

IN THE SUPREME COURT OF OHIO

KIM C. BRECHBUHLER,

Appellant,

vs.

**CLYDE B. BRECHBUHLER, AND
BRECHBUHLER TRUCK SALES, LLC**

Appellees.

ON APPEAL FROM THE STARK
COUNTY COURT OF APPEALS
FIFTH APPELLATE DISTRICT
COURT OF APPEALS CASE NO.
2007CA00281

OHIO SUPREME COURT
APPELLATE CASE NO. 09-0048

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES,
CLYDE BRECHBUHLER AND BRECHBUHLER TRUCK SALES, LLC,**

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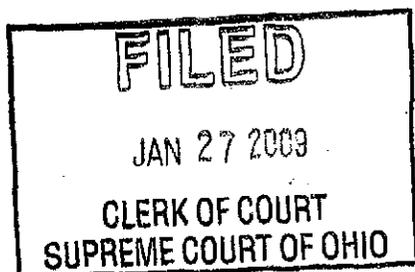


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I. THIS CASE DOES NOT INVOLVE ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

- A. *The law and policy of the Parol Evidence Rule remains sound and were correctly applied by the underlying courts.*

This case represents Appellant's attempt to use the tort of fraudulent inducement to inject evidence of an alleged oral promise to contradict the terms of a subsequently executed written agreement. As discussed below, Appellant's claim of fraudulent inducement failed at the trial court and appellate court level due to: (1) the Parol Evidence Rule barring introduction of extrinsic evidence which conflicted with the terms of a subsequently executed written agreement; and (2) the fact that alleged promises occurring after the execution of an agreement cannot form the basis of a fraudulent *inducement* claim. Appellant's Memorandum requests this Court to set aside centuries of jurisprudence, the principle of stare decisis, and common sense to cure the pleading and evidentiary inadequacies of his case.

In *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 440, 662 N.E.2d 1074, this Court stated:

'The Parol Evidence Rule was developed centuries ago to protect the integrity of written contracts.' ***

Id. (Emphasis added.)

As recognized by this Court in *Galmish v. Cicchini*, 2000-Ohio-7, 90 Ohio St.3d 22:

The principal purpose of the parol evidence rule is to protect the integrity of written contracts. By prohibiting evidence of parol agreements, *the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments.* "It reflects and implements the legal preference, if not the talismanic legal primacy, historically given to writings. It effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreements by deeming those earlier expressions to be merged into or superseded by the written document."

Id. at 27-28. (Citations omitted; emphasis added.)

Appellant's entire case is premised upon an alleged oral promise directly contravened by the terms of the written agreement subsequently executed by Appellant. Quite simply, Appellant's case is exactly the type of case the Parol Evidence Rule seeks to prohibit. The Appellant requests this Court to deny the integrity and preference afforded to written agreements, by arguing this Court's past precedent fails to protect the public from being fraudulently induced to sign written agreements which conflict with prior representations.¹ Contrary, to Appellant's request this Court has long afforded protection to those *actually* victimized by fraud. In *Galmish*, this Court made it clear that evidence of fraudulent inducement will serve as an exception to the Parol Evidence Rule. *Id.* at 27-28. However, the *Galmish* Court carefully crafted its holding to ensure that this exception did not swallow the Parol Evidence Rule:

However, the parol evidence rule may not be avoided 'by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.

Id. at 29.

The limitation on the fraudulent inducement exception discussed by this Court in *Galmish* was not imprecise, but rather founded upon sound public policy. Contrary to Appellant's representations, the mortgage crisis will not be resolved by this Court abandoning long standing public policy and centuries of jurisprudence. Rather, adoption of Appellant's premise would undermine the fundamental purpose of reducing agreements to writing. This premise would have far reaching effects across all facets of the commercial world, as written agreements would have no reliability. Further, adoption of Appellant's proposition would dispense with one's duty to read a document before signing. See *Info Leasing Corp. v. GDR Investments, Inc.*, Hamilton App. No. C-

¹ See Memorandum in Support of Jurisdiction, page 1.

