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I. INTRODUCTION

Couple to Couple League International, Inc's ("CCLI") merit brief continues the same flawed reasoning that informed the Ohio Board of Tax Appeals' ("BTA") two-member majority decision. Echoing the majority's observation that this case is "remarkably similar" to *Girl Scouts—Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, CCLI likewise suggests that the *Girl Scouts* case paves the way for its claim of exemption under R.C. 5709.12(B). Indeed, in CCLI's view, the reasoning of *Girl Scouts* is nothing less than controlling precedent in this matter. CCLI offers virtually no additional authority to buttress its case.

Yet, CCLI's attempt to place all of its eggs in the basket of *Girl Scouts* is mistaken. Though there are many distinguishing factors (and we detail them *infra*), perhaps the most revealing one is that the merchandise sold at the store in *Girl Scouts* played only a de minimis role in the Girl Scouts' overall operations, whereas the promotion of CCLI's natural family planning techniques through the distribution of merchandise and instructional classes on a fee-for-service basis is CCLI's *raison d'être*. Unlike in *Girl Scouts*, the sale of merchandise and instructional classes is not merely incidental to the promotion of CCLI's message; rather, it is the sole vehicle by which CCLI promotes its message. As a general matter, individuals that do not pay for CCLI's merchandise and instructional classes are consequently foreclosed from learning about CCLI's natural family planning techniques. Such a *quid pro quo* relationship hardly embodies this Court's notion of "charity." As explained in *Planned Parenthood Assn. v. Tax Commr.*, "charity" denotes a good-faith attempt to benefit someone "without regard to their ability to supply that need from other sources, and without hope or expectation, if not with

positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.” (1966), 5 Ohio St.2d 117, paragraph one of the syllabus.

CCLI further illuminates the frailty of its position by suggesting that the rule of law that controls in this case is that “where an institution operates a store that serves as an essential and integral part of the institution’s operations and is not operated with a view to profit, an exemption from property taxes must be granted.” CCLI Br. 16. Predictably, CCLI attempts to anchor this rule of law to *Girl Scouts*; however, such a rule of law could not have possibly been intended by the Court. Breathtaking in its sweep, the rule of law urged by CCLI would exempt virtually any entity that distributed information on a fee-for-service basis so long as that entity operated on a not-for-profit business model. Indeed, it is difficult to imagine how a bookseller dealing in self-help merchandise would not fall within CCLI’s posited rule of law so long as the bookseller operated on a not-for-profit basis. Surely, *Girl Scouts* did not open up such a gaping hole in this Court’s tax exemption jurisprudence.

As the Tax Commissioner explained in his merit brief, the proper framework for analyzing the merits of this case is set forth in this Court’s decision in *Zindorf v. Otterbein Press* (1941), 138 Ohio St. 287, as well as the cases that have followed it. See, e.g., *American Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38; *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359; *Battelle Memorial Inst. v. Dunn* (1947), 148 Ohio St. 53; *The Incorporated Trustees of the Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185. Under *Zindorf* and its progeny, the proper inquiry centers on the extent to which the taxpayer is engaged in distributing information on a fee-for-service basis as opposed to a free or reduced-fee basis. A related principle centers on whether the taxpayer operates in the commercial marketplace against other competitors. Here, the record unquestionably demonstrates that CCLI’s core business model involves the

distribution of merchandise and instructional classes on a fee-for-service basis, with little regard given to the distribution of such items on a free or reduced-fee basis. Moreover, the record also demonstrates that CCLI sold information and merchandise in the commercial marketplace against other competitors.

In short, this Court should decline to endorse CCLI's expansive view of *Girls Scouts* and, instead, apply the framework espoused in *Zindorf* and its progeny. The BTA's decision and order should be reversed.

II. ARGUMENT

A. CCLI's operations fall well-outside the ambit of the *Girl Scouts* decision.

CCLI's attempt to shoehorn itself into the reasoning of *Girl Scouts* is simply not persuasive.¹ In that case, the Court granted exemption under R.C. 5709.12(B) to a store owned and operated by the Girl Scouts. The 256 square foot store was situated in the Girl Scouts' 12,000 square foot building. The store only sold items reflecting membership in the Girl Scouts, such as "books, badges, patches, pins, and uniforms, as well as polo shirts, tee shirts, and sweatshirts bearing the Girl Scouts insignia." 113 Ohio St.3d at 24. While members sometimes purchased the items to recognize their participation and accomplishments, they were not required to purchase such items. The items could not be purchased anywhere else in Stark County. Moreover, "[t]he store [did] not advertise to the general public, nor [did] it offer items unrelated to the Girl Scouts." *Id.* Depending on the vendor, the store sold some items above cost and

¹ Though the Tax Commissioner's merit brief contains an extensive discussion of *Girl Scouts* (see T.C. Br. 23-25), he feels compelled to discuss the contours of that case once again due to CCLI's overwhelming reliance on it.

other items at cost plus shipping. In the store's twelve years of operation, it generated a profit in only one year.

