

ORIGINAL

In the  
**Supreme Court of Ohio**

IN RE ALL CASES AGAINST SAGER  
CORPORATION

Case No. 2010-1705

On Appeal from the Cuyahoga County  
Court of Appeals  
Eighth Appellate District

Court of Appeals Case No.  
CA-09-093567

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APPELLANT'S BRIEF IN OPPOSITION TO  
APPELLEE'S MOTION TO STRIKE APPELLANT'S MERIT BRIEF  
AND MOTION TO DISMISS

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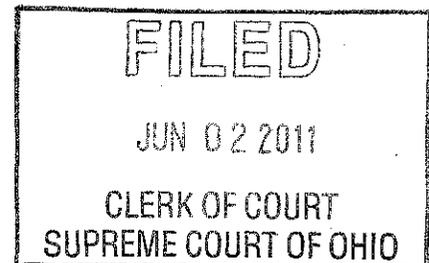
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**APPELLANT'S BRIEF IN OPPOSITION TO**  
**APPELLEE'S MOTION TO STRIKE APPELLANT'S MERIT BRIEF**  
**AND MOTION TO DISMISS**

Appellee's one-page Motion To Strike Appellant's Merit Brief And Motion To Dismiss ("Motion") is untimely, baseless, unsupported by any authority, and frivolous, and should be denied.

**1. APPELLEE'S MOTION TO STRIKE AND DISMISS IS  
UNTIMELY AND SHOULD BE STRICKEN**

Appellee's Merit Brief was due to be filed on May 3, 2011, thirty days after the filing of the Merit Brief of Appellant Sager Corporation ("Appellant" or "Sager"), per S.Ct. Prac. R. 6.3(A)(2). Appellee's Motion, is, in effect, an additional response to Sager's Merit Brief. Because it is a response to Sager's Merit Brief, the Motion was also due to be filed on May 3, 2011, a point effectively conceded by Appellee when Appellee filed the Motion simultaneously with Appellee's Merit Brief.

Appellee did not file its Merit Brief or the Motion on May 3, 2011. Instead, Appellee requested a stipulated extension of time to file its Merit Brief, as permitted by S.Ct. Prac. R. 14.3(B)(2)(a). Specifically, on May 2, 2011, the day before Appellee's Merit Brief was due to be filed, counsel for Appellee contacted counsel for Appellant Sager to request a stipulated extension of time to file the Merit Brief. Counsel for Sager agreed to stipulate to an extension of time for the filing of Appellee's Merit Brief.<sup>1</sup> On May 2, 2011 Appellee filed its "Stipulation to Agreed Extension of Time until May 23, 2011 for Appellee's *to File Merit Brief*"<sup>2</sup> (emphasis added). (See docket entry for May 2, 2011.)

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<sup>1</sup> Counsel for Appellee did not disclose that Appellee was also planning to move to strike and dismiss parts of Sager's merit brief, and did not request any extension to do so.

<sup>2</sup> No Stipulation was sought nor filed as to any Motion to Strike or Motion to Dismiss.

Appellee could not have obtained an extension for its Motion even if it had requested one, whether by stipulation or by application to the Court. By its plain language, S.Ct. Prac. R. 14.3(B)(2)(A) is extremely limited in scope, and permits extensions of time only to file merit briefs (and certain other documents not at issue here). S.Ct. Prac. R. 14.3(B)(1) (titled “General prohibitions against extension of time”) provides that the Court will not extend the time for filing any other documents not mentioned in S.Ct. Prac. R. 14.3(B)(2). Accordingly Appellee’s Motion is an untimely response to Appellant’s Merit Brief, and should be stricken. *See Pfahler v. National Latex Prod. Co.* (2000), 90 Ohio St. 3d 1463, 1463, 737 N.E.2d 1290, 1290 (“[The] motion to strike is, in substance, a response to appellants’ motion for stay pending appeal and, as such, is untimely under S.Ct. Prac. R. XIV(4)(B). Whereas S.Ct. Prac. R. XIV(1)(C) prohibits untimely filings, IT IS ORDERED by the court, sua sponte, that the motion to strike be, and hereby is, stricken.”).<sup>3</sup>