020290, 2003-Ohio-1366, ¶22 (**the law **places upon a person a duty to read any contract before signing it**); *Hadden Co. LPA v. Del Spina*, Franklin App. No. 03AP-37, 2003-Ohio-4507, ¶16.

The *Galmish* Court embraced these fundamental principles when it reasoned:

*** a fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit.

Id. at 29

Appellant also alleges that this Court’s “imprecise language” is causing courts to misapply the Parol Evidence Rule. See Appellant’s Memorandum in Support of Jurisdiction, page 1. Appellant failed to direct this Court to any holdings evidencing such confusion, rather it appears the only party confused with the application of the Parol Evidence Rule is Appellant. The Fifth District Court of Appeals and the Stark County Court of Common Pleas correctly applied the Parol Evidence Rule after expressly finding Appellant’s parol evidence contradicted the express terms of the writing. See November 25, 2008, Fifth District Court of Appeals Judgment Entry ¶13 (“FDCA JE”), and Stark County Court of Common Pleas Judgment Entry, page 5 (“TC JE”). In sum there is no question of public or great general interest that would be served by hearing the instant appeal. Rather, Ohio’s jurisprudence on the Parol Evidence Rule is sound and should not be disturbed.

Appellant also claims that the underlying courts misapplied the Parol Evidence Rule by prohibiting introduction of subsequent oral agreements.² At no time did the underlying Courts issue such a ruling, and Appellant’s Memorandum fails to cite any such holding. Appellant made clear to the Court of Appeals that he was not attempting to enforce *any oral agreements*. See November 25, 2008, FDCA JE ¶11. As a result, the instant litigation did not involve a claim for breach of contract surrounding the written agreement, but rather was premised only upon a claim of fraudulent

² Appellant’s Memorandum in Support of Jurisdiction page 2

inducement. The courts, and common sense, determined that allegations of oral promises made *after* the execution of an agreement do not support a claim that the party was fraudulently induced into signing the same agreement. How could Appellant be fraudulently induced to execute the agreement at issue, by alleged statements and promises occurring *after* the agreement's execution? As a result, it was not the Parol Evidence Rule that defeated Appellant's case, but rather the most basic and concrete of all legal principals, relevance.

- B. *Appellant's assignment of his membership interest transferred all rights associated therewith, including any rights to the underlying investment in the membership interest.*

Appellant's final attempt to contrive an issue of great or public interest comes in the form of another phantom holding. Appellant alleges the underlying courts held that an investor cannot maintain a claim for unjust enrichment. Once again, Appellant provides no citation to such holding. The underlying courts did not make any such determination. This Court does not engage in advisory opinions, and acceptance of Appellant's appeal for the purpose of addressing propositions of law which did not occur at the lower levels is prohibited.

The underlying courts correctly concluded that Appellant assigned his membership interest, and such assignment transferred any and all rights to the alleged investment. See ORC §1705.18. The law on assignments is just as clear and reliable as the Parol Evidence Rule, and is in no need of additional Supreme Court jurisprudence. Thus, there exists no great public or general interest in reviewing the law on Appellant's Third Proposition of Law.

II. STATEMENT OF THE CASE

This case stems from the Appellant's November 7, 2005, written assignment to his father of his entire membership interest in an Ohio limited liability company known as Brechbuhler Truck Sales, LLC ("November Assignment"). The Appellant made the November Assignment in order to induce his father to continue investing additional funds in the failing company. After

assigning his membership interest, Appellant continued to work for the company for over a year prior to his December 9, 2006 termination. After his termination, Appellant asserted, for the first time, that his father made an oral promise to make a Will whereby Appellant expected that he would receive a bequest of the business interest from his father. Appellant also alleged that additional promises were made *after* the November Assignment. Based upon these allegations, Appellant's Complaint sought a variety of claims including: (i) Theft, in Securing Writings By Deception; (ii) Fraud; (iii) Conversion; and (iv) Breach of Contract/Unjust Enrichment for an alleged loan of \$120,000 to Brechbuhler Truck Sales, LLC. *Importantly Appellant failed to assert a claim for breach of the November Assignment or of the alleged subsequent oral agreements.*