The manner by which CCLI uses its property starkly contrasts with the fact-pattern from the *Girl Scouts* case. There are a multitude of distinctions:

- First, and perhaps most importantly, whereas the Girl Scouts' store constituted a de minimis aspect of its operations, the promotion of CCLI's natural family planning techniques through the distribution of merchandise and instructional classes on a fee-for-service basis is CCLI's raison d'être. Unlike in *Girl Scouts*, the sale of merchandise and instructional classes is not merely incidental to the promotion of CCLI's message; rather, it is the sole vehicle by which CCLI promotes its message.
- Second, the store in *Girl Scouts* comprised only 2% of the property whereas CCLI's warehouse comprises roughly 50% of the property. Supp. 17; H.R. 64. Thus, whereas the Girl Scouts dedicated a small sliver of its property to selling merchandise, CCLI has devoted half of its property to holding and processing merchandise for sale.
- Third, whereas members of the Girl Scouts were not required to purchase any of the merchandise offered in their store, prospective adherents of CCLI's message are required to purchase its books and instructional classes in order to understand CCLI's natural family planning techniques. Indeed, without the purchase of CCLI's books and instructional classes, prospective adherents would be unable to implement the natural family planning techniques into their lives.

- Fourth, whereas the Girl Scouts only offered merchandise that was related to their organization, CCLI offered not only its own merchandise but also an array of merchandise created and prepared by third parties. Such third party merchandise included: a video concerning the treatment of religion in movies (Supp. 92); a bluegrass-themed CD regarding the sacred (Supp. 97); an interactive computer game for children (Supp. 97); a “Catholicism for Dummies” book (Supp. 114); a book of family activities and craft projects for Lent and Easter (Supp. 120); a Rosary-themed drawing pad for kids (Supp. 125-126); and various cookbooks concerning the preparation of baby food, eliminating sugar from one’s diet, and preparing nutritious meals on a budget (Supp. 137-138, 146-147).
- Finally, whereas the Girl Scouts’ merchandise was not marketed to compete with for-profit enterprises, the third party merchandise that CCLI sold was available through other outlets in the commercial marketplace. Supp. 15; H.R. 56-57.

CCLI next errs in attempting to craft a rule of law that it claims is moored to the *Girl Scouts* decision. In CCLI’s view, “where an institution operates a store that serves as an essential and integral part of the institution’s operations and is not operated with a view to profit, an exemption from property taxes must be granted.” CCLI Br. 16. It is not surprising that CCLI believes it fits within the aforesaid rule of law. What is surprising, however, is that it could read the *Girl Scouts* decision in such a sweeping fashion and draw such an inference. CCLI’s rule of law would exempt virtually any entity that distributed information on a fee-for-service basis so long as that entity operated on a not-for-profit business model. It is no stretch to conclude that a bookseller dealing in self-help merchandise would fall within the posited rule of law so long as the bookseller operated on a not-for-profit basis. The bookseller could even sell its items at a

price well-above cost, compete against other commercial enterprises, and still receive an exemption so long as the bookseller adopted the not-for-profit business model. Surely, *Girl Scouts* did not set forth such a breathtaking rule of law, nor did it represent such a clean-break from this Court's settled jurisprudence in the realm of charitable tax exemptions. As we explain below, *Zindorf* and its progeny provide the proper framework for analyzing the merits of this controversy, not *Girl Scouts*.

B. *Zindorf* and its progeny confirm that CCLI is not using its property exclusively for charitable purposes.

It is beyond dispute that, as a general matter, the dissemination of information for the benefit of mankind is a charitable act. *American Issue Publishing Co. v. Evatt* (1940), 137 Ohio St. 264, 266. See also *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 120; *Herb Soc. of America v. Tracy* (1994), 71 Ohio St.3d 374, 376; *American Humanist Assn. v. Bd. of Tax Appeals* (1963), 174 Ohio St. 545, 546. Cf. *Planned Parenthood Assn.*, 5 Ohio St.2d at 119-120. However, the Court's jurisprudence has drawn a sharp line where a taxpayer overwhelmingly disseminates information on a fee-for-service basis, with little regard given to the distribution of such information on a free or reduced-fee basis. *Zindorf*, 138 Ohio St. at 290. See also *American Soc. for Metals*, 59 Ohio St.3d at 40; *Lutheran Book Shop*, 164 Ohio St. at 361-362; *Battelle Memorial Inst.*, 148 Ohio St. at 60-61; *The Incorporated Trustees of the Gospel Worker Society*, 140 Ohio St. at 189. A separate, but related, principle that emanates from this Court's decisional law is that exemption must be denied where a taxpayer's core business model involves the offering of merchandise for sale in the commercial marketplace against other competitors. See *Zindorf*, 138 Ohio St. at paragraph 2 of the syllabus; *Lutheran Book Shop*, 164 Ohio St. at 361-362.

