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## STATEMENT OF AMICUS INTEREST

The Ohio Bankers League [“OBL”] is a non-profit trade association that represents the interests of Ohio’s commercial banks, savings banks, savings associations as well as their holding companies and affiliated organizations. The Ohio Bankers League has nearly 230 members, which represents the overwhelming majority of all depository institutions doing business in this state. OBL membership is very diverse and represents the full spectrum of FDIC insured depository institutions. OBL member institutions include small savings associations that are organized as mutual thrifts owned by their depositors, community banks that are the quintessential locally owned and operated businesses, to large regional and multistate holding companies that have several bank and non-bank affiliates and conduct business from coast to coast. Ohio depository institutions directly employ more than 120,000 people.

For more than 100 years the Ohio Bankers League has served as a valuable resource to financial institutions in Ohio, and has advocated positions on behalf of its members in both the legislature and the courts.

This case is of keen interest to all of our members, consumers and the general public. All of our members track and retain financial records as a critical part of their business. As a part of this core function, banks and thrifts have relied on the clear standards and requirements of current Ohio law. An adverse decision in this case will toss aside widely accepted practices and creates potential new liability for banks. Since records for accounts that have been long since closed have already been destroyed in reliance on RC 1109.69, this liability cannot now be limited, controlled, managed or even measured.

Specifically, OBL members will no longer be able to rely on R.C. 1109.69 for protection against stale claims and will be required to retain documents forever to protect against such claims. In addition, state and federal banking regulators will no longer be able to rely on

examinations based on the books and records of the banks they examine. If this Court affirms the decision of the Third District Court of Appeals, banks throughout Ohio will be subjected to new liabilities based on stale claim that previously had been barred by action of law, and the ability of regulatory authorities to accurately examine and analyze the financial condition of banking institutions will be severely compromised. For these reasons, the OBL urges this Court to reverse the decision of the Third District Court of Appeals.

### **STATEMENT OF THE FACTS AND CASE**

Amicus curiae adopts the Statement of the Facts and Case as set forth in Appellant's Merit Brief.

### **ARGUMENT**

**Proposition of Law: Any claim brought against a bank based on, or the determination of which would depend upon, the contents of records for which a period of retention or preservation is set forth in R.C. 1109.69 (A and B) must be brought within the period of time for which such record must be retained or preserved, in accordance with R.C. 1109.69(F).**

In the banking business, predictability and a clear set of guidelines with regard to dealing with depositor funds and other banking relationships is critical in assuring public confidence and accountability. To that end, numerous definitive laws and regulations are applicable to the activities, products, and services of the banking industry. Indeed, the banking industry is one of the most heavily-regulated industries at the state and federal levels.

Certainty in relying on the books and records of a bank is critical from many perspectives, including the need to ascertain a clear picture of the financial status and health of the bank from a regulatory, depositor, and investor perspective.

The Ohio General Assembly has considered the importance of such certainty for Ohio banks, and has provided clearly and unequivocally for the ability to determine with certainty the assets and liabilities of an institution at any point in time through, among other things, the requirements of R.C. 1109.69. This statute enables financial institutions -- and as a result examiners for state and federal bank regulatory agencies, depositors, shareholders, and others, including the public at large -- to rely on the books and records of the institution as they are required to be maintained by applicable law. To ignore the plain meaning of this statute or to create exceptions to it would (1) result in serious and potentially devastating uncertainty with regard to the ability to discern the financial condition of an institution and its relationships with its depositors, lenders, and others and (2) significantly increase the potential for fraud against financial institutions. As a result, those charged with doing so would be unable to determine the health and financial status of banking institutions, and the banking industry as a whole, in Ohio.

At the federal level, the long-recognized “D’Oench, Duhme” doctrine<sup>1</sup> has held that it is critical that the written books and records of an institution accurately reflect all relationships with the institution in order to provide examination certainty and defense against fraud for the institution and its successors. That doctrine forms the basis for recognition of claims against institutions when the FDIC is appointed as a receiver. It recognizes and affirms the critical importance of reliance on written bank records in asserting claims against institutions and against the FDIC as receiver.

