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IN THE SUPREME COURT OF OHIO

WELSH DEVELOPMENT CO., INC, <i>et al.</i> , :	Case No. 2010-0611
Appellants, :	
vs. :	On Appeal from the Warren
	County Court of Appeals, Twelfth
	Appellate District, Judgment filed
WARREN COUNTY REGIONAL :	February 22, 2010
PLANNING COMMISSION, :	
Appellees. :	Court of Appeals Case No. CA 2009-07-101

MEMORANDUM OF APPELLEE, WARREN COUNTY REGIONAL PLANNING COMMISSION, IN RESPONSE TO APPELLANTS, WELSH DEVELOPMENT COMPANY, INC., DANIEL PROESCHEL, ANGELA PROESCHEL, ROBERT PROESCHEL, MARY PROESCHEL, JERALDINE HOFFER, AND KARL HOFFER'S, MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST**

The Twelfth District Court of Appeals' affirmance of an explicit procedural requirement does not generate an issue of public or great general interest. Public interest indicates something in which the public, the community at large, has some interest by which their legal rights or liabilities are affected. *State ex rel. Ross v. Guion* (1959), 161 N.E.2d 800, 803 (citing *State ex rel. Freeling v. Lyon*, 63 Okl. 285, 165 P. 419, 420). The Appellants request that this Honorable Court rewrite the plain language of R.C. 2505.04, which requires an appellant from an administrative decision to *file* a "written notice of appeal * * * with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved." The Appellants blur the distinction between *filing* and *service* and ask the Court to permit an administrative appellant to bypass the statutory requirements and allow a clerk of courts to file on behalf of an appellant.¹ In support of their position, the Appellants submit a "parade of horrors" they claim exists under current law: *e.g.*, "loss of the right to appeal"; or "sideshow litigation." (Mem. in Supp. of J. at 5). At bottom, these perceived maladies may be cured merely by following the statute. On the other hand, the Appellants are forced to resort to incorrect, novel and inadvisable positions in support of their argument; not the least of which is viewing the clerk of courts as an administrative appellant's agent. (*Id.* at 5-6).

¹ Below, the Appellants also argued they "perfected [their] appeals by mailing copies of the cover letter, an unfiled complaint, an unfiled notice of supersedeas bond, and an unfiled praecipe to the WCRPC's chief legal counsel within the required time period." *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm.*, 12th Dist. No. CA2009-07-101, 2010-Ohio-592, at ¶ 46. The court of appeals rejected this argument. *Id.* at ¶ 47. The Appellants do not challenge this portion of the Twelfth District's opinion on appeal.

The Court should decline to exercise jurisdiction because the Twelfth District properly applied R.C. 2505.04 and correctly distinguished *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 58 Ohio St.2d 202. Concerning the interplay between the statute and *Dudukovich*, the court of appeals noted that this Court did not direct a specific filing method; however, the appellate panel correctly found that the *Dudukovich* Court did not alter the statutory mandate that the notice of appeal be *filed* with the agency. See *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm'n*, 12th Dist. No. CA2009-07-101, 2010-Ohio-592, at ¶¶ 22-23 (“*Welsh II*”). Notwithstanding Appellants’ portrayal of *Welsh II* as contrary to *Dudukovich*, the distinguishing fact between *Dudukovich* and the instant case shows why the Twelfth District was correct: in *Dudukovich*, the appellant filed her notice of appeal with the administrative agency; in the instant case, the Appellants did not. Because of this distinction and, furthermore, because the appellate court rightly held that filing is not the equivalent of service, this Court should decline to take this appeal.

STATEMENT OF THE CASE

The case is on appeal from the judgment of the Warren County Court of Appeals, which: 1) affirmed the trial court’s finding that, as a matter of law, the Appellants failed to perfect consolidated administrative appeals from two decisions of the Appellant, Warren County Regional Planning Commission (“WCRPC”); and 2) that, consequently, Appellants failed to exhaust administrative remedies regarding their constitutional claims. *Welsh II*, 2010-Ohio-592, at ¶¶ 49, 60.² The instant appeal arises from the Twelfth District’s second opinion in the case. The appellate court dismissed the Appellants’ previous appeal for want of jurisdiction. *Welsh Dev. Co. v. Warren Cty. Regional*

² The Appellants do not challenge the appellate court’s holding regarding exhaustion.

