

**IN THE SUPREME COURT OF OHIO**

KELLY BLAIR, : CASE NO. 2011-0864  
Appellant, : [Appeal from the Second District  
vs. : Court of Appeals, for Greene  
County, Ohio Case Nos. 2010-CA-0003]  
BOARD OF TRUSTEES OF :  
SUGARCREEK TOWNSHIP, :  
Appellee. :

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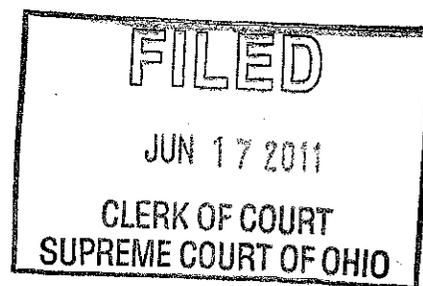
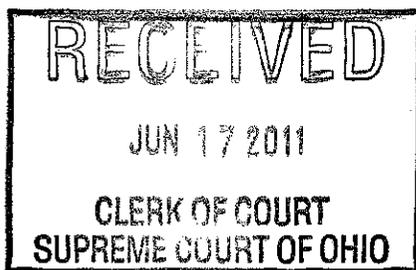
**MEMORANDUM IN RESPONSE TO  
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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

This appeal is not a case of public or great general interest. Public interest indicates something in which the public has some interest by which their legal rights or liabilities are affected. *State ex rel. Ross v. Guion* (1959), 82 Ohio Law Abs. 1, 161 N.E.2d 800, 803 citing *State ex rel. Freeling v. Lyon*, 63 Okl. 285, 165 P. 419, 420. In contrast, this case presents questions of interest primarily to the parties and issues unique to this case. Specifically, it deals with the interpretation of the statute dealing with Township police officials and particularly a Township chief of police and constable. This statute is not widespread in its application to the public or police.

Appellant argues that the Second District Court of Appeals holding in *Blair v. Bd. of Trustees of Sugarcreek Township*, 2<sup>nd</sup> Dist. App. No. 2010 CA 3, 2011-Ohio-1725 (“*Blair I*”) ignores years of established precedent set forth in *Staley v. St. Clair Township Board of Trustees* (Dec. 15, 1978), 7<sup>th</sup> Dist. No. 87-C-44. However, in reality, the Court of Appeals in *Blair II*, merely interpreted the current version of R.C. § 505.49 using sound principles of well established statutory interpretation and construction. The tortured procedural history in this case complicates the primary disputed issues which can be resolved through basic tenants of statutory construction interpretation.

Specifically, as the Second District Court of Appeals noted in *Blair II*, during the initial hearing held in this case before the Greene County Magistrate the parties agreed that the issue before the Court was to hear “evidence relating to whether or not Kelly Blair is a constable or police chief.” *Blair II* at ¶10. This was because Appellant was appointed Township Chief of Police and some months later, was designated as a constable. Faced with the realization that the Court of Appeals had determined that he had been properly terminated as the Chief of Police and

that his due process rights as a constable had not been violated, Appellant switched gears and argued that upon his termination as Chief of Police, he should have been placed in a position of patrol officer—a position that he held at some point prior to becoming Chief. Such an argument and interpretation of the relevant statutes is illogical when viewing the statutes as a whole.

In support of his position, Appellant points to the decision in *Staley v. St. Clair Twp. Bd. of Trustees*, Seventh Dist. App. No. 87-C-44 (Dec. 18, 1987). However, while the *Staley* case did address R.C. § 505.49, at the time *Staley* was decided, R.C. § 505.49 was not divided among the three sections in the manner in which it is today. Since the *Staley* decision in 1987, the legislature has amended R.C. § 505.49 four times. By dividing the subject matter of R.C. § 505.49 into separate divisions of the statute, the General Assembly has cured any ambiguities as to the applicability of each section and as such, a review of that statute is not an issue of public and great general interest.

Revised Code Section 505.49 is presently broken down into three specific subjects. Section 505.49(B)(2) deals with the chief of police position. It provides for the appointment of the chief, it provides that the chief serves at the pleasure of the board of trustees, and it allows the trustees to designate the chief of police as a constable. Specifically, R.C. § 505.49(B)(2) deals with the Chief of Police and provides:

(2) Except as otherwise provided in division (E) of this section and subject to division (D) of this section, the township trustees by a two-thirds vote of the board shall appoint a chief of police for the district, determine the number of patrol officers and other personnel required by the district, and establish salary schedules and other conditions of employment for the employees of the township police district. The chief of police of the district shall serve at the pleasure of the township trustees and shall appoint patrol officers and other personnel that the district may require, subject to division (D) of this section and to the rules and limits as to qualifications, salary ranges, and numbers of personnel established by the board of township trustees. The township trustees may include in the township police district and under the direction and control of the chief of police any constable appointed pursuant to section 509.01 of the Revised Code, or may designate the chief of police or any patrol officer appointed by the chief of police

as a constable, as provided for in section 509.01 of the Revised Code, for the township police district.

