

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

RANDALL J. DOHME : Ohio Supreme Court Case No.  
10-1621

Appellee, : On Appeal from the Montgomery  
County Court of Appeals,  
v. : Second Appellate District

EURAND AMERICA, INC. : Court of Appeals  
Case No. 23653

Appellant. :

---

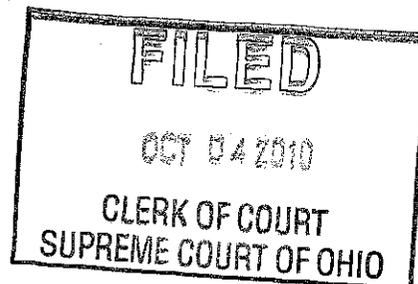
**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
AMICUS CURIAE OHIO MANAGEMENT LAWYERS ASSOCIATION**

---

Donald R. Keller (0022351)  
Vladimir P. Belo (0071334)  
*Counsel of Record*  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
(614) 227-2300 (Phone)  
(614) 227-2390 (Fax)  
[dkeller@bricker.com](mailto:dkeller@bricker.com)  
[vbelo@bricker.com](mailto:vbelo@bricker.com)  
Counsel for Amicus Curiae  
Ohio Management Lawyers Association

Todd D. Penney (0059076)  
*Counsel of Record*  
Scheuer Mackin & Breslin LLC  
11025 Reed Hartman Highway  
Cincinnati, OH 45242  
(513) 984-2040 ext. 219  
[tpenney@smbllaw.net](mailto:tpenney@smbllaw.net)  
Counsel For Appellant Eurand, Inc.

David M. Duwel (0029583)  
Todd T. Duwel (0069904)  
130 W. Second Street, Suite 2101  
Dayton, OH 45402  
(937) 297-1154  
[todd@duwelllaw.com](mailto:todd@duwelllaw.com)  
Counsel For Appellee Randall J. Dohme



**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND OF FACTS .....	5
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	5
<u>Appellant's Proposition of Law No. I: To satisfy the clarity element of a wrongful discharge claim an employee must articulate a policy based in existing Ohio law that addresses the specific facts of the incident rather than merely making a generic reference to workplace safety.....</u>	5
A.    The Court Of Appeals Has Expanded The Public Policy Favoring “Workplace Safety” Beyond What This Court Articulated In <i>Kulch</i> and <i>Pytlinski</i> .....	6
B.    The Court of Appeals’ Approach To The “Clarity” Element Is Tantamount To Judicial Legislation.....	8
<u>Appellants' Proposition of Law No. II: To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation for voicing concerns regarding workplace safety an employee must voice the concerns to a supervisory employee of the employer or to a governmental body. ....</u>	10
<u>Appellants Proposition of Law No. III: To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation an employee must advise the employer or act in a manner that reasonably apprises the employer that the employee's conduct implicates a public policy. ....</u>	10
CONCLUSION.....	13
CERTIFICATE OF SERVICE .....	14

## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Amicus Curiae Ohio Management Lawyers Association (“OMLA”) is an Ohio non-profit corporation. Its stated purpose is “[t]o provide an organization and forum for the exchange of information, discussion of common issues and problems, and promotion of the administration of justice with respect to employment, labor, and other areas of law affecting employers.”

OMLA respectfully submits this Memorandum In Support of Jurisdiction under S.Ct. Prac. R. 3.5 because this case presents issues of public and great general interest. The propositions of law set forth in the Appellant’s jurisdictional memorandum are worthy of this Court’s review, as they implicate issues of critical importance to employers throughout Ohio.

### **EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Three years ago, this Court granted discretionary review in this case to resolve important questions concerning the seemingly expanding scope of the “wrongful termination in violation of public policy” tort created 20 years ago in *Greeley v. Miami Valley Maint. Contractors, Inc.* (1990), 49 Ohio St. 3d 228. Specifically, this Court was called upon to define the scope of the “workplace safety” public policy recognized as the predicate for a wrongful termination claim.