Planning Comm'n, 12th Dist. No. CA2008-02-026, 2009-Ohio-1158 (“*Welsh F*”).

The Appellants appealed from two consolidated cases brought in the Court of Common Pleas of Warren County. In the first case, Appellants took an administrative appeal from the WCRPC’s denial of preliminary plat approval for Welsh’s planned Valley View Farms subdivision (“subdivision”). The latter case involved a second administrative appeal, this time from the WCRPC’s conditional approval of Appellants’ preliminary plat for “Phase II” of the subdivision. When they attempted appeal of the decisions, in March 2005 and April 2005, respectively, Appellants failed to file written notices of appeal with the WCRPC, contrary to the requirements of R.C. 2505.04. Instead, Appellants mailed a copy of a cover letter to the clerk of courts to the Chief Assistant Warren County Prosecutor, and enclosed certain documents: an unfiled Complaint, an unfiled Notice of Supersedeas Bond and an unfiled Praecipe. By praecipe, Appellants directed the Clerk of Courts to serve the WCRPC.

The Magistrate granted the WCRPC’s Motion to Dismiss based on a lack of subject matter jurisdiction. The Magistrate found that the Appellants’ efforts to serve documents upon the Chief Assistant Prosecutor and seeking the Clerk of Courts to issue service of process to the WCRPC were “not tantamount to actual filing.” In addition, the Magistrate dismissed all of Appellants’ causes of action, except counts pertaining to a telecommunications tower and the WCRPC’s “plat approval procedure,” because the Appellants did not exhaust their administrative remedies. Both sides filed objections. The trial court overruled all objections and affirmed.

Next, the Appellants attempted to voluntarily dismiss the remaining causes of action (“remaining claims”), pursuant to Civ.R. 41(A)(1)(a). Although the trial court’s decision did not

comport with R.C. 2505.02 or include a Civ.R. 54(B) certification, the Appellants took an appeal, which the WCRPC moved to dismiss. The appellate court initially denied the motion; however, following oral argument, the court vacated its earlier decision and dismissed, based on this Honorable Court’s decision in *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276. *Welsh I*. Following remand, the trial court granted Appellants leave to file amended consolidated Complaints, which omitted Appellants’ remaining claims. The Appellants then took their second appeal to the Twelfth District.

In *Welsh II*, the court of appeals affirmed the trial court in all respects. First, the court examined the statute and held “[i]t is well settled that the filing of a notice of appeal pursuant to R.C. 2505.04 is essential to vest a common pleas court with jurisdiction to hear an administrative appeal.” *Welsh II*, 2010-Ohio-592, at ¶ 15. The court recognized that *Dudukovich* did not change this well-settled law. “The language of R.C. 2505.04 expressly requires that the notice of appeal be filed with the board from which *Welsh* appeals” and, although the statute does not mandate a method of delivery, “[t]he statute is explicit * * * in requiring that the notice be *filed* with the agency or board.” *Id.* at ¶ 21, 22 (emphasis *sic*)(citing *Dudukovich*, 58 Ohio St.2d at 204); see *id.* at ¶ 33.³ Next, although *Dudukovich* affirmed the statute’s requirements, the lower court recognized that the issue as framed and considered by this Court was distinct from that presented here:

In *Dudukovich*, the *appellee* sent a copy of the notice of appeal to the housing authority by certified mail and filed a copy with the Lorain County Common Pleas Court two days later. * * * This, the issue before the Ohio Supreme Court was

³ The statutory language was amended, post-*Dudukovich*, in 1987 and is now even more clear than when this Court held the statute “appears to require that written notice be filed * * * with the agency or board from which the appeal is being taken, in order for the appeal to be perfected.” *Dudukovich*, 58 Ohio St.2d at 204. See WCRPC’s argument, *infra*.

whether the appellee had sufficiently complied with R.C. 2505.04 by mailing a copy of the notice of appeal to the housing authority.