1. CCLI's modus operandi involves the promotion of its message through the sale of merchandise and instructional classes, with little regard given to the distribution of such items on a free or reduced-fee basis.

The evidentiary record in this matter, though largely ignored by the BTA's two-member majority, brings CCLI squarely within the ambit of *Zindorf* and its progeny.² For the period of June 1, 2002 to June 30, 2007, CCLI's federal tax returns (i.e. Form 990s) demonstrate that CCLI generated over \$2.8 million dollars from the sale of merchandise, resulting in a gross sales profit of over \$1.3 million dollars. Additionally, over the same period, CCLI's federal tax returns demonstrate that it generated almost \$1.9 million dollars from the sale of its instructional classes.³

CCLI seeks to minimize the impact of these massive dollar figures by pointing out that it suffered a net loss in 2002, 2003, and 2004. CCLI Br. 14. This may be true, however, CCLI conveniently omits any mention of the net profits that it enjoyed during 2005 and 2006. Supp. 280, 306. Moreover, CCLI fails to explain how a net loss bolsters its position that its property is being used primarily for charitable purposes. A net loss could be reflective of a multitude of variables, none of which has anything to do with whether the property is being used charitably. Here, a review of CCLI's federal tax returns demonstrates that the largest expense is attributable to "program services."⁴ Using the Form 990 from the 2002 tax year as an example, we see that "program services" constituted \$1,559,959 of CCLI's total expenses. Supp. 172. According to "Part II – Statement of Functional Expenses," the largest component of CCLI's "program

² At page 23 of its merit brief, CCLI attempts to chip away at *Zindorf* by suggesting that the decision impliedly held "that the portion of the printing work performed for the church was charitable in nature." However, as explained in *Hubbard Press v. Tracy*, there is nothing inherently charitable about printing material for a church. (1993), 67 Ohio St.3d 564, 566.

³ The data relating to CCLI's sale of merchandise and instructional classes is more fully set forth at page 8 of the Tax Commissioner's merit brief.

⁴ "Program services" are set forth on line 13 of the form 990.

services” are attributed to: “other salaries and wages” (i.e., \$570,209); “postage and shipping” (i.e., \$138,983); and “promotional” expenses (i.e., \$283,378). Supp. 173, 186. In other words, CCLI’s net loss was simply driven by expenses that are attendant in the operation of any business, namely, overhead.

To be sure, if CCLI’s net losses were driven largely by the provision of merchandise and instructional classes on a free or reduced-fee basis, that would certainly tend to militate in CCLI’s favor. However, the record demonstrates that quite the opposite is true. For 2002, the tax year at issue, CCLI’s two witnesses were unable to provide any probative or competent testimony regarding the extent to which CCLI distributed free or reduced-fee materials to the general public. Supp. 14, 36; H.R. 53, 138-139. The only two years for which information was provided regarding the extent to which CCLI distributed free or reduced-fee merchandise were 2005 and 2007. In 2005, a mere 7.36% of CCLI’s gross sales included the provision of free merchandise. For 2007, the percentage was even less, 4.37%.⁵ Equally telling, CCLI failed to provide virtually any free or reduced-fee instructional classes to the general public. For the 2002 tax year, CCLI presented no information on this topic. Moreover, for 2005, 2006, and 2007, BTA Chairperson Margulies found that “CCLI only offered 1½ to 2 percent of its classes for free.” Supp. 381; BTA Decision and Order 12 (Margulies’ Partial Dissent).

For its part, CCLI endeavors to mitigate the paltry levels of free and reduced-fee merchandise and instructional classes by pointing to Article VII of its Constitution, which states in-part that “Each participant shall be expected to make a contribution of at least the amount established by current CCL policy, however, no one shall be denied attendance at CCL classes because of an inability to make a financial contribution.” Yet, CCLI’s actions undermine this

⁵ The calculations for these percentages are explained on page 11 of the Tax Commissioner’s merit brief.

declaration. Specifically, CCLI's website did not publicize the availability of free or reduced-fee merchandise or instructional classes to the general public. Supp. 36; H.R. 139-140. Moreover, CCLI did not create a formal financial assistance policy until January of 2008—a date that precedes the BTA hearing date (i.e., June 20, 2008) by only five months. Supp. 13; H.R. 48. If CCLI had such a long-standing policy of providing free and reduced-fee merchandise and instructional classes, as CCLI suggests, one is left to wonder why, since CCLI's inception in 1971, it took thirty-seven years to create a formal financial assistance policy. Though many inferences could be drawn from this state of affairs, one could reasonably conclude that the reason for creating the financial assistance policy was spurred, at least in-part, as an anticipation of tax litigation.