With a final appealable order now in place and the Second District Court of Appeals reaching the same conclusion it did three years ago, the case is now back before the Court for a discretionary appeal. The importance of the issue has not changed from the time that this Court first granted discretionary review over Appellant Eurand America, Inc.’s appeal. The judgment of the Second District Court of Appeals elevates the nonspecific notion of “workplace safety” to the status of a “clear public policy” upon which a terminated employee may bring a tort claim for wrongful termination, regardless of the circumstances under which the public policy is being

invoked. This extension of Ohio law is an enormous one that threatens to swallow Ohio's longstanding presumption of at-will employment.

In *Greeley*, this Court first recognized that "public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." *Greeley* at 234. The Court gradually expanded the *Greeley* exception to employment terminations motivated by reasons that are *not* necessarily proscribed by statute. So long as an employee could demonstrate facts showing that his or her employment termination "contravened a clear public policy," which could be "discerned as a matter of law" from non-statutory sources (including "the common law"), the employee could maintain a claim for wrongful discharge in violation of public policy. *Painter v. Graley* (1994), 70 Ohio St.3d 377, paragraphs two and three of the syllabus.

Ultimately, as the development of the tort continued, the Court adopted four elements to define a public-policy claim:

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element);
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

*Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70, quoting Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. Cin. L. Rev. 397, 398-99 (1989).

Since this Court first adopted Professor Perritt's construct as the elements of Ohio's "public policy" wrongful termination claim, the reach of the tort has continued to undergo evolution in the courts. In *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, this Court first addressed the scope of the public policy claim in the context of workplace safety. This Court held that the public policy tort claim provides a remedy for an at-will employee who is terminated in retaliation for filing a complaint with the Occupational Safety and Health Administration (OSHA) concerning matters of health and safety in the workplace. *Kulch* at paragraph one of the syllabus. Despite the fact that there was already a statutory scheme in place to protect whistleblowing activity under R.C. 4113.52, this Court in *Kulch* recognized the existence of a tort claim separate and apart from the statutory remedies provided.

Then came *Pytlinski v. Brocar* (2002), 94 Ohio St.3d 77, where this Court built upon what it had created in *Kulch*. *Pytlinski* involved an employee who brought a public policy claim premised on the allegation that he was terminated in retaliation for having reported OSHA violations to his employer. *Id.* at 78. Even though the *Pytlinski* plaintiff did not satisfy the requirements of Ohio's whistleblower statute (R.C. 4113.52), this Court expanded the scope of *Kulch* by recognizing the existence of a common-law public policy favoring "workplace safety," which existed separate and apart from the whistleblower statute. Accordingly, this Court recognized a claim for wrongful termination based on the common-law "workplace safety" public policy, allowing a plaintiff to pursue the legal theory that he was fired in retaliation for having reported OSHA violations to his employer.

The lesson from this Court's decisions in *Kulch* and *Pytlinski* is that a claim will lie for wrongful termination in violation of the public policy favoring "workplace safety" where an employer has terminated an employee for reporting safety violations to governmental authorities

(as was the case in *Kulch*) or to the employer (*Pytlinski*). But this case takes the “workplace safety” public policy even further. The court of appeals has validated a public policy wrongful termination claim based not on reports of workplace safety violations to people empowered with doing something about those violations, but, rather, on an employee’s act of telling an insurance inspector that he feared discipline due to internal records not showing that a specific inspection had been completed. *Dohme v. Eurand America, Inc.*, 170 Ohio App.3d 593, 2007-Ohio-865, at ¶ 5 (“*Dohme P*”), adopted in *Dohme v. Eurand America, Inc.*, Montgomery App. No. 23653, 2010-Ohio-3905. Even worse, the court of appeals has validated Dohme’s claim amid evidence that Dohme was not even complaining that an inspection was not completed; instead, Dohme seemed concerned that the record of an inspection was removed “to make it look like I’m not doing my job.” *Id.* at ¶ 18.