Id. at ¶ 16 (emphasis added; footnote omitted) (citing *Dudukovich*, 58 Ohio St.2d at 204). As this Court put it, “The issue thus becomes whether *Dudukovich* sufficiently complied with R.C. 2505.04 by mailing a copy of the notice of appeal to LMHA.” *Dudukovich*, 58 Ohio St.2d at 204 (emphasis added). As the court noted, the *Dudukovich* Court held *filing* may be accomplished by any method certain to achieve “actual delivery” of the notice of appeal within the time for appeal. *Welsh II*, 2010-Ohio-592, at ¶ 17-18 (citing *Dudukovich*, 58 Ohio St.2d at 204).

Third, the court of appeals rejected Appellants’ argument that service is the equivalent of filing. *Id.* at ¶ 19. After stating the plain language of the statute mandates otherwise, *supra*, the court rehearsed the majority view, held by at least six appellate districts, including the Twelfth, that service by a clerk of courts does not accomplish filing. *Id.* at ¶ 25-32. The court held that adopting Appellants’ view would “disregard the explicit requirements of R.C. 2505.04 [and] ignore the Ohio Supreme Court mandate that an appeal can be perfected only in the manner prescribed by the statute,” as well the Twelfth District’s “established precedent[.] * * *” *Id.* at ¶ 34.

Finally, the appellate court engaged in three analyses from which the Appellants do not appeal: 1) why “departure from the doctrine of stare decisis under the standard outlined by the Ohio Supreme Court in [*Westfield Ins. Co. v. Galatis*], 100 Ohio St.3d 216, 2003-Ohio-5849]” was unwarranted; 2) that Appellants’ effort to file their appeal by mailing copies of documents to an assistant prosecutor was unavailing; and, 3) why the trial court’s dismissal of Appellants’ “constitutional claims * * * for failing to exhaust [their] administrative remedies” was proper. *Id.* at ¶ 34-60. The Appellants filed a timely appeal from the court of appeals’ decision that they failed to

perfect their administrative appeal by relying upon the clerk of courts' service upon the WCRPC.

STATEMENT OF FACTS

I. APPELLANTS' FIRST CASE

This case pertains to Appellants' efforts to develop a subdivision of 588 single-family homes. After some preliminary meetings, Appellants applied for preliminary plat approval to the WCRPC Executive Committee, which the Executive Committee ultimately denied. Appellants filed a Notice of Appeal with the Common Pleas Court. Prior to filing, the Appellants sent a copy of a cover letter mailed to the Warren County Clerk of Courts to the Chief Assistant Warren County Prosecutor, and enclosed certain documents: an unfiled Complaint, an unfiled Notice of Supersedeas Bond and an unfiled Praccipe. Although Appellants mailed a copy of their cover letter to the Prosecutor's Office, they did not file a "written notice of appeal * * * with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved." R.C. 2505.04. WCRPC's first notice of the appeal was the Summons and Complaint from the Clerk of Courts. Welsh never filed a written notice of appeal with the WCRPC.

II. APPELLANTS' SECOND CASE

Following the WCRPC's aforementioned denial, the Appellants presented the preliminary plat of "Phase II" of their development plan to the WCRPC Executive Committee. This time, the Committee conditionally approved the preliminary plat contingent upon the Appellants' dedication of "interior collector thoroughfare between Hendrickson Road and the southern project limits." The Appellants appealed the decision to the common pleas court. Once again, Appellants sent only a copy of a cover letter, mailed to the clerk of courts, to the Assistant Prosecutor, and enclosed similar

documents as before, except a notice of appeal. The WCRPC's first notice of the instant the second appeal was, again, receipt of the Summons and Complaint. For a second time, the Appellants did not file a written notice of appeal with the WCRPC.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Proposition of Law:

To perfect an administrative appeal, R.C. 2505.04 requires that a written notice of appeal be filed with the appropriate administrative officer or agency; service of process by a clerk of courts upon the officer or agency is not equivalent to filing and does not perfect the appeal.