**2. THE MOTION TO STRIKE IS GROUNDLESS AND SHOULD BE DENIED**

If Appellee’s Motion is not stricken, it should be denied on the merits. The Motion is premised on the incorrect assertion, unsupported by any authority, that portions of Appellant’s Merit Brief should be stricken because the Propositions of Law set forth in that Brief are not identical to the Propositions of Law set forth in Appellant’s Memorandum In Support Of

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<sup>3</sup> The Certificates of Service attached to both Appellee’s Motion and Appellee’s Merit Brief state that the Motion and Brief were served on May 23, 2011, the date both documents were filed. The Certificates, however, are incorrect as service was not actually made on that date. Both the service letter and the postmark on the envelope in which the documents were sent are dated May 24, 2011. (*See* copies of the service letter and postmarked envelope, attached as Exhibits A and B hereto, respectively.) Thus, neither the Motion nor the Merit Brief were timely served. S.Ct. Prac. R. 14.2(A). Because this Court’s Rules of Practice mandate a strict 10-day deadline for responding to the Motion (three days of which, in this case, included the Memorial Day holiday weekend), Appellee’s dilatory service effectively shortened Appellant’s response period by two days, another reason to strike Appellee’s Motions.

Jurisdiction (“Memorandum In Support”). This premise is wrong on its face – every Proposition of Law set forth in the Merit Brief addresses issues of law that were raised in the Memorandum In Support. Indeed, this Court’s Rules of Practice do not require that a Merit Brief repeat verbatim the Propositions of Law stated in a Memorandum In Support, only that the issues be raised in the jurisdictional briefing. By its nature, the Memorandum In Support is supposed to focus on the reasons the Court should accept an appeal for review, not the merits of the legal arguments; the Merit Brief is supposed to address the legal issues in greater depth.

That is exactly what Sager’s Propositions of Law in its Merit Brief do: they take the issues raised in Sager’s Memorandum In Support, and address them in detail.

**A. Every Proposition of Law In Sager’s Merit Brief Pertains To Issues Addressed In Sager’s Memorandum In Support**

While Sager’s Memorandum In Support used different headings and set forth one all-encompassing Proposition of Law with a number of sub-parts, it raised every issue that Sager later amplified and crystallized in the Propositions of Law set forth in Sager’s Merit Brief. Thus, every issue raised in the Merit Brief is encompassed in the scope of the Proposition of Law accepted by the Court for review.

Appellant’s Memorandum In Support urged this Court to accept review for one basic, overarching reason, as summarized in its main argument heading:

**IV. THE COURT SHOULD ACCEPT THIS APPEAL BECAUSE THE COURT OF APPEALS’ DECISION, PERMITTING CLAIMANTS TO RESURRECT A DISSOLVED ILLINOIS CORPORATION IN VIOLATION OF ILLINOIS LAW AND CONTRARY TO SETTLED AMERICAN JURISPRUDENCE, VIOLATES THE U.S. CONSTITUTION, VIOLATES OHIO LAW AND RENDS THE FABRIC OF CORPORATION LAW**

(Memorandum In Support, p. 4.)

Within that main argument heading, Sager set out a single, all-encompassing Proposition of Law, stating that Ohio statutes and precedent, as well as the U.S. Constitution, require the law of the state of incorporation to determine whether a corporation is dissolved and subject to suit. Sager further identified the issues to be presented on review in its argument headings:

A. Proposition of Law No. 1: As a constitutional matter, and as a matter of Ohio statutes and precedent, whether a dissolved corporation is susceptible to suit must be determined by the law of its state of incorporation, not by the law of the forum state.

1. American jurisprudence establishes that corporations are creatures of their state of incorporation, and whether they exist for purposes of suit is determined by that state's law.

2. The Commerce Clause forbids states from applying inconsistent rules to issues that must be determined by one state's law.

3. The Due Process Clause bars Ohio from upending the justified expectations of corporations that their existence will be determined only by the state of their incorporation.