In contrast, R.C. § 505.49(B)(3) addresses everyone else—patrol officers, other police district employees or police constables. Section 505.49(B)(3) provides:

(3) Except as provided in division (D) of this section, a patrol officer, other police district employee, or police constable, who has been awarded a certificate attesting to the satisfactory completion of an approved state, county, or municipal police basic training program, as required by section 109.77 of the Revised Code, may be removed or suspended only under the conditions and by the procedures in sections 505.491 to 505.495 of the Revised Code. Any other patrol officer, police district employee, or police constable shall serve at the pleasure of the township trustees. In case of removal or suspension of an appointee by the board of township trustees, that appointee may appeal the decision of the board to the court of common pleas of the county in which the district is situated to determine the sufficiency of the cause of removal or suspension. The appointee shall take the appeal within ten days of written notice to the appointee of the decision of the board.

Finally, R.C. § 505.49(C) applies only to a township that has a population of ten thousand or more residing within the township and outside of any municipal corporation, that has its own police department employing ten or more full-time paid employees, and that has a civil service commission. There is no dispute; Sugarcreek Township is not such a township. It provides:

(C)(1) Division (B) of this section does not apply to a township that has a population of ten thousand or more persons residing within the township and outside of any municipal corporation, that has its own police department employing ten or more full-time paid employees, and that has a civil service commission established under division (B) of section 124.40 of the Revised Code. The township shall comply with the procedures for the employment, promotion, and discharge of police personnel provided by Chapter 124 of the Revised Code, except as otherwise provided in divisions (C)(2) and (3) of this section.

(2) The board of township trustees of the township may appoint the chief of police, and a person so appointed shall be in the unclassified service under section 124.11 of the Revised Code and shall serve at the pleasure of the board. A person appointed chief of police under these conditions who is removed by the board or who resigns from the position shall be entitled to return to the classified service in the township police department, in the position that person held previous to the person's appointment as chief of police.

In arguing that Appellant should have been returned to the position he held prior to being

promoted to the Chief of Police, Appellant is reading something into R.C. § 505.49(B), that just is not there. In construing a statute, a court must give effect to the words used in the statute, not insert words not used. *State v. Jordan* (2000), 89 Ohio St.3d 488, 492, 733 N.E.2d 601, 605. Had the legislature intended that a person appointed chief of police in a non-civil service township who is removed by the board or who resigns from the position be entitled to return to the position that the person held previous to the person's appointment as chief of police, it would have indicated so in R.C. § 505.49(B)(2).

Additionally, in interpreting these statutes and the scheme they establish concerning appointment and removal of a township police chief, this Honorable Court should apply the maxim of *expression unius est exclusion alterius*, meaning "the expression of one thing is the exclusion of the other." Under this maxim, "if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." *Black's Law Dictionary* (6<sup>th</sup> Ed. 1990) 581; *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 152, 137 N.E. 6. Because the legislature included a mandatory retention provision only for certain townships described in division (C)(1), it justifies the inference that the legislature did not intend to include such a provision for all townships not meeting the definition in division (C)(1). This exclusion in (B)(2) and its inclusion in (C)(1) indicate that the legislature intended that result not by inadvertence but rather by deliberate choice. *Barnhart v. Peabody Coal Co.* (2003), 537 U.S. 149, 168, 123 S.Ct. 748.

Additionally, when language is inserted in a statute it is done so in order to accomplish a definite purpose. *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 479, 159 N.E.2d 756, 759; *In re Phoenix Hotel Co. of Lexington, Ky.* 83 F.2d 724 (6<sup>th</sup> Cir. 1936). If, as Appellant asserts, there is an automatic right of retention for *all* township police chiefs who are terminated from their chief of police position, and they must be retained in a position they

held with the township police department before their promotion, there would have been no purpose whatsoever in the legislature's adding that language to division (C)(1) for only larger townships with civil service commissions. It is a fundamental rule of statutory construction that statutes relating to the same subject matter must be construed together and in such a construction, they should be read so as to harmonize them and give full application to the various statutes. *State ex rel. Thurn v. Cuyahoga County Board of Elections* (1995), 72 Ohio St.3d 289, 294, 649 N.E.2d 1205. To interpret the interplay between these statutes in any way other than illustrated above would result in disharmony between the statutes and render the language contained therein superfluous and hopelessly conflicting.