On September 14, 2007, the Trial Court granted Appellees' Motion for Summary Judgment finding the Parol Evidence Rule and Statute of Frauds barred Appellant's alleged promise to make a Will, and that Appellant's voluntary assignment of his membership interest assigned any rights to his alleged \$120,000 investment to the assignee. (TC JE, pp. 9-10). On November 25, 2008, after a de novo review, the Fifth District Court of Appeals similarly concluded that the Appellant's claims were barred by the Parol Evidence Rule, meritless and summary judgment was appropriately granted.

III. STATEMENT OF THE FACTS

Counsel appreciates the instant briefs are to focus on issues of law worthy of this Court's consideration. However, counsel is compelled to correct the factual inaccuracies in Appellant's Memorandum.

Appellee, Brechbuhler Truck Sales, LLC ("BTS") is an Ohio limited liability company engaged in the sale of Mack trucks. At the time of the underlying litigation, BTS was owned by Appellee, Clyde Brechbuhler, 86 years young, and the father of the Appellant.

In 2002, the Appellant desired to purchase a Mack truck franchise owned by Allied Truck Sales, Inc. ("Allied"). However, the Appellant was incapable of paying the purchase price which was in excess of \$1.8 million.³ Appellant requested his father, Clyde B. Brechbuhler, to provide the financing for the purchase of Allied. Clyde B. Brechbuhler decided to help his son by funding BTS's purchase of Allied, and obtained a \$1.2 million loan from FirstMerit which required the posting of his retirement assets as collateral.⁴

After the acquisition, Appellant began using company money to fund an extravagant lifestyle, and incurred expenses in excess of \$333,000.⁵ During his deposition, the Appellant admitted that he had no memory of repaying these debts to BTS.⁶ Ultimately, Appellant was like a kid in a candy store placing all of his expenditures on daddy's credit card. Appellant was living the good life by using BTS funds to purchase a Hummer, Rolex, extravagant jewelry for his ex-wife, new automobiles for his children; and at times, Appellant took cash directly from the register. As a result of this spending, Appellant continuously requested his father to fund BTS, and soon Clyde Brechbuhler's obligations relating to BTS exceeded \$2 Million.

By the end of 2005, BTS was without a financing floor plan, could not pay for parts it needed to retain customers and needed in excess of \$400,000 to satisfy its debts. Appellant faced with losing the business and his job, admitted he needed the financial assistance of his father *to continue the operation of BTS.*⁷ Concerned that he would lose his personal assets, including his

³ K. Brechbuhler Dep., p. 68; See also, Exhibit A, Letter of Agreement attached to Appellant's July 27, 2007 Trial Court filing entitled Notice of Filing, Plaintiff's Exhibits in Opposition to Defendant's Motions for Summary Judgment.

⁴ See Clyde Brechbuhler Affidavit attached as Exhibit D to Appellee's July 27, 2007 Trial Court filing entitled Notice of Filing Summary Judgment Exhibits.

⁵ See Affidavit of Kathy Mann attached as Exhibit E to Appellee's July 27, 2007 Trial Court filing entitled Notice of Filing Summary Judgment Exhibits.

⁶ K. Brechbuhler Dep., p. 228-229.

⁷ K. Brechbuhler Dep., p. 142.

retirement, which was collateral for the loan, Clyde Brechbuhler informed Appellant that he could no longer continue to fund BTS with Appellant in charge.⁸

As a result, the Appellant voluntarily signed over his entire ownership interest in BTS to Clyde Brechbuhler on November 7, 2005 by virtue of executing the November Assignment.⁹ In the November Assignment, the Appellant “*assigns all of his Membership Interest in Brechbuhler Truck Sales to Clyde B. Brechbuhler.*” Additionally, the November Assignment provides that: “[t]he undersigned, Kim Brechbuhler, represents to Clyde B. Brechbuhler that *** such interest is free and clear of any liens or encumbrances.” *Appendix A to Appellee’s Appellate Brief filed November 13, 2007.*