All banking institutions in Ohio are required to maintain FDIC insurance coverage for bank deposit customers. See R.C. 1109.03. Like others who must be able to rely on the deposit records of bank institutions, the FDIC also must have the ability to rely on the deposit records of

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<sup>1</sup> *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 86 L. Ed. 956, 62 S. Ct. 676 (1942)

Ohio's bank institutions to determine risk and exposure on a bank-by-bank basis, as well as to determine appropriate levels of deposit insurance premiums for those institutions. If the Third District Court of Appeals' decision is allowed to stand, it would create uncertainty not only for individual banks, but would also create tremendous uncertainty for the FDIC in its role as insurer of depositor funds.

Certainty in the banking industry is a prerequisite for public and investor confidence in the system as a whole, and in individual banks. Banks are examined on, and report their financial condition on, the basis of their internal books and records. For decades, banks in Ohio have relied on the statutory scheme set forth in R.C. 1109.69 in the daily management of their books and records of account. Creating exceptions to this clear statutory scheme that protects the reliability of those books and records, and the financial condition they reflect, would wreak havoc on the industry by creating uncertainty with regard to the financial condition of institutions and would create unlimited opportunities for fraud against financial institutions in this State.

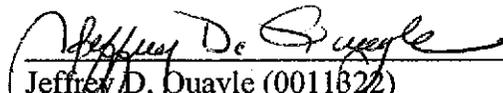
The decision of the Third District Court of Appeals in this matter creates serious uncertainty, unreliability, and potential instability in an industry and environment where uncertainty, unreliability, and instability is unacceptable, and extends well beyond the parties to this appeal. State and federal bank regulatory agencies must be able to rely on the books and records of an institution in order to effectively examine the institution to protect depositors and the public at large, and investors must be able to rely on the books and records of an institution in order to make investment decisions. The Ohio legislature took these concerns into consideration in enacting R.C. 1109.69. If there are to be exceptions to the rules set forth in R.C. 1109.69, they should be created by the Ohio legislature after a full and robust debate of the public policy implications of such proposed exceptions and their impact on banking in Ohio, not by the courts.

See *Abraham v. National City Bank Corp.* (1990), 50 Ohio St.3d 175, 178 (stating in a similar case involving R.C. 1109.69 “We are not unmindful of the potential for harsh results under the clear mandate of the statute, but this is a legislative problem.”).

### CONCLUSION

The ability of the public to rely on the efficacy of the regulatory examination process for financial institutions, and to rely on reports of the financial condition of banks in this State, is critical for the banking system as a whole and for individual banks and their constituencies. Its importance is even more evident in the current economic environment. On behalf of its nearly 230 members in the banking industry in Ohio, amicus curie requests that the Court clarify the true intent and purpose of R.C. 1109.69 by overruling the decision of the Third District Court of Appeals, thereby providing certainty and reliability regarding the financial condition and business of Ohio banks.

Respectfully submitted,



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Jeffrey D. Quayle (0011822)  
*Counsel of Record*

Senior Vice President and General Counsel  
Ohio Bankers League  
4249 Easton Way, Suite 150  
Columbus, Ohio 43219-6170  
Tel: (614) 340-7603  
Fax: (614) 340-7596  
E-Mail: [jquayle@ohiobankersleague.com](mailto:jquayle@ohiobankersleague.com)

Jeffery E. Smith (0010863)  
Anne Marie Sferra (0030855)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215  
Tel: (614) 227-2300  
Fax: (614) 227-2390  
E-Mail: [jsmith@bricker.com](mailto:jsmith@bricker.com)

*Counsel for Amicus Curiae,  
The Ohio Bankers League*

**CERTIFICATE OF SERVICE**

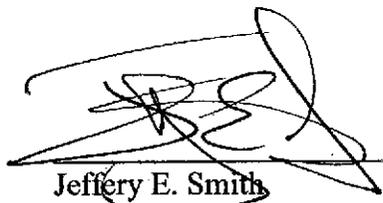
I hereby certify that a true copy of the foregoing MERIT BRIEF OF AMICUS CURIAE was sent via regular U.S. mail, postage prepaid this 8th day of December, 2008, to the following:

Steven R. Fansler (0000644)  
Counsel of Record  
212 N. Detroit St.  
P.O. Box 764  
West Liberty, Ohio 43357-0764

*Counsel for Appellee  
Maxine F. Spiller*

Henry N. Heuermann (0017962)  
Matthew D. Harper (0059192)  
Counsel of Record  
Eastman & Smith LTD.  
One SeaGate, 24<sup>th</sup> Floor  
PO Box 10032  
Toledo, Ohio 43699-0032

*Counsel for Appellant  
Sky Bank-Ohio Bank Region*

  
Jeffery E. Smith