2. The merchandise offered for sale by CCLI was also made available for sale in the commercial marketplace.

Under *Zindorf* and *Lutheran Book Shop*, the inquiry under R.C. 5709.12(B) also centers on whether the taxpayer sells its merchandise in the marketplace against other commercial enterprises. This line of inquiry was later adopted in *Girl Scouts*, where the Court concluded in-part, that the store was entitled to exemption because “the merchandise [was] not marketed to compete with commercial for-profit enterprises.” 2007-Ohio-972, ¶ 18.

Here, the facts demonstrate that the third party merchandise offered for sale by CCLI was offered for sale in the marketplace by other vendors. Specifically, Mr. Alderson, executive director of CCLI, testified as follows:

Q: Okay. Do you know whether any other organizations sold videos, books and other materials similar to what was sold by Couple to Couple League prior to January of this year?

A: I'm sure that there's other organizations that sold their own NFP book, but that's — I'm not sure what other videos and things that they have. I would assume that they have something similar.

Q: And as far as the non-Couple to Couple League materials that you – that the Couple to Couple League recommended, if those materials were otherwise available out in the market?

A: Yes.

Supp. 15; H.R. 56-57. Such third party items included: a video concerning the treatment of religion in movies (Supp. 92); a bluegrass-themed CD regarding the sacred (Supp. 97); an interactive computer game for children (Supp. 97); a “Catholicism for Dummies” book (Supp. 114); a book of family activities and craft projects for Lent and Easter (Supp. 120); a Rosary-themed drawing pad for kids (Supp. 125-126); and various cookbooks concerning the preparation of baby food, eliminating sugar from one’s diet, and preparing nutritious meals on a budget (Supp. 137-138, 146-147). Mr. Alderson did not identify the vendors in the marketplace that also sold such third party items, but considering CCLI’s relationship with Amazon.com, one could reasonably conclude that Amazon.com was one of these vendors.

For its part, CCLI argues that it is “irrelevant that the materials may be available from a third party and that the institution is arguably operating in competition with commercial concerns” if “the materials sold are an essential and integral part of the charitable mission of the institution.” CCLI Br. 24. Not only is this statement irreconcilable with the pronouncements made in *Zindorf*, *Lutheran Book Shop*, and *Girl Scouts*, it has no basis in logic or policy. The following hypothetical illustrates the error with CCLI’s argument. Assume a § 501(c)(3) entity, Healthy Living Inc., has as its stated mission, the provision of information to the public on healthy dieting. The information consists of books, magazines, and videos that outline healthy dieting techniques that are endorsed by Healthy Living Inc. The information is sold from Healthy Living Inc’s property. Further assume Healthy Living Inc. has an additional portion of the property, a kitchen, where it performs live cooking demonstrations that incorporate these

same healthy dieting techniques. In the overwhelming majority of instances, the books, magazines, and videos as well as the live demonstrations are offered for sale on a fee-for-service basis—the books, magazines, videos, and demonstrations are priced above cost. Now assume that the exact same items are also available for sale at for-profit enterprises such as Amazon.com.

Under CCLI's view, Healthy Living Inc. would undoubtedly qualify for exemption pursuant to R.C. 5709.12(B) because the sales of books, magazines, and videos, as well as instructional classes, are an essential and integral part of its charitable mission. It is of no consequence to CCLI that for-profit enterprises such as Amazon.com distribute essentially the same information. Thus, in CCLI's view, the only material distinction is that Healthy Living Inc. is a § 501(c)(3) entity and Amazon.com is not. But this Court has never agreed with the proposition that the status of an institution as "charitable" is determined by reference to whether the institution is recognized by the Internal Revenue Service as a § 501(c)(3) organization. Indeed, this Court has consistently denied charitable exemptions to § 501(c)(3) organizations. See e.g. *NBC-USA Housing, Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553; *Northeast Ohio Psychiatric Inst. v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583; *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749. This notion was emphatically reinforced in *NBC-USA Housing, Inc.-Five*, where the Court stated that "tying charitable use so tightly to Congress' policy goals is wrong because Congress does not define the scope of charitable use under Ohio law." 2010-Ohio-1553, ¶ 20.

In short, just as no one would deny that Healthy Living Inc's message is a laudable one, here, the Tax Commissioner is not disputing the merits of CCLI's message. The problem lies with the manner in which CCLI promotes its message—that is, CCLI's natural family planning

techniques, as a general matter, are only available to paying customers. Under this Court's decisional law, there is nothing inherently charitable about selling someone something.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the BTA's Decision and Order that granted a real property tax exemption to CCLI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Reply Brief of Appellant Richard A. Levin, Tax Commissioner of Ohio, was sent by regular U.S. mail on this 22nd day of October, 2010 to the following:

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