By applying the “workplace safety” public policy to revive Dohme’s claim in this case, the court of appeals has applied it to a situation that has little connection to workplace safety. The *Kulch* and *Pytlinski* cases from which the “workplace safety” public policy was born involved complaints by an employee about safe working conditions that were made to persons empowered or authorized to effectuate a change in those working conditions. Here, the court of appeals has taken the extraordinary step of cloaking an employee with protection under “public policy” for talking about a workplace condition with someone having no authority to demand a change in working conditions. This remarkable expansion of the wrongful termination tort premised upon the “workplace safety” public policy is a matter of public or great general interest, as it affects every employer in Ohio that could conceivably have a workplace safety issue arise.

If the court of appeals' decision signals the direction that the "workplace safety" public policy claim is going, it is a direction that does not naturally flow from the lessons this Court taught in *Kulch* and *Pytlinski*. The issues stated in the Appellant's propositions of law are just as important today as they were in 2007 when this Court granted discretionary review in this very same case. Amicus Curiae accordingly asks that this Court accept the Appellant's discretionary appeal and hear this cause on the merits.

### STATEMENT OF THE CASE AND OF FACTS

Amicus Curiae defers to the statement of case and facts as stated by the Appellant's Memorandum In Support of Jurisdiction.

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Appellant's Proposition of Law No. I: To satisfy the clarity element of a wrongful discharge claim an employee must articulate a policy based in existing Ohio law that addresses the specific facts of the incident rather than merely making a generic reference to workplace safety.**

The court of appeals found Appellee Dohme to have articulated a clear public policy favoring "workplace safety" as the basis of his claim for wrongful termination, based on this Court's pronouncements in *Kulch* and *Pytlinski*. See *Dohme I* at ¶ 24. Underlying the court of appeals' ruling was evidence that Dohme told an insurance inspector about his suspicion that a fire inspection report was missing from the company's records. *Id.* at ¶¶ 18-22. Despite evidence that Dohme revealed his suspicion to the insurance inspector "to protect himself from complaint or criticism" rather than a desire to report workplace safety issues, the court of appeals found Dohme's motivation irrelevant to the public policy analysis. *Id.* at ¶ 23. What was relevant, said the court of appeals, was "whether Dohme did in fact report information to the inspector that encompassed a public policy favoring workplace safety." *Id.* And because the

court deemed workplace fire safety to be a public policy embodied in “Ohio’s Fire Code,” the court of appeals found the clarity element satisfied. *Id.* at ¶ 24.

The problem with the court of appeals’ rationale is that it makes “workplace safety” little more than a catch phrase for plaintiffs to utilize in trying to satisfy the “clarity” element of a public policy wrongful termination claim. The court of appeals has deemed it appropriate to evaluate the plaintiff’s articulation of public policy without regard to whether the facts underlying the incident in question can truly be said to implicate the substantial public policy of “workplace safety.”

**A. The Court Of Appeals Has Expanded The Public Policy Favoring “Workplace Safety” Beyond What This Court Articulated In *Kulch* and *Pytlinski*.**

To illustrate how far the court of appeals’ decision has gone in transforming the public policy tort, one need only look to *Kulch* and *Pytlinski*. In both of those cases, this Court looked to the public policy of “workplace safety” through the lens of what the facts and circumstances of the case were. In *Kulch*, for example, this Court identified two main sources of public policy that satisfied the clarity element in that case—the “policy prohibiting retaliatory discharge” found in OSHA and in Ohio’s Whistleblower Statute (R.C. 4113.52). See *Kulch*, 78 Ohio St.3d at 151-153. The Court deemed retaliation against employees who file OSHA complaints related to unsafe or unhealthy working conditions to be “an absolute affront to Ohio’s public policy favoring workplace safety.” *Id.* at 153. Thus, this Court evaluated the “clarity” of the “workplace safety” public policy with reference to the particular facts at issue—the alleged retaliation against the employee for reporting safety issues to OSHA.

