decision because the Court of Appeals "focused on the documents that would eventually be produced in hard copy form" and, thereby, failed to address and, indeed, "ignored" the propriety of the trial court's Electronic Discovery P.O. That order, they argue, will cost them "tens of thousands of dollars" to comply with and, according to Appellants, will inevitably result in their purported trade secrets being improperly disclosed to Appellees. According to Appellants, the Court of Appeals' complete failure to address the Electronic Discovery P.O. denied them their due process rights and will have a widespread "chilling effect" on competition in the State of Ohio.

Appellants are wrong.

First, in deciding that the appealed discovery orders did not determine the action or prevent a judgment in Appellants' favor regarding any trade secret (as opposed to a class of documents that might include trade secrets), the Court of Appeals did not "ignore" or "miss" the fact that the Electronic Discovery P.O. allows for forensic imaging of electronic information. Likewise, contrary to the numerous assertions in Appellants' Jurisdictional Memorandum, the Court of Appeals did not focus on hard copies to the exclusion of electronically-stored information.[5] Indeed, it explicitly held that the combined effect of the two protective orders was to "maintain[] the parties' right to object" regarding materials produced in "an electronic medium." (*See* Journal Entry at ¶ 11, Appx. at 9.)

Second, the forensic imaging process described in the Electronic Discovery P.O. will cost Appellants nothing: the trial court's August 10, 2007 Order denying Appellants' Motion for

[5] The Electronic Discovery P.O. does not even call for separate electronic and "hard copy" productions. Thus, it appears that Appellants are the only ones who are mistakenly focusing on hard copies.

Protective Order, which Appellants failed to include in their Appendix, explicitly requires *Appellees* to bear that cost. (*See* Aug. 10, 2007 Order at 2, attached to Appellees' Opp. to Mot. to Stay as Exhibit F.) Moreover, even if Appellees were not obligated to pay for the forensic imaging process, there is no evidence regarding the expense involved in the process or to support Appellants' allegation that the process will cost them or anyone else "tens of thousands of dollars." Therefore, the Court of Appeals' decision not to exercise jurisdiction over the trial court's discovery framework in no way establishes a dangerous or potentially expensive precedent.

Third, as the Court of Appeals recognized, Appellants have not demonstrated (1) that they have any trade secrets to protect, (2) that trade secrets exist on their computers, or (3) that the Electronic Discovery P.O. is inadequate to protect any such trade secrets. Moreover, the Court of Appeals correctly stated that the protective orders set forth a general discovery framework with adequate safeguards to protect any trade secrets that might exist in "an electronic medium." In other words, the Confidentiality P.O. applies equally to information produced in compliance with the Electronic Discovery P.O. And the protective orders provide Appellants adequate time— and the ability to request extensions of time— to review any electronic production for confidentiality and privilege prior to producing any such materials to Appellees. (*See* Electronic Discovery P.O. at 5-8, Appx. 16-19.) Thus, Appellants have no basis upon which to argue that trade secret information will somehow be improperly or prematurely disclosed; the trial court's framework adequately protects against that possibility.

Fourth, there is no evidence in this case upon which any court could determine that the forensic imaging process set forth in the Electronic Discovery P.O. would likely damage Appellants' computers. In fact, in their two briefs in support of their Motion for Protective

Order, Appellants never argued that electronic discovery would damage their computers, much less ask the trial court to make such a determination. Moreover, the degree of risk of physical damage to a computer posed by the imaging processes described in the Electronic Discovery P.O. is not the type of factual finding a court could make through judicial notice.

Fifth, the Court of Appeals did not improperly decline the opportunity to "set forth a standard" and "provide a framework for future cases involving a business wishing to clone the computers and other electronic devices of another," and this Court is not now presented with that opportunity because (1) the trial court's general framework for electronic discovery is not a final appealable order under R.C. § 2505.02 and (2) even if it were, Appellants never argued at the trial level that Appellees should be required to satisfy any special standard in order to be entitled to the electronic discovery contemplated in the Electronic Discovery P.O. Thus, the trial court has never been confronted with that issue. Additionally, even if Appellants had urged the trial court to apply the heightened discovery standard they now urge this Court to adopt, the evidence in this case satisfies that standard.

