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10-0806

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

FILED
MAY 06 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	**Case No. 09-017**
Richard Todd Ricketts **Attorney Reg. No. 0033538**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent,	:	
Disciplinary Counsel	:	
Relator.	:	

¶1. This matter was heard on September 17, 2009, and January 22, 2010, upon a complaint filed by the Office of Disciplinary Counsel against Respondent, Richard Todd Ricketts of Pickerington, Ohio. The complaint charges the Respondent with violating DR 1-102(A)(4), and Prof. Cond. R. 8.4(c) and 8.4(h). The case was heard by a panel of members of the Board of Commissioners on Grievances and Discipline consisting of attorneys Janica A. Pierce Tucker, Joseph L. Wittenberg, and Stephen C. Rodeheffer, chair. None of the panel members resides in the appellate district from which the complaint originated or served on the probable cause panel that certified the complaint. Respondent appeared represented by Attorney Alvin E. Matthews, Jr., and appearing on behalf of Relator was Attorney Stacey Solochek Beckman.

FACTS

¶2. Cheryl Lemke is the widow of Michael Lemke who died in August 1993 as the result of a brain aneurysm that he suffered while operating a car. During his life Mr. Lemke had

developed a business known as Lemke Sales & Service that sold farm equipment and parts in Marion County, Ohio. Under his guidance the company grew to the point that it had two locations, and Mr. Lemke was contemplating a third location when he died.

¶3. Upon his death Ms. Lemke became the sole shareholder of the company. The new owner and operator attempted to keep the business going but apparently lacked her husband's business acumen, at least insofar as farm machinery was concerned. As the 1990's drew to a close, she found herself continually funneling personal funds into the enterprise to keep it going until finally she reached the determination that it was time to get out. Attempts were made to sell the business, but the high risk and low profit nature of the industry discouraged buyers. Finally in 2001 she reached the decision to liquidate the business, pay off her creditors and close the doors.

¶4. At this time Lemke Sales largest creditors were AGCO, to which it was indebted in the amount of $830,000 for its equipment floor plan, Agri Credit (to be distinguished from Ag Credit referenced later) to which it owed $130,000 for financing the parts division of the business, and Bank One in the amount of $180,000 for a credit line. Bank One held a security interest in personal property owned by the business. It should be noted that Ms. Lemke was personally obligated on all of these debts. In addition to these three major creditors, Lemke Sales also owed a number of lesser, unsecured creditors. The total amount of the company indebtedness, both secured and unsecured, was approximately $1,200,000. (Ex. A)

¶5. Aside from her ownership interest in Lemke Sales, Ms. Lemke personally owned a farm, some rental properties and a residence. At the time of the liquidation her personal assets were secured by mortgages to a variety of banks including Marion Bank, Bank One and a farm

credit company in Toledo, Ohio, by the name of Ag Credit. She testified that much of the debt that she personally owed were funds that had been used to keep Lemke Sales afloat financially.

¶6. While Lemke Sales was struggling, the undisputed testimony of all the witnesses in the case was that the company was solvent. It had assets, cash flow, and was meeting its obligations as they came due, albeit with difficulty.[1] Further, there was no pending or threatened litigation against the Company, and no assets had been repossessed.

¶7. The consulting company that Lemke hired to do an analysis of her business operations referred her to the Respondent for legal assistance in completing a liquidation of the company. Lemke told the panel that she expected Respondent to effect an orderly liquidation, and to keep company creditors from panicking and moving against their collateral or filing suit while the sale was being organized.

¶8. After being hired, Respondent analyzed the company's financial situation and was surprised to find that Lemke Sales owned two pieces of real estate on which the company operations took placed that were entirely unencumbered. For reasons that will be discussed later in this Recommendation, Respondent decided that Lemke Sales would execute mortgages on these properties to four personal creditors of Lemke: Bank One, Marion Bank, Ag Credit and a man by the name of Ray Hildreth to whom Lemke owed $15,000. Three of these creditors, Bank One, Marion Bank and Ag Credit, already held collateral in the form of mortgages on real property owned personally by Lemke. None of these creditors, except Bank One, had loans with Lemke Sales. In fact, Ag Credit declined to loan Lemke Sales money sometime prior to the events at issue in this disciplinary proceeding.