4. The Full Faith and Credit Clause requires Ohio to give effect to the corporation law of Illinois.

B. The rulings below unconstitutionally fail to give effect to Illinois law.

C. A court cannot circumvent the law of the state of incorporation by appointing a receiver to collect insurance "assets."

D. The Court of Appeals improperly applied an "abuse of discretion" standard.

(Memorandum In Support, Table of Contents, p. i.)

Then, in the context of explaining why this Court should accept the case for review, Sager raised and discussed, in general terms as befits a brief Memorandum In Support of Jurisdiction, issues that would be the subject of specific and more detailed discussion in its Merit Brief. The issues raised included the limitations of Ohio's corporation law and receivership law

(Memorandum In Support, pp. 8, 9; 13), whether jurisdiction may be obtained over a dissolved corporation by the pretext of appointing a receiver, especially where the only alleged assets are insurance policies (*Id.*, pp. 12-14); whether jurisdiction for a tort claim may be premised on alleged insurance policies (*Id.*, pp. 13-14); and whether appointing a receiver for a dissolved foreign corporation violates the Constitution, including the Due Process, Commerce and Full Faith and Credit clauses (*Id.*, pp. 9-12 and *passim*).

These exact issues became, in Sager's Merit Brief, the following specific and detailed Propositions of Law:

Proposition of Law No. I: The powers of a state court to determine the corporate existence of a foreign corporation, or otherwise to supervise and manage its corporate affairs, are narrowly circumscribed by the Constitution and by principles of jurisdiction and comity.

Proposition of Law No. II: Section 2735.01 of the Revised Code does not authorize an Ohio court to appoint a receiver to wind up the affairs of a foreign corporation or to accept service of process for it.

Proposition of Law No. III: A receiver may not be appointed to resurrect a dissolved corporation when the only assets alleged to exist are liability insurance policies.

Proposition of Law No. IV: In the absence of jurisdiction over an alleged tort defendant, a court may not rest jurisdiction for a tort claim upon the purported interest of tort claimants in the defendant's alleged insurance policies.

Proposition of Law No. V: Subjecting a dissolved foreign corporation to suit, contrary to the law of its state of incorporation, violates the Due Process Clause, the Commerce Clause and the Full Faith and Credit Clause of the U.S. Constitution.

Every one of these Propositions of Law is directed to issues that were specifically raised and presented in Sager's Memorandum In Support and is directly related to the overarching issue presented in this case. In addition, none of these issues are new to this

litigation – they have formed the basis of argument at every step, in the trial court and in the Court of Appeals, and each was a factor in the Court of Appeals’ decision, now on appeal.

Appellee does not assert otherwise. Indeed, Appellee cannot point to a single substantive issue presented in Sager’s Propositions of Law that was not raised in the Memorandum In Support. Nor can Appellee point to any authority in the Court’s Rules of Practice or elsewhere to support its accusations. Instead, Appellee simply and superficially asserts, as allegedly improper, that the labels given to the arguments are not identical across the briefing. Appellee is wrong. Sager used different headings and organized the argument with greater detail and precision in its Merit Brief, but addressed exactly the same issues, as befits the purpose of having separate jurisdictional and merit briefing. Thus, Sager’s five Propositions of Law in its Merit Brief present a roadmap by which the issues presented in the Memorandum In Support and accepted by this Court for review can be properly analyzed and adjudicated.

For Appellee to claim that either Appellee or the Court is now being “surprised” with new issues that were beyond the scope of the appeal is disingenuous, if not frivolous. Appellant’s Merit Brief did exactly as expected – it organized and discussed in greater detail the exact issues presented in Sager’s Memorandum In Support, including a discussion of the Court of Appeals’ rationale, with which Appellant disagrees (as is to be expected with any appealing party). Appellee’s feigned “surprise” at Appellant’s Merit Brief is wholly unfounded.

**B. This Court’s Rules Of Practice Do Not Require That Propositions Of Law Asserted In Merit Briefs Be Identical To Those Set Forth In Jurisdictional Memoranda, Only That The Issues Be Raised**

Appellee’s argument also falters because it presumes (again, without authority or support) that the jurisdictional briefing and merit briefing must contain identical Propositions of

Law. That is simply incorrect. Ohio S.Ct. Prac. R. 6.2(B)(4) provides that the Appellant's Merit Brief must contain Propositions of Law formulated to serve as a syllabus:

An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

Likewise, an Appellant's Memorandum In Support of Jurisdiction must set forth propositions of law the Appellant wishes the Court to address. S.Ct. Prac. R. 3.1(A).