Finally, the Court of Appeals did not violate Appellants' constitutional due process rights by holding that the trial court's discovery orders were not final and appealable under R.C. § 2505.02. As has already been explained, the Court of Appeals did not "ignore" or "miss" the fact that the Electronic Discovery P.O. called for forensic imaging of electronic information. Moreover, even if Appellants possess trade secrets and some or all of those are stored on Appellants' computers, there is no evidence that trade secrets are likely to be improperly or prematurely disclosed in contravention of the trial court's protective orders. Therefore, Appellants have not been denied due process, and this appeal does not raise a substantial constitutional question.

II. STATEMENT OF THE CASE AND FACTS.

Appellants' Jurisdictional Memorandum contains many errors and mischaracterizations in the section entitled "Statement of the Case and Facts." Therefore, Appellees provide the following as a correction.

A. Appellants Withheld Relevant Electronic Documents.

This case involves numerous claims brought by Appellees, National Interstate Corporation ("NIC") and National Interstate Insurance Company ("NIIC"; collectively, "Appellees") against the RIS Appellants and the individual Appellants— Andrew West, Eric Raudins, William Hobbs, and Scott Gurley. The individual Appellants are former NIIC employees. Appellees allege, among other things, that all Appellants misappropriated NIC's trade secrets, that Appellant West breached his covenant not to compete and his common law duty of loyalty, and that Appellants Raudins and Hobbs breached various covenants they had with NIC. The Appellants have asserted a variety of counterclaims against Appellees.

In March 2007, Appellees served interrogatories and requests for production upon Appellants which sought, among other things, electronic documents and electronic communications in their native digital format with no metadata removed. The requests also sought production of Appellants' computers and electronic communications devices for examination. In response, Appellants produced several innocuous emails between the individual Appellants.

At about the same time as written discovery was proceeding, Appellees conducted a forensic examination of the computer Appellant West used while employed with NIIC. **That examination revealed emails between Appellant West and Appellant Hobbs that were within the scope of Appellees' Requests for Production but which Appellants never produced.**

Those emails included, among other things, information establishing that, contrary to West's deposition testimony at the start of his deposition,[6] Hobbs solicited West for employment prior to February 4, 2007, the day on which Hobbs' non-solicitation agreement expired. (*See, e.g.*, West Dep. Exhibit 21, attached to Appellees' Opp. to Mot. to Stay as Exhibit B (e-mail exchange between West and Hobbs regarding their apparent joint recruitment of another NIIC employee, Vincent Perlick) and West Dep. Exhibit 22, attached to Appellees' Opp. to Mot. to Stay as Exhibit C (e-mail showing West's agreement to provide information to Hobbs from within NIIC, saving Hobbs and the RIS Appellants time and money in their efforts to compete with NIIC)). Additionally, West used his personal email account to send Hobbs information taken from Appellees. (*See* West Dep. Exs. 16 & 18, attached to Appellees' Opp. to Mot. to Stay as Exhibit D (showing that West forwarded a "Carrier Comparison" to Hobbs from within NIIC).)

The trial court found these e-mails and others exchanged between West and Hobbs to be "strong evidence" that "discussions between Hobbs and West prior to West leaving [the employ of NIIC], existed and were not of the minimal character as only about a possible job change as sought to be explained by both Mr. West or Mr. Hobbs." (Magistrate's Order at 5, attached to Appellees' Opp. to Mot. to Stay as Exhibit E).[7] Importantly, however, despite NIC's request for all e-mails exchanged between the Appellants and the clear relevance of these emails to this case, ***Appellants produced none of these emails.***

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[6] When Plaintiffs took Appellant West's Deposition on March 13, 2007, West initially testified, under oath, that he only used his personal e-mail account to e-mail Appellant Hobbs about the RIS Appellants "after [he] started working" at Recreation Insurance Specialists, LLC, (West Dep. Tr. at 11:17-23, attached to Appellees' Opp. to Mot. to Stay at Exhibit A), and that he had never used his personal e-mail account "to communicate with anyone for the purpose of sending them information about National Interstate or RIS." (*Id.* at 13:2-6).

[7] The Magistrate's Order granting a preliminary injunction barring Appellant West from working for the RIS Appellants was adopted by the trial court on August 10, 2007.