After the November Assignment, Clyde Brechbuhler was forced to obtain a number of loans to keep BTS afloat. Additionally, the Appellant’s performance at work did not improve after the November Assignment, but instead became worse. On December 9, 2006, 13 months after the November Assignment, Clyde Brechbuhler terminated the employment of Appellant.¹⁰

1. *Appellant testified there was only one alleged promise made by his father.*

Unfortunately, Appellant's Memorandum takes liberties with the facts of this case in a number of regards, including the alleged promises at issue. Appellant’s briefs have claimed there were three misrepresentations regarding (1) an interest rate; (2) that the BTS interest would be returned upon death or repayment of the real estate loan; and (3) Appellant's interest would be returned to him. Contrary to Appellant’s Memorandum, during his deposition, the Appellant testified that he believed there was only *ONE* promise made by Clyde Brechbuhler, which provided for the return of BTS at Clyde Brechbuhler's death. (K. Brechbuhler Dep., p. 61-62, emphasis added).

⁸ Affidavit of Clyde Brechbuhler attached as Exhibit D to Appellee’s July 27, 2007 Trial Court filing entitled Notice of Filing Summary Judgment Exhibits.

⁹ See Exhibit H of Appellee’s July 27, 2007 Trial Court filing entitled “Notice of Filing Summary Judgment Exhibits”; see also C. Brechbuhler Dep., p. 18-20 identifying Assignment of Membership Interest.

Appellant has continuously cited to his deposition testimony at pages 198-200 as evidence of the additional promises. The underlying courts found no support for Appellant's alleged multiple promises in the record. Regardless, Appellant's Brief acknowledged the fictitious promises occurred *after* the November Assignment. See Appellant's Amended Reply Brief filed December 28, 2007, page 1. As a result, the only allegation of a promise prior to the execution of the November Assignment was the promise to make a Will, which is barred by the Parol Evidence Rule and Statute of Frauds. All other alleged promises asserted by Appellant occurred after the November Assignment, thereby rendering the allegations immaterial and irrelevant to a claim of fraudulent inducement.

IV. ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

- A. APPELLANT'S PROPOSITION OF LAW NO. 1: PRIOR TO APPLYING THE PAROL EVIDENCE RULE TO A FRAUDULENT INDUCEMENT CLAIM A TRIAL COURT MUST FIRST MAKE A DETERMINATION THAT FALSE REPRESENTATIONS THAT INDUCED THE MAKING OF A CONTRACT PERTAIN TO THE SAME SUBJECT MATTER OR ARE DIRECTLY CONTRADICTED BY SUBSEQUENT WRITTEN AGREEMENT.

The Parol Evidence Rule properly barred Appellant's claim for fraudulent inducement based upon promises for the return of BTS. The principal purpose of the Parol Evidence Rule is to protect the integrity of written contracts. *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St. 3d 433, 440, 662 N.E.2d 1074, 1080. By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized, written instruments. *Galmish*, 90 Ohio St.3d 22.

Appellant continuously asserts this Court abandoned the general public with its holding in *Galmish*. Appellant's assertion is based upon a fundamental misunderstanding of this Court's pronouncement in *Galmish*. At no time, has this Court stated that parol or extrinsic evidence

¹⁰ Appellant's Appellate Brief footnote 19 citing Appendix 17.

of fraudulent inducement will be barred if it pertains to the *same subject matter* as the written agreement.¹¹ Rather, as quoted in Appellant's Memorandum, this Court held "**** an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, *yet has different terms.*" *Galmish*, 90 Ohio St.3d at 29, emphasis added. Thus, not all extrinsic evidence is barred from supporting a claim of fraudulent inducement, but rather only extrinsic evidence concerning the same subject matter *which conflicts with the terms of the written agreement is excluded.*

In the November Assignment, the Appellant "assigns all of his Membership Interest in Brechbuhler Truck Sales to Clyde B. Brechbuhler." Additionally, the November Assignment provides that: "[t]he undersigned, Kim Brechbuhler, represents to Clyde B. Brechbuhler that . . . such interest is free and clear of *any liens or encumbrances.*" Appendix A to Appellee's Appellate Brief filed November 13, 2007; emphasis added.

