

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

In Re:	:	10-1886
Complaint against	:	Case No. 10-019
David Romain Pheils, Jr.	:	Findings of Fact,
Attorney Reg. No. 0005574	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Toledo Bar Association	:	the Supreme Court of Ohio
	:	
Relator	:	

OVERVIEW

While representing a client in civil litigation, Respondent arranged for his wife to make two loans totaling \$14,500 to the client. Respondent acted as the attorney for his wife during the loan transactions. Respondent's conduct violated rules prohibiting the acquiring of a financial interest in litigation, conflict of interest, and failure to cooperate. The panel recommends a suspension of one year, all stayed on the condition of additional CLE and no further misconduct.

INTRODUCTION

1. The Toledo Bar Association filed a complaint against Respondent on February 8, 2010. The complaint contained four counts of alleged misconduct on the part of Respondent based on his representation of a client, Charles Robinson. The four counts alleged violations of the following disciplinary rules:

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SUPREME COURT OF OHIO

COUNT I

- Prof. Cond. R. 1.8(a) - A lawyer shall not enter into a business transaction with a client or knowingly acquire a pecuniary interest adverse to a client unless the transaction is fair and reasonable, the client is advised in writing and given opportunity to seek independent legal counsel, and the client gives informed consent in writing;
- Prof. Cond. R. 1.8(e) - A lawyer shall not provide financial assistance to a client in connection with pending litigation; and
- Prof. Cond. R. 8.4(a) - It is professional misconduct for a lawyer to violate the Ohio Rules of Professional Conduct through the acts of another.

COUNT II

- Prof. Cond. R. 1.7(a) - A lawyer's continuation of representation of a client creates a conflict of interest if the representation of that client will be directly adverse to another current client.
- Prof. Cond. R. 1.7(b) - A lawyer shall not accept or continue representation of a client if a conflict of interest would be created unless each affected client gives informed consent confirmed in writing.

COUNT III

- Prof. Cond. R. 1.7(a)
- Prof. Cond. R. 1.7(b)
- Prof. Cond. R. 1.8(a)
- Prof. Cond. R. 1.8(e)
- Prof. Cond. R. 1.8(i) - A lawyer shall not acquire a pecuniary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.
- Prof. Cond. R. 8.4(a)

COUNT IV

- Prof. Cond. R. 8.1(b) - A lawyer shall not, in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or knowingly fail to respond.

Respondent filed an answer on March 5, 2010.

2. The matter was heard on August 10, 2010 in Bowling Green, Ohio, before a panel composed of Roger S. Gates, John A. Polito, and Judge John B. Street, panel Chair. None of the panel members was from the appellate district from which the complaint arose, and none was a member of the probable cause panel that certified the matter to the Board. Patrick B. Cavanaugh, Michael A. Bonfiglio, and Jonathan B. Cherry appeared as counsel for Relator, Toledo Bar Association. Respondent was represented by Marshall D. Wisniewski and also acted pro se as co-counsel.

FINDINGS OF FACT

3. On January 4, 2005, Charles M. Robinson hired respondent to represent him with regard to claims against Joseph Goodell, Gary VanCleaf, Royal Homes, Inc., and Henry County Bank. On June 24, 2005, Respondent filed suit on behalf of Robinson. After a series of dismissals and consolidations, the case went to trial on April 14, 2008. On April 25, 2008, at the close of plaintiff's case in chief, the defendants moved for a directed verdict. The court requested that the parties make another effort to try to resolve the case, and the parties reached a settlement agreement which was read into the record. The terms of settlement included a payment of \$20,000 to Robinson.

4. Defense counsel prepared a written settlement agreement to reflect the settlement that had been read into the record at the conclusion of the trial. Respondent believed that the written agreement imposed new and additional obligations upon his client that were not part of the oral settlement agreement. Respondent therefore advised his clients¹ not to sign the proposed written

¹Respondent represented another individual by the name of Scott Salisbury in this litigation as well as Robinson.

agreement.