B. The Trial Court Ordered the Production of Documents and Forensic Imaging, and Appellants Appealed.

As the result of a subsequent discovery dispute, the trial court ordered that the parties brief their respective positions on several issues.[8] One such issue was Appellees' request to image Appellants' computers and other devices capable of sending and receiving electronic communications.[9] Appellees sought to image those devices in part because of the fact that Appellants withheld the previously discussed requested, relevant email communications. Upon the completion of the briefing, the trial court ordered Appellants to allow a third-party previously engaged by Appellees— Vestige, Ltd.— to make forensic images, (i.e., mirror-image copies) of Appellants' computers and other electronic communications devices under a detailed electronic discovery protocol, (*see* Aug. 10, 2007 Order, attached to Appellees' Opp. to Mot. to Stay as Exhibit F), which the trial court set forth in the Electronic Discovery P.O.

Contrary to Appellants' draconian characterization of the Electronic Discovery P.O., the electronic discovery protocol set forth in that Order is fair and balanced. First, the Order allows Appellants ten (10) *business* days (not 10 calendar days, as implied by Appellants) to review the data for privilege, work product and confidentiality, and it specifically allows Appellants to seek reasonable extensions of time. (*See* Electronic Discovery P.O. at 6, 8, Appx. at 17, 19.) The Order does not, as Appellants assert, require Appellants to turn all information over at the end of ten days even if they have not completed their privilege and confidentiality review.

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[8] There is no evidence to support Appellants' allegation that "the trial court judge stated that while Appellee's counsel's promises as to confidentiality were commendable, practically speaking, Appellants' confidential documents would eventually be seen by others." Indeed, as has been explained, to this day Appellants have not demonstrated that they have any trade secrets or any "confidential" information that warrants protection. Moreover, the comment Appellants belatedly attribute to the trial judge conflicts with the trial court's two protective orders and assumes, without justification, that the parties or their counsel will violate those orders.

[9] As the Court of Appeals recognized, Appellees had raised the forensic examination issue over three months before the parties filed their respective briefs. Thus, Appellants were in not, as they now argue, "ambushed" by Appellees' renewed request for electronic imaging.

Neither does the Electronic Discovery P.O. give Appellees "unfettered access" to Appellants' electronically-stored information.[10] Indeed, it specifically allows Appellants to review all information for privilege and confidentiality prior to production to Appellees. Additionally, the Confidentiality P.O. allows Appellants to mark any electronically-stored trade secrets or other proprietary information as "confidential" or "attorney's eyes only" prior to producing any such materials to Appellees, and materials marked "attorney's eyes only" may only be viewed by Appellees' counsel of record – not even in-house corporate counsel may view such materials. Thus, the Electronic Discovery P.O. does not give Appellees "unfettered access" to Appellants' electronic information.

Nevertheless, Appellants appealed the three discovery orders to the Ohio Court of Appeals for the Ninth District. After briefing and oral argument, the Court of Appeals determined that it lacked jurisdiction over the appeal because the discovery orders were not final and appealable under R.C. § 2505.02. It, therefore, remanded the case to the trial court. As is explained above, this appeal arises exclusively from the Court of Appeal's decision that it lacked jurisdiction over Appellants' appeal of the trial court's three discovery orders.

[10] The protective orders include every single form of protection for trade secrets listed in R.C. § 1333.65 (the Ohio Trade Secrets Act) and, in fact, provide additional protection not listed in the statute. The protective orders (1) limit use and disclosure of documents designated "Confidential" to this litigation only subject to contempt penalties; (2) limit disclosure of "Confidential" document to specified persons; (3) limit disclosure of documents designated "Attorneys' Eyes Only" only to outside counsel (specifically excluding any in-house counsel); (4) require any filings that include "Confidential" or "Attorneys'-Eyes-Only" materials to be made under seal, if at all; and (5) provide for the destruction of "Confidential" information after final disposition of this case. (*See* Confidentiality P.O., Appx. 20-28.)

III. DISCUSSION REGARDING APPELLANTS' PROPOSITIONS OF LAW

A. Appellants' Proposition of Law No. 1 Lacks Merit Because a Protective Order Which Allows for Forensic Examination of a Party's Computers as Part of a General Framework for Discovery, But Which Does Not Compel the Production of Any Known Trade Secret or Privileged Information is Not a Final Appealable Order under R.C. § 2505.02.