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[1] Lemke did admit to being two payments behind to Bank One, but that she had spoken with the company about this. (Tr. 170)

¶9. The mortgages were signed by Lemke on behalf of Lemke sales in November, 2001, and were recorded with the Marion County Recorder on December 28, 2001. The mortgages were structured by Respondent as follows:

a. Business Property #1

   i. Bank One - $173,000
   ii. Marion Bank - $250,000
   iii. Ag Credit - $300,00

b. Business Property #2

   i. Marion Bank - $250,000
   ii. Bank One - $200,000
   iii. Ray Hildreth - $15,000
   iv. Ag Credit - $300,000 (Ex. A)

¶10. These mortgages were never requested by the mortgagees, the mortgage deeds were never delivered to the mortgagees, and the mortgages were not given for any extension or renewal of credit. Indeed, Lemke was current on all of the obligations that she personally owed to these finance companies.

¶11. An auction of the company's personal property assets occurred sometime in 2002. The proceeds from the auction were insufficient to payoff all of the creditors, and Lemke provided $60,000 of her personal funds to make up the deficiency. Only one creditor, Agri Credit, came up short in the amount of $30,000. However, Lemke explained that Agri Credit agreed to absorb this deficit in return for Lemke not pursuing legal action against it based on the manner in which Agri Credit had valued the collateral Lemke Sales had surrendered to it.

¶12. It appears from the evidence that after the liquidation everyone was satisfied. The creditors had been paid and Lemke had managed to successfully wind up a business that was causing her a great deal of stress. Lemke was completely satisfied with the work that

Respondent performed for her and offered no criticism of his legal representation at the hearing on the Relator's complaint. (Tr. 157)

¶13. Five years later, in 2007, Lemke was in the process of constructing a building on the Lemke Sales real property (now titled to her) and she went to American General Finance to obtain a $60,000 mortgage loan on the property to finance the project. American General performed a title search of the properties and discovered that the mortgages that had been placed against the property by the Respondent in 2001 were still of record and unreleased. When contacted, Marion Bank and Bank One released the mortgages. Ag Credit, on the other hand, would not.

¶14. Initially Lemke called Ag Credit herself and was told by a representative of the company that they never had a loan with Lemke Sales and had nothing on their records regarding a mortgage. The company declined to issue a release. Lemke then re-connected with Respondent and asked him to take care of the matter.[2]

¶15. Respondent directed his legal assistant to call Ag Credit and request a release. Again, Ag Credit declined for the same reasons given Lemke. At this point the matter was referred to the company's outside legal counsel, Attorney John Hunter of Toledo. Hunter wrote Respondent informing him of Ag Credit's position in the matter. This letter prompted Respondent to call Hunter and a phone conversation took place, the contents of which are subject to dispute. Hunter testified that he pointed out to Respondent that Ag Credit had no record of a loan transaction and did not have a mortgage. According to Hunter, Respondent responded as follows:

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[2] It is unclear how and when the other mortgages encumbering the property were released. Suffice it to say that Marion Bank, Bank One and Ray Hildreth all voluntarily released their mortgages.

"[He] had indicated to me at that time that he understood that there was no obligation with Lemke Sales & Service. He indicated, as well, that there was some sort of financial difficulty at Lemke Sales & Service and that, as he put it, they had created debt to Ag Credit and that the mortgage was granted to Ag Credit to – I believe the term was to protect the interest of Ag Credit." (Tr. 44-45) Hunter then told Ricketts that his client felt that a fraud had been perpetrated on creditors, and that it would not be a party to that fraud by issuing a release of the mortgage lien.