Admittedly, part of the reason that the clarity element was framed as such in *Kulch* was because of the statutory source of the “public policy.” This Court invoked federal and state statutes that set forth a clear public policy prohibiting retaliation. But even absent a statute as a

basis for the “workplace safety” public policy, this Court did not, for purposes of the clarity element, articulate a public policy as broad as the one that the court of appeals recognized in this case.

*Pytlinski* involved another whistleblower fact pattern in which the employee alleged he was terminated in retaliation for complaining to his employer about perceived workplace safety violations. *Pytlinski*, 94 Ohio St.3d at 78. The plaintiff in *Pytlinski* could not, however, rely upon the Ohio Whistleblower Statute as a predicate for his public policy wrongful termination claim because he had failed to comply with the statute’s requirements—namely, R.C. 4113.52’s 180-day statute of limitation. *Id.* In validating *Pytlinski*’s claim, this Court found the R.C. 4113.52 statute of limitation inapplicable because “his cause of action is not based upon that statute, but is, instead, based in common-law for violation of public policy” favoring workplace safety, which was an “independent basis” upon which to bring a wrongful termination claim. *Id.* at 80.

Despite this Court’s emphasis on “workplace safety” as the “independent source” of public policy, *Pytlinski* should not be read as a pronouncement that the clarity element is satisfied merely by making reference to “workplace safety” in every fact pattern. Indeed, in articulating the common-law public policy recognized in *Pytlinski*, this Court kept its pronouncement in context: “[I]t is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety. *Pytlinski*’s complaint clearly sets forth the allegation that appellees retaliated against him *for lodging complaints* regarding workplace safety.” (Emphasis added.) *Id.* at 80. Thus, the “workplace safety” public policy was tethered to a specific circumstance—an employee’s complaint to his employer about violations of OSHA regulations.

In finding the clarity element satisfied in Dohme's case, the court of appeals has pulled *Kulch* and *Pytlinski* from their berths. In both of those cases, the clarity element was met because of a recognized public policy barring retaliation for reporting workplace safety violations. But in both of those cases, the employees reported specific violations to authorities empowered to fix them—to OSHA in *Kulch* and to the employer's management in *Pytlinski*. Here, the court of appeals has found the "public policy" favoring workplace safety to be implicated even though Dohme's "report" was to a third party—an insurance inspector—with no authority or ability to vindicate the public policy.

This Court should accept jurisdiction in this case to decide whether the clarity element should be as easily satisfied as it was in Dohme's case. If it is, then employers of this state will be subjected to potential liability for public policy wrongful termination claims regardless of whether the employee's acts are truly calculated to vindicate the public policy favoring workplace safety.

**B. The Court of Appeals' Approach To The "Clarity" Element Is Tantamount To Judicial Legislation.**

Under the "workplace safety" public policy announced by the court of appeals in this case, Dohme was deemed to be protected from being terminated in retaliation for speaking to an insurance inspector. But this is nothing more than recognizing a species of "whistleblower" liability that is outside the scope of R.C. 4113.52.

In *Kulch* and *Pytlinski*, this Court chose not to strictly follow the dictates of the legislature in recognizing a public policy claim premised upon workplace safety. In both of those cases, the employee had engaged in what could only be described as whistleblowing activity. Yet, this Court deemed it appropriate as a matter of public policy to recognize a tort claim for wrongful discharge with the full range of tort remedies, even though the plaintiff in

*Kulch* had available to him the remedies provided in R.C. 4113.52 (*Kulch* at 155, 161) and the plaintiff in *Pytlinski* could not bring a *statutory* action at all due to the failure to satisfy R.C. 4113.52's statute of limitation (*Pytlinski* at 78-79). Thus, this Court has, in its own way, upset the balance of right and remedy set by the legislature, in furtherance of this Court's interpretation of Ohio's "public policy" favoring workplace safety.