5. Robinson, however, was anxious to receive the proceeds from the settlement. Robinson wanted to accept the proposed written agreement so he could get his money. Robinson then asked respondent about a loan while the settlement was pending. Respondent agreed to try to arrange a loan for \$4,000 for Robinson. Respondent told Robinson to come back to his office later that afternoon, and he would have the check ready. (Rel. Ex. 25, p. 8) Respondent testified that he contacted two former clients to see if they would be interested in making a loan to Robinson, but they declined.

6. When Robinson returned, there was a check from Jo Anne Pheils, Respondent's wife, made payable to Charles Robinson and Stacy Robinson for \$4,000 waiting for him. Respondent also had a promissory note for the Robinsons to sign. The note was dated May 4, 2008, and called for payment in full by May 30, 2008. Respondent explained to Robinson that the check was from his wife because attorneys are not allowed to loan money to their clients.² Robinson had never met Jo Anne Pheils.

7. The attorneys involved in the lawsuit continued to argue about the terms of the settlement agreement and were unable to reduce it to writing. Each side then submitted a proposed agreement to the court. On June 12, 2008, the trial court chose the other side's proposal, and ordered Respondent's clients to sign that written agreement. Respondent still thought that the written settlement agreement did not accurately reflect the oral agreement, and he advised his clients to appeal the court's decision.

²It is not clear on what date this conversation took place. The check and note were dated May 4, 2008, but Robinson may have had possession of them for a short time before signing the note and cashing the check.

8. Respondent discussed filing an appeal with his clients. In conjunction with this discussion, he prepared a document titled "Attorney Direction." This document would have directed Respondent to end the litigation by accepting the proposed written agreement, even though Respondent advised them not to do so. Neither Robinson nor Salisbury signed the "Attorney Direction." Instead, they signed an "Addendum to Representation Agreement" authorizing Respondent to pursue an appeal.³ (Resp. Ex. N) On June 25, 2008, Respondent filed an appeal.

9. Robinson, however, complained that he needed more money since the case was going to be appealed. On July 3, 2008, Respondent obtained a \$10,500 cashier's check from Huntington Bank payable to his law firm's escrow account. Respondent testified that the source of the cashier's check was money belonging to Jo Anne Pheils, but he never produced any documentation to support this claim. (Tr. 62-64) The money was deposited into the escrow account, and a check for \$10,450 was written out of the account to Charles Robinson and Stacy Robinson, reflecting another loan from Respondent's wife, Jo Anne Pheils. In addition, Respondent prepared a closing statement showing the breakdown of the loan proceeds as follows:

Loan Amount	\$14,500.00
Repayment of \$4,000 loan Plus \$50.00 interest owed	<u>- 4,050.00</u>
Net new money On 7/1/08 loan	\$10,450.00

On the closing statement Respondent identified himself as the attorney for Jo Anne Pheils.

10. Respondent also prepared an "Installment Promissory Note" dated July 1, 2008, which

³The "Addendum to Representation Agreement" appears to be dated June 3, 2008, but it refers to a "June 12, 2008, Judgement Entry," so the actual date of the document is not clear.

required the Robinsons to make payments of \$125 per month at 12% interest until the amount of \$14,500 was paid back to Jo Anne Pheils. Respondent also prepared an "Assignment" whereby Robinson assigned "all his interests, causes of action, rights to be paid and appeal" to Jo Anne Pheils as security for the \$14,500 loan. The assignment was dated July 3, 2008.

11. Robinson failed to make the payments, and on December 17, 2008, Respondent filed suit as attorney for Jo Anne Pheils against Charles Robinson and Stacy Robinson to enforce the note and assignment. This case was dismissed after the Robinsons paid the debt out of the settlement proceeds. Robinson had retained a different attorney and settled the original, underlying case on October 23, 2008.

12. On February 25, 2009, the Toledo Bar Association's certified grievance committee sent a letter to Respondent asking for a written narrative response to the grievance that Robinson had made against him. On March 4, 2009, Respondent wrote back to the Toledo Bar Association. Instead of a written narrative response, Respondent simply enclosed some documents with a cover letter describing the grievance as a fee dispute. On April 2, 2009, the bar association through attorney Edward Fischer wrote to Respondent saying "I am inviting you to expand in writing as to the grievance portion of Mr. Robinson's complaint. In the event that you prefer not to provide anything further or I do not hear from you within the next ten days, I will treat your cover letter as your narrative." (Rel. Ex. 10) On April 6, 2009, Respondent responded to that letter saying that he thought his first letter was more than adequate.