Recognizing Appellant could not contradict the clear terms of the November Assignment, he attempted to claim that he was fraudulently induced into signing the agreement. Appellant's reliance upon fraudulent inducement is misplaced as the *Galmish* Court held "****the parol evidence rule may not be avoided 'by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, *the terms of which are directly contradicted by the signed writing.*'" *Galmish*, 90 Ohio St.3d at 29. (Emphasis added). In the case at hand the BTS interest, according to the express terms of the November Assignment, was assigned free of any liens or encumbrances, i.e. there were no strings attached. Appellant's alleged promise for the return of BTS clearly contradicted the subsequent writing and is unenforceable.

The Fifth District Court of Appeals correctly applied the *Galmish* holding and held the alleged oral agreement conflicted with the November Assignment:

¹¹ See Memorandum in Support of Jurisdiction, page 3.
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More specifically, Son wishes to enforce the unsubstantiated oral agreement which would cause the membership interest and property to revert back to him upon the death of the Father, or for satisfaction of the debts on the property; *however, this directly contradicts the terms of the written assignment which transferred all interest to Father, and which dealt with the exact same subject matter as the alleged oral agreement.*

See FDCA JE, page 5; emphasis added.

Contrary to Appellant's arguments, the underlying courts correctly applied *Galmish* to preserve the integrity of the written November Assignment. Any other holding would render meaningless the exercise of reducing agreements to writing, as the parties could always seek to contradict the written agreement with prior negotiations.

Despite Appellant's bold assertion that Ohio's Courts do not understand *Galmish*, Appellant fails to direct this Court to even one decision incorrectly applying the law set forth in *Galmish*. Without such support, this Court should not assume that Ohio courts have been misapplying the Parol Evidence Rule. Appellant's allegations fall squarely within the Parol Evidence Rule and as such failed as a matter of law. Accepting this case will serve no public or great general interest, and will only detract from this Court's ability to address actual legal controversies.

B. APPELLANT'S PROPOSITION OF LAW NO. II: THE PAROL EVIDENCE RULE DOES NOT BAR EVIDENCE OF SUBSEQUENT ORAL AGREEMENTS OR MODIFICATIONS.

Appellant asserts the Parol Evidence Rule does not bar the introduction of evidence of *subsequent* agreements or modifications.¹² At no time has Appellee or the underlying Courts discredited this sound legal principle. Further, Appellant provides no citation to the record that any such holding occurred. Importantly, Appellant's Appellate Brief filed October 24, 2007, made clear, "*plaintiff/appellant has not attempted to enforce an oral contract to return his membership interest, rather plaintiff/appellant pleaded that his membership interest was gained through the tort of fraud,*

¹² Appellant's Memorandum in Support of Jurisdiction, page 8.

thus, subjecting him to damages in tort not in contract.” See Appellant’s Appellate Brief filed October 24, 2007, p. 8 (Emphasis sic). A claim for fraudulent inducement requires a showing of intent to induce, reliance, justifiable reliance, and injury proximately caused by reliance. See *Below Clearance, LLC v. Refugee Road, Ltd.*, Fairfield App. No. 05CA108, 2006-Ohio-6562. Appellant argues the underlying courts erred in prohibiting introduction of subsequent promises which purportedly caused him to assign his interest to his father. In other words, Appellant makes the argument that the Appellant signed the November Assignment based on an unknown promise that his father would make in the future! How could representations occurring *after* the November Assignment have induced Appellant to transfer his interest? Perhaps this Court can defer on Appellant’s Second Proposition of Law until time machines allow one to see into the future.