While *Kulch* and *Pytlinski* are one thing, the court of appeals' decision in this case is quite another. In both *Kulch* and *Pytlinski*, the plaintiff at least engaged in conduct that fit within the General Assembly's contemplation in R.C. 4113.52. In this case, however, the court of appeals has effectively cloaked Dohme with protected whistleblower status when he did not report any specific safety violation to either his employer or to authorities empowered with enforcing fire safety laws. The court of appeals has recognized a species of whistleblower protection *not* recognized by the General Assembly, under the guise of a common-law "public policy" favoring workplace safety.

If the "workplace safety" public policy is to reach as far as the court of appeals allowed, that is a legislative decision for the General Assembly to make. This Court has cautioned that "it would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature." *Bickers v. Western Southern Life Ins. Co.*, 116 Ohio St.3d 351, 357, 2007-Ohio-6751, at ¶ 24. Indeed, in the years since *Pytlinski* was decided, this Court's decisions have trended toward a reining in of the public policy wrongful termination tort rather than an expansion of it. *See id.* at ¶¶ 23-25 (declining to recognize a common-law wrongful discharge claim when doing so would override the legislature's policy choice to allow a statutory claim only for retaliatory discharges defined in R.C. 4123.90); *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, at syllabus and ¶¶ 22-33 (declining to

recognize a wrongful discharge claim based on public policy against age discrimination, finding it unnecessary to expand the scope of statutory remedies already available); *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, at ¶ 20 (declining to recognize wrongful discharge claim based on public policy embodied in federal Family and Medical Leave Act, finding it unnecessary to impose additional remedies when there was “a Congressional balancing of right and remedy that we ought not disturb”) (plurality opinion).

The court of appeals’ expansion of the wrongful termination tort in this context cuts against the grain of this Court’s post-*Pytlinski* decisions and is tantamount to judicial legislation in the area of employment law. This case therefore implicates an issue of public or great general interest that is worthy of this Court’s exercise of discretionary jurisdiction.

**Appellants’ Proposition of Law No. II: To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation for voicing concerns regarding workplace safety an employee must voice the concerns to a supervisory employee of the employer or to a governmental body.**

**Appellants’ Proposition of Law No. III: To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation an employee must advise the employer or act in a manner that reasonably apprises the employer that the employee’s conduct implicates a public policy.**

The Appellant’s second and third propositions of law are also worthy of this Court’s review, as they implicate important questions relating to the proper analysis of the “jeopardy” element of a public policy wrongful termination claim. This Court has previously indicated that a plaintiff must satisfy the jeopardy element through a showing that the absence of the claim would “seriously compromise” the public policy at issue. See *Wiles*, 96 Ohio St.3d at 244.

The United States Court of Appeals for the Sixth Circuit, in evaluating wrongful termination claims brought under Ohio substantive law, has interpreted this Court’s precedents in a manner that is faithful to the vindication of the “public policy” that underlies the purpose of having the claim in the first place. In *Jermer v. Siemens Energy & Automation, Inc.* (C.A.6,

2005), 395 F.3d 655, the plaintiff employee investigated employee complaints about the air quality at his employer's facility. 395 F.3d at 656. The plaintiff claimed that his supervisor denied a request for a particular air filter and that he repeated to his supervisor that there remained "issues" about the facility's air quality more than two months before his job was eliminated. The plaintiff asserted a public policy wrongful termination claim under Ohio law, alleging that he was laid off in retaliation for voicing his complaints about the air quality "issues."