13. On May 7, 2009, the bar association requested the following list of documents from Respondent:

- 1) Copies of all promissory notes issued by your wife Jo Anne Pheils to Charlie Robinson;
- 2) Copy of the Complaint filed in Wood County Common Please (sic) Court case no.

2008CV1197.

- 3) Copies of any checks issued to Mr./Mrs. Robinson by you or your wife;
- 4) Copies of any checks received by you or your wife from Mr./Mrs. Robinson;
- 5) An accounting of all fees and/or costs paid to you by Mr./Mrs. Robinson; and
- 6) All correspondence between you and Mr. Robinson relating to your representation and/or discharge.

14. Respondent wrote back on May 11, 2009. He said he “enclosed all documents not subject to attorney-client privilege, which I believe responds to all six requests.” (Rel. Ex. 13) The response did not group the documents by the request, but it did seem to include all the documents except for checks issued to Robinson. Respondent did not supply a copy of the checks until May 2010.

CONCLUSIONS OF LAW

15. Count One of the complaint concerned Respondent’s role in the \$4,000 loan from Respondent’s wife to Robinson. Relator alleged that Respondent violated Prof. Cond. R. 1.8(a), 1.8(e), and 8.4(a). The panel recommends dismissal of the violation of Prof. Cond. R. 1.8(a) because there was not clear and convincing evidence that Respondent entered into a business transaction with Robinson or acquired a pecuniary interest adverse to him. The terms “business transaction” and “pecuniary interest” are not defined in the rules. Clearly, Respondent’s wife had either a business transaction or pecuniary interest, but the panel does not impute that relationship to Respondent. The panel, on the other hand, does find a violation of Prof. Cond. R. 1.8(e) and 8.4(a) based on the wife’s loan to Robinson. Prof. Cond. R. 1.8(e) prohibits providing financial assistance to a client, and although financial assistance is not defined in the rules, the panel believes it should include arranging a loan from one’s wife to a client. Respondent argued that Robinson was not his client at the time of the loan based on the theory that the attorney-client relationship ended the moment the settlement agreement was read into the record. He contended

that his relationship with Robinson was as a “special” counsel, in that it was limited to the litigation, and not as a “general” counsel. Respondent, however, continued to represent Robinson and even filed an appeal on his behalf. Prof. Cond. R. 8.4(a) makes it misconduct to violate the rules through the acts of another. Respondent committed misconduct by arranging a loan for the client from his wife.

16. Count Two concerned Respondent representing both his wife and Robinson in arranging the loan and alleged a violation of Prof. Cond. R. 1.7(a) and 1.7(b). Respondent argued that he had not violated these rules because his fee agreement with Robinson was limited to the litigation described in the fee agreement. Respondent stated that when the litigation was concluded by the oral settlement agreement, his representation of Robinson ended as well. Therefore, according to Respondent, he was not representing Robinson during the loan process, he was only representing his wife. Respondent’s argument, however, is untenable. Respondent clearly represented Robinson until Robinson fired him on November 17, 2008. He corresponded with opposing counsel about the written settlement agreement on behalf of Robinson, he drafted a settlement agreement, he filed motions on behalf of Robinson, and he filed an appeal. He even had Robinson sign his rights in the case over to his wife. The panel therefore finds that by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.7(a) and 1.7(b).