Neither Rule 3.1(A) nor Rule 6.2(B)(4), however, state that the proposition(s) of law set forth in the Merit Brief must be identically organized or worded. Indeed, the Staff and Committee Notes to Rule 3 emphasize that the primary focus of the jurisdictional memorandum is not the proposition of law, but the reasons the case should be accepted for merit review: "A memorandum in support of jurisdiction will **briefly** address the propositions of law presented for review in the appeal and the legal arguments supporting those propositions of law. However, the primary focus of the memorandum should be why the Supreme Court should accept the case for a merit review." S.Ct. Prac. R. 3, Staff and Committee Notes (emphasis added).

This focus is the reason the Court imposes a 15-page limit on jurisdictional briefs, so as to "discourage attorneys from filing what amount to full merit briefs, considered inappropriate at this stage of the proceeding." *Id.* Thus, an Appellant's jurisdictional briefing must focus on the reasons for review, not on the details of the propositions of law that will later be presented. An Appellant's merit briefing, then, takes the issues presented in the jurisdictional brief, and addresses them in full. That Sager designated as separate Propositions of Law in its Merit Brief certain headings set forth in its Memorandum In Support is perfectly allowable and, in fact, adds to a cogent discussion of these issues, which have been raised throughout this litigation.

**C. Where An Issue Is Presented In The Appellant's Memorandum In Support Of Jurisdiction, The Court Will Not Reject A Proposition Of Law In Appellant's Merit Brief That Raises The Same Issue**

This Court has clarified that when an issue is “essentially” raised in the jurisdictional briefing, the Court will not reject an Appellant’s Brief simply because it contains more detailed or additional propositions of law. In *Crawford-Cole v. Lucas County Dep't of Job & Family Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, the Appellant’s jurisdictional briefing set forth only one proposition of law and the Appellant’s Merit Briefing presented additional propositions of law. The Court looked to the substance of the propositions, determined they “essentially raise[d] the same issue,” and addressed them all:

¶8 In its memorandum in support of jurisdiction filed in this court, LCDJFS presented one proposition of law: "The Appellate Court erred in applying the R.C. 119.07 thirty-day period to appeal a Certificate revocation by [LCDJFS] instead of the ten-day period under OAC 5101:2-14-40 because although the rule may have been adopted in accordance with R.C. Chapter 119, R.C. Section 5101.09 specifically exempts the rule from the requirements of R.C. Sections 119.06 to 119.13, which include the 30-day limit." In its merit brief, LCDJFS presents two additional propositions that essentially raise the same issue: whether a 10-day filing period applies to Crawford-Cole's hearing request pursuant to the Administrative Code, or whether a 30-day filing period applies pursuant to the Revised Code.

*Crawford-Cole* is similar to this case, where Sager’s single, all-encompassing general proposition of law in its Memorandum In Support, with numerous subparts, coupled with the more specific headings outlining its jurisdictional argument, raised *all* of the issues that Sager later addressed in its Merit Brief. Sager’s Merit Brief expanded upon these legal propositions, setting forth five specific propositions of law, “applicable to the case and that could serve as a syllabus for the case if appellant prevails.” S.Ct. R. Prac. 6.2(4)(B). Each of those propositions referenced and expanded upon legal issues directly raised and presented for review in Sager’s Memorandum in Support, as described above.

If an Appellant's jurisdictional briefing does not raise an issue in any form, unlike the situation here, then the Court may not address it at the merits stage. *In re Timken Mercy Medical Ctr.* (1991), 61 Ohio St. 3d 81, for example, the Court declined to consider an issue that the appellant "did not raise *or even allude to.*" *Id.*, at 87 (emphasis added). The Court did not reject an issue that was organized or phrased differently in the Merit Brief than it had been in the jurisdictional briefing, but only did so where the issue was not raised at all – which is certainly not the case here.