In their Jurisdictional Memorandum, Appellants do not claim that the trial court's discovery orders are final and appealable under R.C. § 2505.02 merely because they allow forensic imaging of parties' computers. Indeed, it is undisputed, as indicated by the case law Appellants cite, that the trial court's orders are not final and appealable under R.C. § 2505.02 to the extent they merely reject Appellants' discovery objections based upon relevance, undue burden and expense. *Whitt v. ERB Lumber* (2004), 156 Ohio App.3d 518, 2004 Ohio 1302 at ¶ 31. This is true because the Appellants can obtain "meaningful and effective appellate relief from overly burdensome discovery[] by an order shifting the costs of the discovery."[11] *Id.* Appellants' argument is, therefore, dependent upon their factual allegation that the orders require them to disclose unspecified privileged and trade secret information. (*See* Appellants' Jurisdictional Memorandum at 9-10.)

Appellants, however, admit that the Court of Appeals "may have been correct that until such time as the trial court rules on Appellees' request for the production of certain hard copy documents to which Appellants object, there **may not be a final appealable order.**" (*See* Appellants' Jurisdictional Memorandum at 10.) Thus, Appellants' argument should be rejected because, fundamentally, electronically-stored information is simply a general category of discoverable information that, like the "certain hard copy documents," ***might*** encompass trade secrets or privileged information. When Appellants admit that the trial court's order requiring

[11] As is discussed above, the Electronic Discovery P.O. already shifts the cost of the electronic imaging process to Appellees.

them to produce hard copies of documents that may contain purported trade secrets is not final and appealable, Appellants necessarily admit that the order allowing for the production of electronically-stored information is not final and appealable.[12] Both orders require the production of general categories of documents that ***might*** encompass protectible information,[13] and the trial court's general discovery framework set forth in its two protective orders provides the parties adequate means to ensure that any purported privileged and trade secret information is handled with the appropriate level of confidentiality.

Moreover, Appellants' allegation that the orders require them to disclose unspecified privileged and trade secret information finds no support in the record. As the Court of Appeals recognized, Appellants have not identified any privileged information or trade secrets that the trial court's orders require them to disclose. They simply assert that compliance with the Electronic Discovery P.O. will *necessarily* result in the disclosure of privileged and trade secret information. Because Appellants have not yet even shown that they possess any protectible trade secrets and have presented no evidence to support their assertion that trade secrets and privileged information will be improperly disclosed under the Electronic Discovery P.O., Appellants' argument should be rejected.

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[12] Even in their admission, however, Appellants improperly characterize the trial court's August 10, 2007 Order requiring them to produce business plans, submission agreements and other financial documents as distinguishing between hardcopy materials and electronic materials. The Order did not make this distinction.

[13] Appellants' assertion that trade secrets are "exempt from disclosure" in a trade secret misappropriation action is simply wrong. *See Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.* (1999), 134 Ohio App. 3d 673, 682-683 (trial court abused its discretion in excluding trade secret information from discovery altogether); *Armstrong v. Marusic* (May 21, 2004), 2004 Ohio 2594, ¶ 23, 2004 Ohio App. LEXIS 2296 ("trade secret information is not absolutely privileged. The disclosure of such information in discovery is contemplated both by Civ.R. 26(C) and by R.C. 1333.65, provided its secrecy is preserved"); *see also, Alpha Benefits Agency, Inc.*, 134 Ohio App. 3d at 683 (noting that a court may regulate the discovery of trade secrets by ordering "that [the] use of the discovered information be limited to the lawsuit" and by "limiting the persons who have access to the information"); *Majestic Steel Serv., Inc. v. Disabato* (Dec. 16, 1999), No. 76521, 1999 Ohio App. LEXIS 6047, *7-8 (noting that a court is "well within its discretion to limit the scope of discoverable [trade secret] information to trial issues only and to restrain, under penalty of contempt, use of the disputed information for any purpose other than the instant litigation.").