17. Count Three concerned Respondent’s representation of Robinson and Salisbury in the same matter and alleged that respondent had a conflict with respect to representing both Robinson and Salisbury.⁴ Count Three also alleged misconduct for Respondent’s role in arranging the second loan to Robinson from Jo Anne Pheils. The panel does not find, by clear and convincing

⁴During the hearing, the bar association withdrew the allegations of misconduct concerning respondent’s representation of both Robinson and Salisbury.

evidence, any violations with respect to Respondent's representation of both Robinson and Salisbury. They both seem to have been kept informed of the status of the case and to have given informed consent in writing to allow Respondent to represent them. The panel does find, however, with respect to the second loan made by Jo Anne Pheils to Robinson that Respondent violated Prof. Cond. R. 1.7(a), 1.7(b), 1.8(e), and 8.4(a) for the same reasons as in Counts One and Two. Count Three also alleged a violation of Prof. Cond. R.1.8(i) (a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client) because of the assignment that Robinson made in favor of Respondent's wife as security for the note. The panel is troubled by Respondent's actions, but cannot conclude that he acquired a pecuniary interest, even though his wife did. The panel therefore recommends dismissal of Prof. Cond. R. 1.8(i). The panel also recommends dismissal of Rule 1.8(a) for the same reasons as given in Count One.

18. Count Four alleged a violation of Prof. Cond. R. 8.1(b) in that Respondent did not fully comply with requests by the bar association grievance committee for information. The panel cannot say that it has been shown, by clear and convincing evidence, that Respondent engaged in the specific misconduct alleged in Count Four. Count Four of the complaint alleged misconduct in the way in which Respondent responded to the first inquiry he received from the bar association grievance committee in that he "provided only a very cursory response" instead of a written narrative. Count Four also alleged misconduct because Respondent did not provide all documents requested in the May 7, 2009 letter, and because he referenced an attorney-client privilege. Prof. Cond. R. 8.1(b), however, says that a lawyer shall not "fail to disclose a material fact or knowingly fail to respond." Respondent did respond, and the panel does not find, by clear and convincing evidence, that he violated Prof. Cond. R. 8.1(b). Count Four should be dismissed. Had the

Relator amended the complaint to allege misconduct by the way in which Respondent answered the interrogatories propounded to him or in his testimony at deposition or at the hearing, the panel would have been more likely to find a violation Prof. Cond. R. 8.1(b). Respondent's conduct in this regard will be dealt with in the aggravation section of this report.

MATTERS IN MITIGATION AND AGGRAVATION

19. There is an absence of any prior disciplinary record weighing in favor of mitigation.

20. Aggravating factors are multiple offenses, lack of cooperation, submission of false evidence, false statements or deceptive practices, and refusal to acknowledge the wrongful nature of conduct which were all shown to be present. Respondent was quite uncooperative in his dealings with counsel for Relator. He was combative throughout Relator's investigation. He refused to provide a narrative of what happened and simply sent documents. He failed to disclose the source of the money for the second loan which was used to get the cashier's check from Huntington Bank. He repeatedly claimed that he was not Mr. Robinson's attorney at the time of the second loan, even though Robinson had authorized him to file an appeal on his behalf and that authorization was the sole reason for the loan. He called Relator's counsel stupid.

21. Some of his uncooperativeness manifests itself in conjunction with interrogatories that Respondent was asked to complete. The interrogatories did not specify a date by which they were to be answered, so Respondent took the position that he would not have to answer them. In a series of e-mails between Relator's counsel and Respondent discussing the interrogatories and whether or not they were "past due," Respondent wrote:

Have you ever practiced trial law? Do you have any familiarity with the rules of discovery? Can you read and understand the English Language? I do not believe that my cooperation requires me to correct your incompetence and/or ignorance and/or do your work for you. We await any cogent, informed, rational and fact base response which to date we have been denied. (Rel. Ex. 19)

22. The interrogatories themselves made a request for “all bank accounts you had (both business and personal) in April, May, June, and July 2008.” Respondent replied that he “had none.” He said his response was accurate because he did not have any personal bank accounts and he did not have any business accounts. His law firm was a separate entity. In his testimony at the hearing, however, at one point he said that he and his wife kept all of their accounts separate.⁵ He later changed his answer to say that his wife kept her accounts separate and that he