¶16. Respondent testified that he does not recall using the terms "create debt" in the phone conversation with Hunter. His version of the conversation is that he repeatedly asked Hunter whether Lemke owed Ag Credit any money and that Hunter admitted that she did not. When Hunter still declined to release the mortgage Respondent said he felt like he was being subjected to some kind of "April Fools Joke." He told the panel that he was simply "dumbfounded" by Hunter's position. (Tr. 424-428)

¶17. At this point Respondent decided that his only course of action was to file a quiet title or declaratory judgment action to get the title to the properties cleared. However, Lemke informed him that she could not wait for a legal proceeding of this type to run its course. She told him that she had outstanding obligations that needed to be paid and that she needed the American General loan to be completed immediately. Respondent, then, drafted and signed a release of Ag Credit's mortgage and had Lemke take it to the Marion County Recorder and file it. Apparently this document satisfied the individual doing the title work for American General, because the loan was eventually consummated.

¶18. Hunter, at his client's behest, ultimately complained of Respondent's actions to the Office of Disciplinary Counsel and these proceedings followed. Relator alleges that the

execution and recording of the mortgages and the execution and recording of the "release" constitute unethical conduct. Because the panel views these two events as being different in character they will be dealt with separately.

CONCLUSIONS OF LAW

MORTGAGE

¶19. Relator has alleged in its complaint that the filing of the mortgage on December 28, 2001,[3] was a violation of DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation]. Relator contends that Respondent engaged in conduct designed to deceive creditors by having his client execute and then record a document whose purpose was to make creditors think that the real estate owned by Lemke Sales was encumbered by multiple mortgages when in fact the tracts were not. In support of this conclusion Relator points to the following:

a. Lemke Sales owed nothing to Ag Credit and no new loan had been transacted despite recitations in the documents that would indicate otherwise.[4] Thus, says counsel for Relator, the mortgages were not supported by any consideration.

b. The mortgage was illegal because the mortgage was never requested by Ag Credit, was never delivered to Ag Credit and they were otherwise completely ignorant of the document's existence until 2007 when a release was requested by Lemke.

c. Respondent admitted in his phone conversation to Hunter that the purpose of the mortgage was to make it look like the properties were encumbered. Though Respondent says he

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[3] The complaint incorrectly alleges that it was filed in March 2001.

[4] The mortgage recites that it is being given "for new consideration to secure the outstanding obligations of Mortgagor". The mortgage later provides that it is being given "as additional collateral security for the Obligation and any other obligations of Mortgagor to Mortgagee in any form or fashion..." (Rel. Ex. 1)

does not recall making this statement, Hunter's version of the conversation is supported by an email to Lemke and her consulting firm in the early stages of his representation of her in 2001. (Ex. 3 and M) In that communication that Respondent admits he authored, he sets forth a proposed strategic plan for his new client that included getting the secured creditors to take their equipment back in full satisfaction of their debt. He goes on to tell Lemke that in order to accomplish this "... they must perceive that they will not otherwise collect from the company." He further added that they needed to "... eliminate the potential for equity in the real estate being made available for general unsecured creditors of the company..." Id.

¶20. Respondent and his three expert witnesses understandably have a different perspective. They feel that the mortgages were legal because Lemke was personally in debt to Ag Credit, Bank One, and Marion Bank. Since much, if not all, of the borrowed funds owed to these banks went to keep Lemke Sales afloat the mortgages were legally given to these banks to provide additional security for Lemke's loans. They conclude that while one may disagree with the strategy of gratuitously using company property as collateral to secure the personal obligations of the company's sole shareholder, there is certainly nothing unethical in doing so.

¶21. Respondent also argues that placing the mortgages of record was indispensable to an orderly liquidation of the company's assets. It was Lemke's intention from the beginning to see that all of her creditors got paid. Indeed, for the secured creditors this was critical since she was obligated personally on those loans. Had the creditors gone into panic mode when the liquidation was announced and started racing to the courthouse to get a head start on obtaining a judgment, the liquidation would have been much more difficult, if not impossible. The mortgages were meant to discourage creditors from bolting and moving against the property outside the liquidation process.