The differences between the facts in the cases Appellants cite and those involved in this case also demonstrate the lack of merit in Appellants' appeal. In *Gipson-Myers & Associates, Inc. v. Pearce*, the case Appellants cite in favor of the patently erroneous proposition that trade secrets are always "exempt from disclosure," the trial court granted the appellees' motion to compel before the appellant even had a chance to file a brief opposing the motion to compel, much less to seek an *in camera* review. (Oct. 27, 1999), Summit Cty. Case No. C.A. 19358, 1999 Ohio App. LEXIS 5010, *3. Moreover, the trial court in *Gipson-Myers* did not put in place a protective order to ensure the confidential handling of any trade secrets appellants produced.[14] *See id.* Here, on the other hand, Appellants filed two briefs in opposition to Appellees' request for forensic imaging over the course of three months and never once even attempted to identify a trade secret they would be required to produce. Additionally, Appellants in this case have the advantage of a comprehensive protective order to ensure the confidentiality of any trade secrets they produce.

In *Shottenstein, Zox & Dunn v. McKibben*, the trial court ordered the production of documents in an attorney file that consisted exclusively of "documents generated in the course of [the attorney's] representation of [the appellant]." *See McKibben*, Franklin App. No. 01AP-1384, 2002 Ohio 5075, ¶ 19. Thus, the court held that the appellant had "raised a colorable claim that the documents [the trial court had ordered to be produced] constituted privileged matter," and, therefore, that the order compelling the production of the attorney file was final and appealable.

[14] Likewise, in *Armstrong*, the appellate court's finding of a final appealable order hinged upon the fact that the trial court required the disclosure of trade secrets with no attorney's eyes only provision in place. 2004 Ohio 2594 at ¶ 15. The appellant in *Armstrong* had requested a protective order allowing him to submit documents to the court for *in camera* review and then to designate documents determined to be trade secrets "attorney's eyes only." *Id.* Here, the protective orders provide Appellants the right to designate documents and electronic materials "attorney's eyes only" without having to submit them for *in camera* review and requires Appellees to raise any objections they have regarding specific designations to the court. (*See* Confidentiality P.O. at ¶ 13, Appx. at 26.) Thus, here, unlike in *Armstrong*, the Appellants have not been denied an effective remedy with regard to any trade secrets they may possess.

See id. Here, Appellants have made no attempt to demonstrate that privileged information is in danger of being improperly disclosed, and the protective orders provide adequate protection against that possibility.[15]

B. Appellants' Proposition of Law No. 2 Lacks Merit Because Appellants Waived Their Request for a Heightened Discovery Standard by Not Asserting it at the Trial Level, and the Issue of What Showing a Party Must Make Prior to Seeking Electronic Discovery is Not Before this Court Given that There is No Final, Appealable Order Concerning that Issue.

As is explained above, the Court of Appeals' decision that the trial court's protective orders were not final and appealable under R.C. § 2505.02 is the only substantive issue Appellants are entitled to ask this Court to review. Moreover, Appellants waived their current argument in favor of a heightened discovery standard with regard to electronic discovery by failing to request that the trial court apply that standard. Likewise, even if Appellants had requested the trial court to apply their proposed heightened discovery standard, the trial court's refusal to do so would not have been a final, appealable order under R.C. § 2505.02 because Appellants' heightened standard is focused exclusively upon concerns of relevance, undue burden and expense. *Whitt*, 156 Ohio App.3d 518, 2004 Ohio 1302 at ¶ 31 (trial court's rejection of discovery objections based upon irrelevance, over-breadth and undue burden is not final and appealable under R.C. § 2505.02 because the impact of such discovery requests can be effectively remedied in a post-trial appeal). Therefore, Appellants' second proposition of law fails.

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[15] *Williams v. Nationwide Mut. Ins. Co.* is irrelevant to the issue of whether the protective orders were final and appealable because the holding in *Williams* was that an order granting a protective order to protect privileged information is not final and appealable. (Dec. 15, 2005), Meigs Cty. Case No. 05CA15, 2005 Ohio 6798, ¶ 3. Moreover, the federal district court cases Appellants cite in their Jurisdictional Memorandum never discuss the question of whether an order allowing forensic imaging of parties' computers is final and appealable under federal or Ohio law. *See Scotts Company, LLC v. Liberty Mutual Ins. Co.* (June 12, 2007), S.D. Ohio Case No. 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005; *Deipenhorst v. City of Battle Creek* (June 30, 2006), W.D. Mich. Case No. 1:05-cv-734, 2006 U.S. Dist. LEXIS 48551; *Bethea v. Comcast* (D.C. Dist. 2003), 218 F.R.D. 328.