I. Amended R.C. 2505.04 explicitly sets forth the procedure for filing an administrative appeal.

The court of appeals appropriately affirmed the trial court's judgment that Appellants did not perfect their administrative appeal. The language of R.C. 2505.04 clearly provides:

An appeal is perfected when a written notice of appeal is filed * * * *in the case of an administrative-related appeal*, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. If a leave to appeal from a court first must be obtained, a notice of appeal also shall be filed in the appellate court. After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

R.C. 2505.04 (emphasis added). The statute, therefore, requires that an administrative appellant file a written notice of appeal with the administrative officer or agency from whose decision the appellant takes an appeal.

Prior to the General Assembly's amendment of the statute, effective March 17, 1987, the law stated:

An appeal is perfected when written notice of appeal is filed with the lower court, tribunal, officer, or commission. Where leave to appeal must be first obtained,

notice of appeal shall also be filed in the appellate court. After being perfected, no appeal shall be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

Former R.C. 2505.04. The former statute did not include any express distinction of administrative appeals. Nevertheless, in its 1979 *Dudukovich* opinion, this Court was able to hold, “[a]lthough not explicit on this point, [the statute] appears to require that written notice be filed, within the time limit prescribed by R.C. 2505.07(B), with the agency from which the appeal is being taken, in order for the appeal to be perfected.” 58 Ohio St.2d at 204. The now-explicit language can require no less.

II. Even under the former statute, this Court held the appeal must be filed with the agency.

The issue in *Dudukovich* was not *where* the appeal must be filed but *how* the appeal must be filed with the agency; specifically, whether Ms. Dudukovich complied with the statute by mailing her notice to the agency by a method reasonably certain, without contravening evidence, to achieve “actual delivery” within the appeal period: certified mail. *Id.* at 204-05. This Court’s affirmance of the method of filing because there was “evidence in the record that [the agency] did eventually receive the mailed copy of the notice [and there was] no evidence of late delivery,” *id.* at 205, was in keeping with settled law. “An appeal, the right to which is conferred by statute, *can be perfected only in the mode prescribed by statute.* The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements.” *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123, at paragraph one of the syllabus (emphasis added). As the Court later stated, “The right to appeal an administrative decision is neither inherent nor inalienable; to the contrary, it must be conferred by statute.” *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 2001-Ohio-24. The statute confers the right to an

administrative appeal only if the appellant files the appeal with the agency and the statute prescribes its requirements more explicitly than in 1979.⁴

The Appellants read too much into *Dudukovich*, which, of course, they must if they are to find support for their service-equals-filing posture. They twist *Dudukovich*'s issue into *where* the appeal must be filed. This Court expressly stated the issue as “whether Dudukovich sufficiently complied with R.C. 2505.04 by mailing a copy of the notice of appeal to LMHA.” *Dudukovich*, 58 Ohio St.2d at 204. Statutory compliance requires “that, when appealing the decision of an administrative agency, an individual must file a written notice of appeal with the administrative agency.” *In re Jones-Smith*, 8th Dist. No. 93276, 2009-Ohio-6470, at ¶12. Hence, the issue in *Dudukovich* was not where the appeal was filed. This Court's focus was whether the appellant's certified mail delivery to the agency satisfied R.C. 2505.04. After reciting the appellant's mailing to the agency, the Court noted that the appellant's “act of depositing the notice in the mail, in itself, does not constitute a ‘filing,’ at least where the notice is not received until after the expiration of the prescribed time limit.” *Dudukovich*, 58 Ohio St.2d at 204. The remainder of the Court's analysis on this issue concerned what record evidence supported or opposed a finding that the agency, indeed, timely received the filing. *Id.* at 204-05. The location of the filing was not in dispute.