¶22. The panel feels that the arguments of Respondent regarding the legality of these instruments are questionable. Further, the panel does not conclude that the mortgages were given because of a concern that Lemke's creditors needed additional protection. Simply put, it believes that the mortgages were given for the reasons articulated by in his email: to create the appearance of debt.

¶23. The panel also believes that the mortgages were of doubtful legality. Mortgages and the provisions contained in them have generally been construed in accordance with contract principles. See *Bank One v. Wilborn*, 121 Ohio St.3d 546, 2009-Ohio-306. Since Ag Credit was not a party to the issuance and execution of this mortgage thus there clearly was no contractual agreement underlying the document. Furthermore, it is generally held that a mortgage is not effective until there has been delivery and acceptance by the mortgagee. *Alaska Seaboard Partners v. Godwin* (2002), 4th App Dist No 02 CA5, citing *Sidle v. Maxwell* (1854), 4 Ohio St. 236.

¶24. Notwithstanding this conclusion, the panel feels that the legality of the mortgage is not the real issue in this case. At the worst these transfers were fraudulent transfers subject to being set aside by the creditor under R.C. §1336.07. Given the fact that the evidence in this case shows that Lemke Sales & Service was solvent, that it was meeting its obligations and paying its bills, that no creditor had attempted to repossess its collateral and no creditor had filed suit, there appears to be no legal obstacle to the company creating the "appearance of debt" as Ricketts described it. Lemke's right to pursue this course of action is further buttressed by the fact that from the beginning it was her intention to pay her creditors both for moral reasons and the practical reason that she was personally obligated on a great majority of these obligations.

¶25. Thus, the panel has concluded that if, under these circumstances, Respondent decides to attempt to give Lemke's personal creditors a mortgage, there appears to be no reason why he could not carry out this plan. Lemke was not under any contractual, statutory, or other restriction preventing her from alienating her property in any manner she deemed fit. One might call the conduct "sharp practice" but in the panel's opinion it falls within the Supreme Court's admonition in *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-120 that [l]awyers are permitted to advance claims and defenses for which "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." *Rust,* at 312 ¶42. In this same decision, the Supreme Court points to the following language in the comment to Prof. Cond. R. 3.1 saying: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Id at 313 ¶44.

¶26. Respondent in this case wanted to employ the best means possible to maintain order in the liquidation of Lemke Sales. While granting Lemke's personal creditors a mortgage that they did not solicit may be of questionable legality, in the panel's opinion the conduct comes within "the proper scope of advocacy." The panel therefore recommends that the allegation that Respondent violated DR 1-102(A)(4) be dismissed.

RELEASE

¶27. The Relator has alleged in its complaint that the drafting and recording of the mortgage release is in violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation] and 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]. The panel agrees with Relator.

¶28. Respondent argues that once the underlying obligation supporting the mortgage is satisfied the mortgage is discharged.[5] *Jennings v. Wood,* 20 Ohio 261 (1851). See 69 Ohio Jur. 3d Mortgages § 200.

¶29. While it may be true that the mortgage is "discharged" once the loan it secures is satisfied, the law clearly does not give the mortgagor the option of making that determination and discharging his own mortgage. R.C. §5301.34 states that a mortgage is to be released of record when the recorder is presented with "a certificate executed by the mortgagee ... certifying that the mortgage has been paid and satisfied." The case law on the subject also supports the proposition that the mortgagor is the proper party to release a mortgage. See *Upjohn v. Ewin,* 2 Ohio St. 13 (1853); *Bostian v. Cholley,* 47 Ohio App. 295 (1933).