*Crawford-Cole* and *Timken* are consistent with the Court's overall preference for substance over form. In *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St. 3d 33, 2006-Ohio-6365, the Appellant's Merit Brief did not contain or designate propositions of law at all. But the Court determined that the Appellant's "argument headings...served the purpose of organizing her argument" and thus "presented the legal issues...in a sufficient, concise manner." *Id.* at ¶23 (emphasis added). Thus, the Appellant "did not substantially disregard" the Supreme Court Practice Rules, and her brief was not stricken. The Court noted: "Although 'a substantial disregard of the whole body of these rules cannot be tolerated,' '[i]n order to promote justice, the court exercises a certain liberality in enforcing a strict attention to its rules, especially as to mere technical infractions.'" *Id.* at ¶22, citing *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39.<sup>4</sup>

Here, each issue presented in the Propositions of Law in Sager's Merit Brief were directly raised in Sager's Memorandum In Support. The Court passed on each of those issues when it accepted the appeal for review. Appellee's attempt to argue that it was somehow

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<sup>4</sup> Similarly, in *State ex rel. Charvat v. Frye*, 114 Ohio St. 3d 76, 2007-Ohio-2882, this Court held that even though the Appellant's proposition in his Merit Brief "arguably fails to contain the facts that he alleges compel the conclusion that the court of appeals erred," "the [Appellant's] brief includes headings and subheadings to his proposition of law that presented the legal issues in this case in a sufficient, concise manner." *Id.*, ¶ 11.

surprised by the appearance of these same issues in the Merit Brief is disingenuous and should be rejected.

**3. APPELLANT'S MERIT BRIEF DOES NOT RAISE ANY ARGUMENTS FOR THE FIRST TIME ON APPEAL; TO THE CONTRARY, ALL OF ITS ARGUMENTS SPECIFICALLY RESPOND TO THE COURT OF APPEALS' DECISION AND WERE RAISED BELOW**

Appellee also asserts, in a single sentence in its Motion, that Propositions of Law III and IV are “issues being raised for the first item on appeal.” Appellee disregards the fact that these Propositions of Law are directly addressed to key components of the Court of Appeals’ decision. Clearly, an appellant has the right to raise and discuss the Court of Appeals’ rationale with which it disagrees. Moreover, Appellant’s assertion is false, since the issues raised in these Propositions of Law have been the subject of briefing and analysis below.

One of the central bases of the Court of Appeals’ reasoning was its contention that “Bevan was not seeking the appointment of a receiver in order to dissolve Sager, but instead to administer the remaining assets of Sager; specifically, the distribution of potential insurance proceeds.” Court of Appeals’ Opinion (“Op.”), ¶ 16. The Court of Appeals predicated its reasoning in the remainder of the Opinion on its assumption that alleged insurance policies constitute assets of Sager, thus permitting the receiver to exercise jurisdiction over Sager even though it was a dissolved foreign corporation. Op., ¶¶ 17, 19-22. Thus, Sager is entitled to, and, indeed, obligated to, respond to and rebut the Court of Appeals’ reasoning, which it did under Proposition of Law III: “[a] receiver may not be appointed to resurrect a dissolved corporation when the only assets alleged to exist are liability insurance policies.” (*See also* Memorandum In Support, pp. 4, 5, 12-14, discussing this issue.)

Likewise, in Paragraph 21 of its Opinion, the Court of Appeals stated that “there is no due process violation because the appointment of a receiver does not extend its corporate

life; the receiver ‘will merely be a vehicle through which [the asbestos claimants] will seek recovery from the insurers.’ Op., ¶ 21 (citation omitted). Again, Sager certainly has the right to demonstrate why the Court of Appeals’ rationale was wrong, and thus raises the issue in Proposition of Law IV: “[i]n the absence of jurisdiction over an alleged tort defendant, a court may not rest jurisdiction for a tort claim upon the purported interest of tort claimants in the defendant’s alleged insurance policies.” (See also Memorandum In Support, pp. 10-11, 13-14, discussing this issue.) Appellee’s suggestion that Sager should not be permitted to not take issue with the Court of Appeals’ reasoning on these points is absurd, and should be rejected.