Appellant's speculation that the *Blair II* decision will deter any township police officer from accepting the position of township chief of police is contradicted by a simple reading of the statute. In fact in this case, when Appellant accepted the position as Chief of Police, he did so knowingly and voluntarily and reaped the benefits of that position, in exchange for giving up any statutory protections he may have been afforded as a patrol officer. Precedent of this Court in *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 278, 690 N.E.2d 1267, 1998-Ohio-628, put him on notice that he is estopped from arguing that he is entitled to the protections of his prior position as a patrol officer when he accepted the benefits of the Chief's position. Nothing about the *Blair II* decision will deter qualified and experienced police officers from making a similar choice to serve their communities.

Additionally, the *Blair II* decision did not change the standard for perfecting an appeal. Rather, the Second District Court of Appeals correctly pointed out that the course of the proceedings in this case and the actual testimony of Appellant himself revealed that the only decision that was administratively appealed was his termination as Chief of Police. Notwithstanding that determination, the Second District Court of Appeals addressed the issue of

whether Appellant should be returned to a patrolman's position because of some admittedly confusing language contained in the *Blair I* decision. This was a situation unique to this case and does not present questions of public or great general interest or a constitutional question.

Appellant also seeks review by this Court as to the significance of a Township's designation of its Chief of Police as a constable. In *Blair I*, the Second District Court of Appeals filed its Decision and Final Entry on November 3, 2008. The Court determined that

\* \* \* Blair was terminated from his appointment as Chief of Police only, and not from his appointment as a police constable. Therefore, the trial court abused its discretion when it reversed and vacated the Trustees' decision to terminate Blair on a finding that the Trustees failed to comply with the statutory requirements for termination of a police constable appointed by a board of trustees \* \* \*.

*Blair I*, at §17. Appellant did not appeal the above finding by the Second District Court of Appeals. Thus, the above-holding in *Blair I* is not properly before this Court.

Finally, Appellant seeks review of a denial of any back wages for the position of constable. Generally speaking, the compensation of constables is fixed by the appointing authority. *State ex rel. Stiles v. Cooper* (1916), 7 Ohio App. 218. The statutes governing constables provide for the Board of Trustees to establish the compensation, if any, of a constable. R.C. § 505.49(B)(2). Here, the Board did not include in the township police district "any constable appointed pursuant to section 509.01," but instead, as allowed by R.C. 505.49(B)(2), alternatively designated the chief of police as a constable. Revised Code § 509.01 provides, in relevant part:

The board ***may pay each police constable, from the general funds of the township, the compensation that the board by resolution prescribes for the time actually spent in keeping the peace, protecting property, and performing duties as a police constable***, including duties as an ex officio deputy bailiff of a municipal court pursuant to section 1901.32 of the Revised Code and duties as a ministerial officer of a county court. The police constable shall not be paid fees in addition to the compensation allowed by the board for services rendered as a police constable, including services as an ex officio deputy bailiff of a municipal court pursuant to section 1901.32 of the Revised Code and as a

ministerial officer of a county court. All constable fees provided for by section 509.15 of the Revised Code, if due for services rendered while the police constable performing those services is being compensated as a police constable for that performance, shall be paid into the general fund of the township.

(Emphasis added.)

“In statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.” *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, paragraph one of the syllabus.

Here, the Board did not pass any such a resolution or establish a salary schedule for constables. Thus, this is not a situation such as the cases cited by Appellant. Here, Appellant was well aware that the designation of constable did not include any additional compensation. Thus, this case is not one of great public interest or substantial constitutional question.

## **II. STATEMENT OF THE CASE AND FACTS**

### **A. Relevant Procedural History**

On September 27, 2006, Appellant filed Amended Notice of Appeal under R.C. Chapter 2506 contesting Appellant’s removal as Chief of Police for the Sugarcreek Township Police Department by the Sugarcreek Township Board of Township Trustees (the “Board”) and his alleged removal as a certified police constable. The Amended Notice of Appeal did not contest in any way the failure to retain Appellant in any paid position he had held prior to being promoted to Chief of Police. Appellant moved to supplement the record under R.C. § 2506.03 and towards that end hearings were held on March 8, 2007 and March 15, 2007. The Magistrate issued his Decision on September 20, 2007, finding that Appellant had been properly terminated as Chief of Police but that his “employment as township constable was improperly terminated.” As a result, the Magistrate reversed the decision terminating Appellant as police constable and

ordered Appellant reinstated “with back pay and benefits consistent with that position.”