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- Q. Okay. Now, back to the source of the money again. I want to make this clear, okay? Did you have the ability in this case to sign for Jo Anne to withdraw money from the accounts from which her money came that were the dollars, the cash, that was loaned to Robinson?
- A. The only accounts that she and I had that were joint survivorship were investments in the stock market, okay? All the other accounts were in our individual names, either my name or hers. And I was neither a signatory on her money nor was she a signatory on mine. She could not take money out of my account nor could I take any out of hers.
- Q. And that agreement, or that arrangement, was at all times during the course of the marriage?
- A. Well, originally when we were married, we didn't have any money. But since we had a fair amount of money the last 20 years or so, yeah, that's what that was.
- Q. Okay. Now, your testimony, then, would also be she didn't have the ability to withdraw your money from your accounts?
- A. That's right. (Tr. 159)

did not have any.⁶ While it is difficult to believe that Respondent did not have any bank accounts in his name, none was shown to exist. Respondent may not have engaged in submitting false evidence or false statements, but the panel does conclude that, by his testimony at the hearing, Respondent failed to disclose material facts in an attempt to deceive the panel as to the source of the funds for the second loan to Robinson.

23. Respondent does not acknowledge that he did anything wrong.

SANCTION

24. Relator recommended a one year suspension, all stayed, on the condition that Respondent complete an additional six hours of continuing legal education in ethics and office management and that he commit no further disciplinary violations. Respondent argued that there had not been

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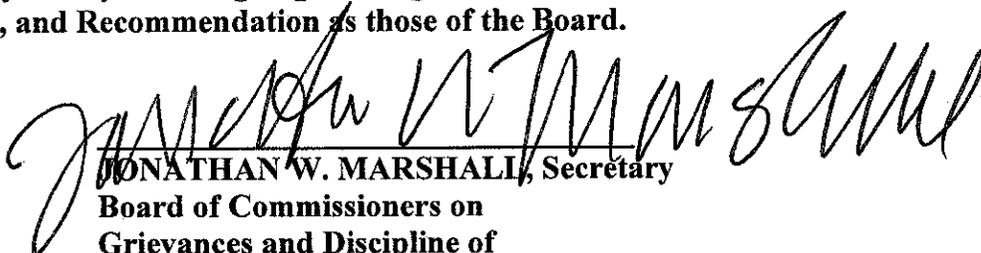
- Q. . . You testified that between April and July of '08, the times of these two loans, the only joint and survivor accounts you held with your wife were stock market accounts, correct?
- A. The only ones I recall, yes. There were no demand deposit accounts of any kind.
- Q. And that all the other accounts were either in your name alone or your wife's name alone, correct?
- A. That's correct.
- Q. Then why, Mr. Pheills, in response to interrogatory No. 1, later Exhibit 21, when we asked you to identify all bank accounts you had in April, May, June, July of 2008, you responded you had none?
- A. How's that supposedly inconsistent?
- Q. You said you had none.
- A. That's right.
- Q. And now you're saying you do.
- A. No, I'm not. I'm saying that there are no accounts in my wife's and my name jointly other than stock accounts with a stockbroker.
- Q. Did you testify that you had accounts in your name alone and your wife's name alone?
- A. Well, if I said that, then I misspoke, because there were none in my name. The only places I had my name on any accounts were in the law firm. (Tr. 200-201)

a showing that he violated any of the alleged violations and that the complaint should be dismissed. The panel recommends that Respondent be suspended from the practice of law for one year, all stayed, on the conditions that he complete an additional six hours of continuing legal education in ethics and office management and that he commit no further disciplinary violations.

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 October 7, 2010. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. It recommends, however, based on his demonstrated contempt for his obligations to the profession and the disciplinary system as well as his deceptive actions throughout this proceeding, that Respondent, David Romain Pheils, Jr., be suspended for a period of one year with six months stayed upon the conditions contained in the panel report. 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 Recommendation as those of the Board.


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

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

In re:

Case No. 10-019

David R. Pheils, Jr.,

STIPULATION

Respondent,

-vs-

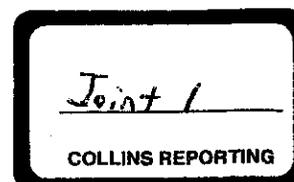
Toledo Bar Association,

Relator.

Now comes Relator and Respondent, and stipulate the following facts:

1. The Toledo Bar Association, Relator, through its certified grievance committee, is authorized to file this complaint pursuant to rule V, Sections (3)(C) and (4)(A) of the supreme Court for the Rules of Government for the Bar of Ohio.