Nor are these issues new. Sager’s briefing in the trial court and the Court of Appeals addressed these questions of jurisdiction and due process. For example, the issues raised in Proposition of Law III were directly addressed in Sager’s Brief in Opposition to Motion to Appoint Receiver (“Brief in Opp.”), where Sager argued “Sager dissolved under Illinois Law as of June 17, 1998, and suits filed against it more than five years later ... are now barred. ... This rule applies even where the claimant alleges that the dissolved corporation has assets in the form of unexhausted insurance policies.” (Brief in Opp., Stipulated Supplemental Record (“Supp. Rec.”) 3, p. 5; see also Sager’s Appellant’s Brief in the Court of Appeals, pp. 21-22, 30-31.)

Likewise, Sager addressed the issues raised in Proposition of Law IV throughout the proceedings below. Sager argued, for example, that “applying the tort law of Ohio to Ohio injury cases...has nothing to do with whether this Court can re-legislate Ohio law governing the existence and dissolution of corporations, or unconstitutionally appoint a Receiver over a foreign corporation” and that “winding up the business of foreign corporation is ‘*subject to* constitutional limitations.” (Sur-Reply Brief of Defendant Sager Corporation...In Opposition to “Motion to

Appoint Receiver” (“Sager’s Sur-Reply”), Supp. Rec. 13, p 7 (emphasis original, citation omitted); see also Brief in Opp., Supp. Rec. 3, pp. 5-7.) Sager also addressed these issues at length in its Appellant’s Brief (pp. 29-32) and Reply Brief (pp. 8-9) in the Court of Appeals.

Thus, it is not only completely appropriate but also necessary, for Sager to raise these issues before this Court so the faulty rationale and improper decisions below can be fully discussed before and analyzed by this Court.

**4. APPELLEE’S MOTION TO DISMISS IS BASELESS**

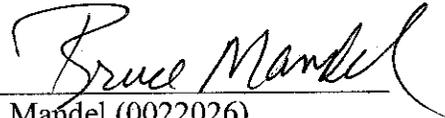
Appellee also seeks to have Sager’s Merit Brief dismissed because it was supposedly not filed “within the allotted time.” This part of Appellee’s Motion, too, is untimely, and should be stricken, as set forth above (see Section 1, above). Moreover, Appellee does not explain how a Merit Brief filed on a due date stipulated by both parties pursuant to S.Ct. Prac. R. 14.3(B)(2)(a) was not timely. Nor does Appellee present any authority to support this request. Indeed, because Appellant’s Motion to Dismiss “is not reasonably well grounded in fact or warranted by existing law,” the Court could well determine that the request is “frivolous,” pursuant to S.Ct. Prac. R. 14.5(A).

**CONCLUSION**

Appellee's Motion To Strike Appellant's Merit Brief And Motion To Dismiss is untimely and should be summarily rejected. Alternatively, Appellee's Motion is factually and legally unfounded and unsupported, and should be denied. There are no issues raised in Appellant Sager's Merit Brief that were not raised in Appellant's Memorandum In Support of Jurisdiction and in the briefing and argument below, and in the Court of Appeals' decision from which this appeal is taken.

Dated June 1, 2011

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

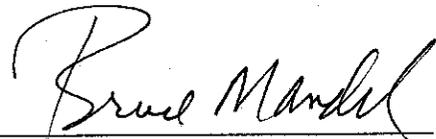
I hereby certify that a copy of Appellant's Brief In Opposition To Appellee's Motion To Strike Appellant's Merit Brief And Motion To Dismiss was served by ordinary U.S. Mail on June 1, 2011, upon the following:

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Re: In Re All Cases Against Sager Corporation  
Supreme Court of Ohio Case No. 10-1705

Dear Mr. Mandel:

Enclosed please find the Appellees' Motion to Strike Appellant's Merit Brief and Motion to Dismiss and Appellees' Merit Brief.

Sincerely,



Erin Clark  
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Enclosure

Exhibit A



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**TO**  
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Exhibit B