¶30. Respondent argues that the document that he filed contains no incorrect statement of fact or law. This may be a correct statement, however, the document was clearly meant to mislead the recorder, the public and specifically American General Finance. It is headed with the words "RELEASE OF REAL ESTATE MORTGAGE IN FAVOR OF AG CREDIT". The body of the release recites that the mortgage "has been satisfied and is hereby fully released and discharged" – statements normally coming from the creditor that had extended the credit. Taking the document as a whole, the inescapable impression is that Respondent is releasing the mortgage on behalf of Ag Credit; an impression that he clearly intended to create. (Ex. 2)

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[5] In this case Lemke's personal obligation to Ag Credit was paid off in 2005 when she sold her farm.

¶31. None of Respondent's experts who opined that there was no law preventing a mortgagor from releasing a mortgage could remember ever seeing it done. Respondent himself implicitly acknowledged the fact that the power to release the mortgage was held by Ag Credit when he called the company seeking the release. Had Respondent really believed that Lemke held the authority to release the company's mortgage he would never have phoned Ag Credit in the first place and requested a release. Furthermore, the evidence showed that had Lemke not impressed upon Respondent the urgency of getting something done, Respondent would have sought a resolution of the matter with legal action.

¶32. Respondent's conduct was intended to mislead, and the panel believes that Relator has proven by clear and convincing evidence that in preparing and recording the release of mortgage, Respondent violated Prof. Cond. R. 8.4(c) and 8.4(h) as alleged.

RECOMMENDED SANCTION

¶33. The panel has reviewed the guidelines for imposing lawyer sanctions found in BCGD Proc. Reg. 11 and makes the following findings:

¶34. *Aggravating Facts* The only aggravating fact that the panel finds present in this case is that Respondent steadfastly clings to his belief that what he did was both legal and ethical. To this extent he has refused to acknowledge the wrongful nature of his conduct. However, given the fact that three qualified lawyers that practice in this area agreed with him on this subject, the panel declines to put a great deal of weight on this fact.

¶35. *Mitigating Facts.* There are a great many mitigating facts to be considered:

a. Respondent has practiced law 24 years with no disciplinary action against him.

b. The drafting of the release was not the product of a selfish motive on his part. He impetuously filed the document in response to his client's need to conclude a loan with her bank.

c. There is no indication that Respondent was less than cooperative with Disciplinary Counsel. Relator admits in its post trial brief that Respondent cooperated, and counsel for the Respondent complained during the hearing and in his post trial brief that Relator did not include Respondent enough in the preliminary investigation that took place before the complaint was filed.

d. The panel was extremely impressed by Respondent's reputation not only in the legal community within which he practices, but also the community in which he lives. He has lectured at well over a hundred seminars dealing with farm property and debtor/creditor law and has testified as an expert witness in both state and federal cases. From all appearances he has a successful law practice and is well respected by his peers. Outside of his professional life he is active in community organizations, including his church. Furthermore he is involved with the activities of his family, and he volunteers many hours of his time to charitable organizations.

¶36. Respondent asks that the charges against him be dismissed, but that if an ethical violation is found that he receive no actual time off from the practice of law.

¶37. Relator asks that Respondent be suspended from the practice of law for six months. Noting that this is a fact situation without precedent in Ohio, Disciplinary Counsel cites a number of cases (all from jurisdictions outside of Ohio) noting that similar conduct has received a public reprimand to disbarment. In *Iowa State Bar v. O'Donohoe*, 426 N.W.2d 166 (1988), the Supreme Court of Iowa recommended a public reprimand for a lawyer that drafted and then back dated a deed for clients against whom a summary judgment was about to be entered for a substantial amount of money. The deed was executed to complete a transaction between the client and the corporation they had formed for their farming operations some five months earlier. As part of the incorporation process the client and his wife were to transfer land

to the company in exchange for stock certificates. For some reason the transfer had never been completed so the respondent used this transaction as a justification for moving the land out of the clients' names. The respondent dated the deed not the date it was executed, but the date of the formation of the company. The Iowa Supreme Court agreed with the characterization of the respondent's conduct as "an isolated incident in an otherwise exemplary career." Id. at 168. The same characterization could be used in this Respondent's case.