The Appellants cite to three words of the Court's opinion in support of their argument that service and filing are identical. (Mem. in Supp. of J. at 5). As part of its analysis that certified mail

⁴ Even the Second District Court of Appeals, which the Appellants cite for support, (Mem. in Supp. of J. at 1 n.1), recognized the less-explicit former statute required filing with the agency. “Clearly, under this statute, to perfect an appeal the notice of appeal must be filed with the tribunal rendering the decision for which review is sought, not with the reviewing court.” *In re Williams v. City of Dayton* (Mar. 5, 1981), 2nd Dist. No. 6818, 1981 WL 2711, at * 2.

was an appropriate method of filing, the Court stated, “Having considered appellee’s *method of service*[.] * * *” *Dudukovich*, 58 Ohio St.2d at 204 (emphasis added). Once again, the Appellants overreach. The Court could not have been using “service” as a legal term of art. Service of process is distinctly a judicial function. “[S]ervice of process is a matter of procedure which now falls within the ambit of this court’s rule-making responsibility.” *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 89. The Appellants cite to no rule or law that cloaks an individual with the authority to issue service of process to hail an opposing party into court. Yet that is one argument the Appellants are forced to recommend to maintain their position.

III. “Filing” and “service” are not identical.

The Appellants’ proffered procedural gloss omits the distinction between the purpose of filing and service. Just as a notice of appeal is required to be filed with a trial court to invoke the jurisdiction of a court of appeals, so, too, is a written notice of appeal required to be filed with the agency to invoke the jurisdiction of a reviewing common pleas court. *Zier*, 151 Ohio St. at 125; App.R. 3; see *Tzungas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206 (agency acts as factfinder; common pleas as reviewing court). In contrast, the purpose of service “is to give such notice as will in the nature of things most likely bring the attention of [a] person to the fact that an action has been instituted against him and that he has an opportunity to defend the same.” *Krabill v. Gibbs* (1968), 14 Ohio St.2d 1, 6. Even if an action is “filed” against an individual, if the person is not served, judgment may be rendered only with “a showing upon the record that the defendant has voluntarily submitted himself to the court’s jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense.” *Maryhew v. Yova* (1984), 11 Ohio

St.3d 154, 157. As shown by the Appellants' praecipe to the clerk, serving the notice of appeal, not the filing thereof, is the judicial function. See *Morrison*, 32 Ohio St.2d at 89.

Even when both filing and service are within a court's ambit, this Court recognized the distinction. "The act of entering judgment is distinct from the act of serving notice of the entry of judgment." *Harvey v. Hwang*, 103 Ohio St.3d 16, 2004-Ohio-4112, at ¶ 14 (construing Civ.R. 58(B)). Defendant brought a JNOV motion "16 days after entry of the court's final judgment," or two days too late. *Id.* at ¶ 7. Appealing from the trial court's dismissal, the Defendant argued that Rule 6(E) "provided three additional days for filing the * * * motion because the clerk of the trial court had served notice of the judgment on the verdict by ordinary mail." *Id.* at ¶ 6. The court of appeals affirmed but certified the issue to this Court. *Id.* at ¶ 7-9. The Court noted that, like Civ.R. 58, "App.R. 4(A) also clearly recognizes that entry of judgment and service of the notice of judgment are two distinct acts. * * * In short, we reject the appellant's contention that entry of judgment does not occur until the clerk serves notice of the entry of judgment." *Id.* at ¶ 15. Similarly, this Court should reject the instant Appellants' assertion that "'service' is 'filing.'" (Mem. in Supp. of J. at 5) (emphasis *sic*).