2. David Romain Pheils, Jr., Respondent, was admitted to the practice of law in the state of Ohio on the 9th day of November, 1974, and is subject to the Supreme Court Rules for the Government of the Bar of Ohio, and is registered with the Supreme Court under attorney registration number 0005574.



3. On November 16, 2004, attorney Stephen D. Hartman of Kerger & Associates, sent Charles Robinson a letter in response to being terminated by Robinson.

4. On January 30, 2004, Robinson filed a Chapter 7 Bankruptcy listing claims for money due from Royal Homes, Inc., as a declared asset which fact was successfully interposed as a defense in Case No. CI-05-07042 in the Lucas County Court Common Pleas (Exhibit C).

5. On January 4, 2005, Charles M. Robinson ("Robinson") hired Respondent to represent him with regard to claims against Joseph Goodell, Gary VanCleaf, Royal Homes, Inc. and Henry County Bank. (January 4, 2005, authorization and Agreement for Contingent Fee Representation; Exhibits 1 and B).

6. On June 24, 2005, Respondent filed suit on behalf of Robinson and after a series of dismissals and consolidations the case went to trial on April 14, 2008. On April 25, 2008, at the close of plaintiffs' case in chief, the defendants moved for a directed verdict. The court requested that the parties make another effort to try to resolve the case. The parties then reached a settlement agreement which was read into the record (Exhibit F).

7. After defense counsel, Erik G. Chappell prepared, and Respondent reviewed, a proposed written settlement agreement (Exhibit K), Respondent advised Robinson that he should not sign Defendants' proposed written agreement because such defense proposed written agreement imposed many obligations to which Robinson had not agreed.

8. Thereafter defense counsel filed a motion with the court to require Robinson to sign Defendants' proposed written settlement agreement which motion was granted by the trial court, to which Respondent objected and asked the trial court to order Defendants to sign Plaintiffs' proposed written settlement agreement (Exhibit P).

9. Robinson and his wife, Stacy, signed a May 4, 2008, \$4,000.00 Promissory Note to JoAnne Pheils and received JoAnne Pheils' check in the amount of \$4,000. (Exhibits 2 and I; Exhibits 2A and J).

10. At the time of the May 4, 2008 loan, Robinson had never met JoAnne Pheils.

11. On June 3, 2008, Robinson signed a "Representation Addendum for Appeal" (Exhibit N).

12. On June 6, 2008, Respondent filed a Motion regarding the settlement (Exhibit P).

13. On June 25, 2008, Respondent filed an appeal pursuant to such Representation Addendum for Appeal (Exhibit N).

14. The Escrow Account record for Pheils & Wisniewski reflects a deposit into "Escrow Account: JoAnne Pheils" in the amount of \$10,500 on July 3, 2008. (Exhibits 3A and S).

15. A \$10,500 Huntington Bank Cashiers Check, dated July 3, 2008, listing Respondent as remitter and payable to Pheils and Wisniewski Escrow Account, was deposited into Pheils & Wisniewski's Escrow account on July 3, 2008. (Exhibits 3B and S; Deposit Ticket attached as Exhibit 3C).

16. Respondent prepared a Closing Statement, undated, which reflects that of the \$14,500 loan amount, \$4,050 was deducted as repayment of the \$4,000 loan, plus \$50.00 interest owed. (Exhibits 4 and T).

17. On December 17, 2008, respondent filed suit as counsel for JoAnne Pheils against Charles Robinson and Stacy Robinson to enforce the July 1, 2008 Note and July 3,

2008 Assignment. (December 17, 2008 Complaint, Wood County Court of Common Pleas, Case No. 2008-CV-1189, Exhibit 6).

18. Such case was dismissed after the Robinsons paid such debt from the settlement proceeds (Exhibit AA).

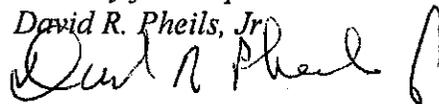
19. Relator's and Respondent's Exhibits are stipulated as authentic but both parties reserve any other objections as to their admissibility.

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David R. Pheils, Jr.


DATED this 10th day of August, 2010.