¶38. In a New Jersey case cited by Relator[6] two attorneys were publicly reprimanded for engaging in the transfer of a clients' property to one of the client's uncles. In this transaction the pair engaged in creating sham documentation that the uncle had actually paid something for the properties. Further, the transfers were made when the clients were unquestionably in default of obligations owed on a business that had recently acquired.

¶39. Relator cited only one case that resulted in a sanction involving actual time off from the practice of law. *In the Matter of Breen*, 113 N.J.522 (1989), the respondent was disbarred for putting multiple mortgages on his property to avoid a judgment creditor. The panel finds this case clearly distinguishable for a number of reasons. First, the respondent was not only guilty of putting these mortgage against his property, he was disciplined for multiple other offenses involving neglect and dishonesty. The opinion also indicates that he was less than cooperative in the disciplinary process. Second, the respondent was clearly insolvent and on the verge of losing the home when he made the transfers.

¶40. The panel is mindful that the presumptive sanction for a lawyer found guilty of dishonesty, fraud or deceit is an actual suspension. *Disciplinary Counsel v. Fowerbaugh,* 74 Ohio St.3d 187, 1995-Ohio-261; *Disciplinary Counsel v. Greene*, 74 Ohio St.3d 13, 1995-Ohio-97. On the other hand there have been instances where the Supreme Court found a violation of

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6 *In re De Pamphilis,* 30 N.J. 470 (1959)

DR 1-102(A)(4) and imposed a stayed suspension or a public reprimand. *Lake County Bar Assn. v. Ezzone*, 102 Ohio St.3d 79, 2004-Ohio-1774; *Cleveland Bar Assn. v. Russell,* 114 Ohio St.3d 171, 2002-Ohio-3603.

¶41. The panel has found that Respondent's misconduct consists of his releasing a mortgage that was of questionable legality to begin with. Further, Ag Credit, Lemke Sales's creditors, and the public have sustained no harm. And while it is true that Respondent has failed to acknowledge that his conduct was wrong, this lack of remorse derives more from a difference of opinion that an inherent character flaw. Finally, the overwhelming mitigating factors, including character evidence, convince the panel that a public reprimand is the appropriate sanction.

¶42. The panel therefore recommends that Respondent, Richard Todd Ricketts, be publicly reprimanded.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on April 9, 2010. The Board adopted the Findings of Fact, and Conclusions of Law of the Panel except that it found that Respondent violated DR 1-102(A)(4) in executing the mortgages. In light of this finding, the Board recommends that Respondent, Richard Todd Ricketts, be suspended from the practice of law in the State of Ohio for six months with the entire six months stayed. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

RELEASE OF REAL ESTATE MORTGAGE
IN FAVOR OF AG CREDIT

KNOW ALL MEN BY THESE PRESENTS: That for good and valuable consideration, the mortgage in favor of AG Credit as against **LEMKE SALES & SERVICE**, an Ohio corporation, which Mortgage is recorded in Official Record Volume 594, Page 752, in the Recorder's Office of Marion County, Ohio has been satisfied and is hereby fully released and discharged.

IN WITNESS WHEREOF, the undersigned has executed this Release of Real Estate Mortgage this 1st day of August, 2007.

By: _____
Name: Richard T. Ricketts

Sworn to and subscribed before me this 1st day of August, 2007.

Richard T. Ricketts

NOTARIAL SEAL STATE OF OHIO

AMY L. SLANE
Notary Public, State of Ohio
My Commission Expires
9-27-09

Amy L. Slane
Notary Public

THIS INSTRUMENT PREPARED BY:
RICHARD T. RICKETTS, ATTORNEY AT LAW
RICKETTS CO., L.P.A.
50 HILL ROAD SOUTH
PICKERINGTON, OHIO 43147
P: 614-834-8246 / F: 614-834-8238

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EXHIBIT
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