C. **Even if Appellants' Proposition of Law No. 2 Had Not Been Waived and Had Merit, the Evidence in this Case Satisfies Appellants' Proposed Heightened Discovery Standard.**

Finally, even if Appellants had not waived their right to insist upon application of their proposed heightened discovery standard the evidence in this case easily satisfies that standard. Appellees have shown that relevant information or information likely to lead to the discovery of admissible evidence is on Appellants' computers and that Appellees cannot obtain such information through other means.

As discussed above, in response to Appellees' request for all communications from and between Appellants, Appellants produced a variety of innocuous documents. In the meantime, Appellees had West's work computer (which he used when he worked for Appellees) searched and obtained numerous emails between West and Hobbs, including several related to the RIS Appellants' recruitment of West. Appellants, however, produced *none* of those emails. Indeed, West initially denied *under oath* that such communications ever existed, when, in fact, they did exist but were *never* produced by Appellants.

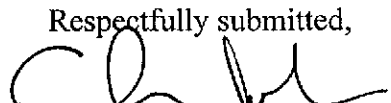
Further, the trial court specifically found by clear and convincing evidence that (1) a "cozy relationship" existed between West and Hobbs while West was still employed by Appellees; (2) "West was passing on information to Mr. Hobbs" at that time; and (3) West's actions were "disloyal[]" to Appellees. (*See* Magistrate's Order at 7.) As a result, the trial court found that Appellants' credibility was "significantly diminish[ed] in this matter." (*Id.*) It further found that Appellants' testimony regarding the innocent nature of their interactions with each other was "not credible." (*Id.* at 6) Thus, unlike the cases Appellants' cite, wherein there was no

indication that evidence had been withheld,[16] in this case it is indisputable that Appellants have withheld information, specifically including electronically stored information.[17] Moreover, given Appellants' demonstrated lack of credibility in this matter (as found by the trial court), there is no factual basis upon which to conclude that Appellees could obtain the information they seek through other means.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should deny Appellants' request to exercise jurisdiction over this appeal.

Respectfully submitted,



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[16] In *Scotts*, the request for forensic imaging was denied because it was based solely upon the requesting party's "mere suspicion" that the responding party was withholding information. 2007 U.S. Dist. LEXIS 43005 at *6. Similarly, the trial court, in *Bethea*, refused a request for forensic imaging because there simply was no evidence that the responding party had withheld information. 218 F.R.D. at 330.

[17] Courts have ordered discovery via forensic imaging based upon much less serious withholding concerns than are present in this case. *See Balboa Threadworks* (March 24, 2006), D. Kan. Case No. 05-1157-JTM-DWB, 2006 U.S. Dist. LEXIS 29265 at *1-2, 4, 6, 12 (plaintiff entitled to forensically image all of defendant's husband's computers where defendants alleged those computers had never been used for business, but a single business e-mail appeared to have been printed from the husband's computer and the copyright infringement allegedly occurred via computer); *Ameriwood Industries, Inc. v. Liberman* (Dec. 27, 2006), E.D. Mo. Case No. 4:06CV524, 2006 U.S. Dist. LEXIS 93380, *2, 9, 11 (in trade secret action against three former employees of the plaintiff, ordering production of all of defendants' computers where misappropriation allegedly occurred using defendants' personal e-mail accounts; defendants, in paper discovery, failed to produce any business e-mails sent using their personal accounts, and plaintiff, through its own investigation, obtained a single e-mail that one of the defendants had sent to one of plaintiff's customers using his personal e-mail account).

CERTIFICATE OF SERVICE

On this 23rd day of May 2008, a copy of the foregoing **APPELLEES' RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION** was served by Federal Express overnight, postage prepaid, on the following:

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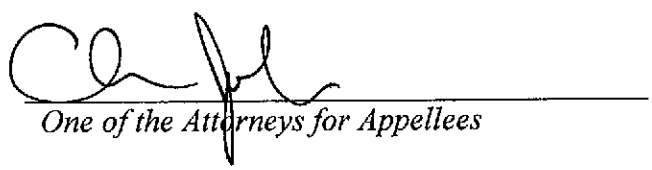

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