Affirming a summary judgment in favor of the employer, the Sixth Circuit reasoned that the "jeopardy" element of a wrongful termination claim was not satisfied under these circumstances. Heeding the notion that the jeopardy element requires a showing that the articulated public policy "itself is at risk if dismissals like the one in question are allowed to continue" (*Jermer* at 659), the Court reasoned that a termination does not "jeopardize" Ohio public policy unless the employee's statements "indicate to a reasonable employer that he is invoking a governmental policy in support of, or as the basis for, his complaints." *Id.* Absent this crucial ingredient, public policy is not implicated—much less jeopardized—by the adverse employment action. As the *Jermer* court explained, this interpretation of the jeopardy element follows naturally from this Court's cases:

The Ohio Supreme Court views employee complaints and whistleblowing as critical to the enforcement of the State's public policy, and the Court therefore intended to make employees de facto "enforcers" of those policies. Toward this end, the Court granted them special protection from Ohio's generally applicable at-will employment status when the employees act in this public capacity. In exchange for granting employees this protection, employers must receive notice that they are no longer dealing solely with an at-will employee, but with someone who is vindicating a governmental policy. Employers receive clear notice of this fact when actual government regulators arrive to audit or inspect. They should receive some similar notice when an employee functions in a comparable role.

*Id.* at 659.

The court of appeals in this case rejected *Jermer*'s approach in favor of the view that employers "are presumed to be sophisticated enough to comply with the workplace safety laws." *Dohme*, at ¶ 32. The court of appeals refused to look at the employee's conduct as being relevant to the jeopardy element inquiry, believing that it "would be minimizing the importance of these complaints and the State's public policy were we to concentrate on the employee's intent in raising the safety concern rather than on whether the employee's complaints related to the public policy and whether the employer fired the employee for raising the concern." *Id.*

But the court of appeals' philosophical approach is problematic, for it does not give due consideration of the reasons for having a public policy favoring "workplace safety." If an employee does not make clear that he is addressing a legitimate safety concern or violation of safety regulations, it is questionable, at best, to say that the employee's termination would jeopardize the public policy. Even in *Pytlinski*, which created the cause of action based on the common-law public policy of "workplace safety," this Court described the touchstone of the cause of action recognized there as being the "retaliatory action" of the employer for "*lodging complaints* regarding workplace safety." (Emphasis added.) *Pytlinski*, 94 Ohio St.3d at 80. Thus, the key to the cause of action was the employee's *complaints to management* about the workplace safety issues. See *id.* at 78.

Absent some invocation of the public policy in a manner that puts the employer on notice that the employee is vindicating broader interests than his own, the jeopardy element cannot be satisfied. An employer cannot jeopardize a policy that an employee is not invoking. The court of appeals' opinion departs from this logic, leaving employers open to liability under theories that have only a tenuous (if any) connection to the public policy supposedly invoked. This

possibility makes this case one of public or great general interest that is appropriate for this Court's review.

### CONCLUSION

For all of the foregoing reasons, this case presents a matter of public or great general interest that is deserving of this Court's attention, analysis, and adjudication. Amicus Curiae therefore asks that this Court accept the Appellant's discretionary appeal and hear this cause on the merits.

Respectfully submitted,



Donald R. Keller (0022351)

Vladimir P. Belo (0071334)

*Counsel of Record*

BRICKER & ECKLER LLP

100 South Third Street

Columbus, Ohio 43215

Telephone: 614-227-2300

Facsimile: 614-227-2390

E-mail: dkeller@bricker.com

vbelo@bricker.com

Attorneys for Amicus Curiae

Ohio Management Lawyers Association

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document, *Memorandum In Support of Jurisdiction of Amicus Curiae Ohio Management Lawyers Association*, was served by ordinary U.S. mail to the following counsel for Appellee and Appellant on October 4, 2010:

Todd D. Penney, Esq.  
Scheuer Mackin & Breslin LLC  
11025 Reed Hartman Highway  
Cincinnati, OH 45242  
Counsel For Appellant Eurand, Inc.

David M. Duwel, Esq.  
Todd T. Duwel, Esq.  
130 W. Second Street  
Suite 2101  
Dayton, Ohio 45402  
Counsel for Appellee Randall Dohme



---

Vladimir P. Belo  
Counsel of Record for Amicus Curiae