Clearly Appellant’s argument was not rejected by the Parol Evidence Rule but rather by the simple fact that subsequent promises are not relevant in a fraudulent inducement case. Clearly, there exists no justifiable reliance for inducement, if the false representation occurs *after* a party has taken action. In sum, there exists no question of law for this Court to consider, and Appellant seeks only to cure pleading and evidentiary deficiencies.

C. APPELLANT’S PROPOSITION OF LAW NO. III: THE DETERMINATION THAT FUNDS RECEIVED BY A LIMITED LIABILITY COMPANY ARE AN INVESTMENT INSTEAD OF A LOAN DOES NOT PRECLUDE AN INVESTOR OR A CREDITOR FROM MAINTAINING AN UNJUST ENRICHMENT CLAIM.

Appellant’s Third Proposition of Law is similarly based upon a fictitious holding. At no time did the underlying courts hold that an investor cannot assert a claim for unjust enrichment. Appellant’s claim for unjust enrichment was premised upon BTS’s alleged failure to repay Appellant the sum of \$120,000 allegedly invested by Appellant to BTS. Appellant’s Third Proposition fails to consider the Trial Court and Appellate Court’s conclusion that Appellant *assigned* his membership

interest to his father. The Trial Court concluded the November Assignment assigned *all* of Appellant's rights to the alleged investment:

As such, the assignment of Plaintiff's membership interest in BTS transferred all rights in Plaintiff's investment to Clyde, the assignee. ORC §1705.18.

(TC JE, p. 9).

Ohio Revised Code §1705.18, *Assignment of Membership Interest*, expressly states that the assignment of the membership interest transfers to the assignee *all* rights to the contributed property of the assignor:

An assignment of a membership interest does not dissolve the company or entitle the assignee to become or to exercise any rights of a member. An assignment entitles the assignee to receive, to the extent assigned, the distributions of cash and other property and the allocations of profits, losses, income, gains, deductions, credits, or similar items to which the assignee's assignor would have been entitled. Except as otherwise provided in the operating agreement, an assignor ceases to be a member upon assignment of all the assignor's membership interest.

As a result, upon Appellant's assignment of his membership interest in BTS to his father, he transferred all rights to his alleged \$120,000 investment. The principle that an assignment transfers one's entire interest in the item assigned is like the Parol Evidence Rule, subject to centuries of jurisprudence. "An assignment is defined as a transfer to another person of the whole of any property or right therein . . . If an assignment is a transfer of rights in property to an assignee, then the *assignee loses all of his/her rights in the property by virtue of the assignment.*" *Utt v. Utt*, Washington App. No. 03CA38, 2003-Ohio-7043, ¶7 (Emphasis added).

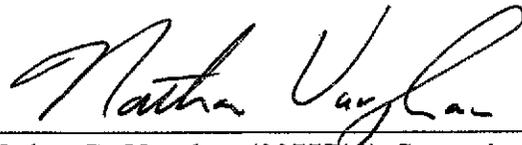
The law of assignments is clear that once Appellant executed the November Assignment, he was transferring all rights to his membership interest, including any right to alleged underlying investments. To the extent Appellant had any claims against BTS for the mismanagement of his investment, they were assigned to his father after the November Assignment. Had Appellant

wished to preserve any claims for the inappropriate use of his investment, he should not have executed the November Assignment.

As with Appellant's other propositions of law, there exists no general public or great interest to be served by accepting his appeal.

V. CONCLUSION

As discussed above, Ohio's Jurisprudence on the Parol Evidence Rule is sound and need not be addressed by this Court. Rather, Appellant's failure at the Trial Court and Appellate Court levels was based upon evidentiary inadequacies and pleading deficiencies which cannot be cured by the adulteration of centuries of jurisprudence. Further, appellant's Second and Third Propositions of Law are based upon holdings which do not exist. There exists no basis for this Court to accept this appeal.



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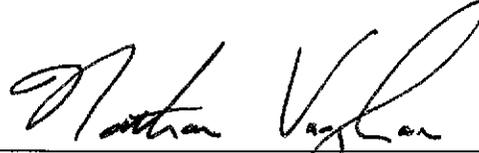
CERTIFICATE OF SERVICE

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