IV. The clerk of courts cannot be the Appellants' agent for filing without becoming their advocate.

Appellants countenance another problematic argument: that a clerk of courts may "be considered the appellant's agent" to file an appeal on their behalf. (Mot. in Supp. of J. at 5). The only authority for this proposition appears to be a short dissenting opinion in another Twelfth District case in which the majority held an administrative appeal was not perfected on facts similar to the instant appeal. *Ware v. Civil Service Comm'n of Hamilton* (Aug. 29, 1994), 12th Dist. No. CA94-01-

020, 1994 WL 462192, at *1 (Koehler, J., dissenting); but see Gov.Bar R. V(11)(B) (Supreme Court clerk is agent for service of legal notices to attorney who conceals address). “[W]e observe that neither the Clerk of Courts nor the trial judge is obliged or permitted by law to act as plaintiffs’ agent or advocate.” *Carter v. Carter* (Sept. 19, 1989), 3rd Dist. No. 11-88-13, 1989 WL 108692, at *2. If anything, the clerk is an agent of the court. See *Blankenship v. Enright* (1990), 67 Ohio App.3d 303, 310 (clerk of courts covered by Chapter 2744 immunity); *McVetta v. Totin* (1990), 56 Ohio App.3d 87, 88 (same). If a clerk was a party’s agent, the clerk would be required to accept any document submitted by the principal, which is contrary to law. See *State ex rel. Wanamaker v. Miller* (1955), 164 Ohio St. 176, 177 (clerk not required to accept filings that are scurrilous, obscene or contrary to court’s obstructions). Agency would transform the reviewing court into an appellant’s advocate and place the court’s imprimatur on an appeal.

Of course, there is nothing to prevent counsel or other legitimate agent from mailing the notice of appeal on behalf of the appellant. (See Mem. in Supp. of J. at 5). It is established that, “in a broad sense counsel may be an agent and his client a principal[.] * * *” *Gaines Reporting Service v. Mack* (1982), 4 Ohio App.3d 234, 234 (quoting *Burt v. Gahan* (Mass.1966), 220 N.E.2d 817, 818. But these are not the facts. Neither the Appellants nor their counsel mailed the notice to the WCRPC. Instead, they relied on the clerk to undertake that action on their behalf. Their notice arrived complete with a summons from the common pleas court by which it exercised its jurisdiction over the WCRPC while, in the Appellants’ view, acting on their behalf in “filing” the action. In addition to the concerns regarding Appellants’ employment of the official arm of the court in such a manner, the Appellants’ method contravenes the plain language of R.C. 2505.04. This Honorable

Court should decline to exercise jurisdiction.

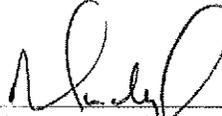
CONCLUSION

In *Dudukovich*, this Court reaffirmed that a written notice of an administrative appeal must be filed with the decision-making agency. Although at the time the Court found R.C. 2505.04's requirement, "not explicit," it held Ms. Dudukovich's certified mailing of her notice to the agency, and the agency's receipt within the appeal period, to constitute "actual delivery" and, therefore, filing with the agency. Since *Dudukovich*, the General Assembly amended R.C. 2505.04 and explicitly provided that notice of an administrative appeal must be filed with the agency.

It is further apparent that the appellant must file the action rather than the clerk of courts. *Dudukovich* is distinguishable from the instant appeal on this fact. In that case, the appellant filed the notice of appeal with the agency – in the instant case, Appellants did not. The Appellants' reliance on the clerk of court's service as sufficient under R.C. 2505.04 discounts the distinction between service and filing, both their purpose and effect. This Honorable Court has recognized the difference between the two acts and should continue to do so. In addition, permitting a clerk of courts to file an action on behalf of an appellant would alter the court's traditional role as an arbiter of disputes into an advocate.

Therefore, for the reasons stated herein, the Warren County Regional Planning Commission respectfully requests that the Court decline to exercise jurisdiction over Appellants' appeal from the decision of the Twelfth District Court of Appeals because the case does not present an issue of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. Mail to Mr. Matthew C. Blickensderfer, Frost Brown Todd LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202 and to Messrs. Scott D. Phillips and Benjamin J. Yoder, Frost Brown Todd LLC, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, on this 7th day of May 2010.



Robert J. Surdyk