The Board was the only party to object to that decision and its objections were limited only to that portion of the Magistrate’s Decision that ordered Appellant reinstated to the position of police constable. Appellant did not object to the Magistrate’s Decision of September 20, 2007, nor did Appellant file any cross-objections upon the filing of the Board’s objections. As a result, the sole issue that went to the trial court was the Board’s objections to the Magistrate’s Decision finding that Appellant had been improperly terminated as a police constable and the order to reinstate Appellant to that position. No other issue relative to this case, not Appellant’s termination as Chief of Police, or his retention to some paid position he held prior to being promoted to Chief of Police, was preserved for appeal. On February 28, 2008, the trial court overruled the Board’s objections and adopted the Magistrate’s Decision.

On March 3, 2008, the Board filed its Notice of Appeal with the Second District Court of Appeals and was again the only party to appeal, and again limited its appeal to the sole issue of whether or not Appellant was terminated as police constable. No cross-appeal was filed by Appellant objecting to any other decision of the trial court below. As a result, any obligation to retain Appellant to any paid position he held prior to his promotion to Chief of Police was not before the Court of Appeals.

On October 31, 2008, the Second District Court of Appeals issued its Opinion, *Blair v. Bd. of Trustees of Sugarcreek Township*, 2<sup>nd</sup> Dist. App. No. 2008 CA 16, 2008-Ohio-5640 (“*Blair I*”), reversing the trial court’s determination that Appellant had been terminated as police constable. However, the Court of Appeals remanded the case to the trial court with the following language:

Blair argues that he enjoys certain rights of retention as a certified police constable and/or former certified police officer of which the Trustees’ action deprived him. That contention involves issues the trial court did not reach. Blair

may present evidence on *those* matters in the course of further proceedings.

*Blair I*, p. 18 (emphasis added).

On remand the trial court held additional evidentiary hearings on April 30, and May 1, 2009. Thereafter on August 13, 2009, the Magistrate issued his Decision dismissing this administrative appeal finding that Appellant was not entitled to retention to any paid position he held prior to being promoted to Chief of Police since Sugarcreek Township did not meet the criteria for such action under R.C. § 505.49(C)(1), and further that since no order had terminated Appellant as police constable, this issue was not proper for an administrative appeal under Chapter 2506 of the Revised Code, and that he was not entitled to back pay for his designation as constable. Appellant filed objections to the Magistrate's Decision with the trial court on August 27, 2009. On December 11, 2009, the trial court overruled Appellant's objections and adopted the Magistrate's Decision dismissing the appeal.

Appellant then filed his Notice of Appeal with the Second District Court of Appeals. On April 8, 2011, the Court of Appeals affirmed the decision of the trial court and held that Appellant was a "former certified police officer employee with the township and is not automatically entitled to return to the classified service in the position that he held previous to his appointment as chief." *Blair II* at ¶24. The Court held further that "we cannot say that the magistrate's finding that no compensation attached to the constable position was an abuse of discretion" *Blair II* at ¶13. Appellant filed a Motion to Certify a Conflict between the Second District's Decision in *Blair II* and *Staley*, supra. On May 27, 2011, the Second District Court of Appeals issued its Decision and Entry granting the Motion to Certify a Conflict.

B. Summary of Relevant Facts

Appellant was hired as a part-time patrol officer by the Sugarcreek Township Police Department in 1988. Thereafter Appellant completed his certification from the Ohio Peace

Officer's Training Academy. Over the years Appellant was promoted several times and ultimately was promoted to Chief of Police in May 1998. In August 1998, some three and a half months after being promoted to Chief of Police, Appellant, by Township resolution, was secondarily designated a police constable for the first time in his career.

In September 2006, Appellant was terminated from his position as Chief of Police by resolution. No voluntary agreement was executed between Appellant and Sugarcreek Township that would have permitted Appellant to remain employed in any other paid position, including any position he held prior to being promoted to Chief of Police. The Board took no action on Appellant's secondary designation as police constable. In fact, at the time of the September 2006 executive session and public meeting vote to terminate Appellant, neither the Trustees nor the Township Administrator were even aware that he had been secondarily designated as a police constable.

### **III. ARGUMENTS IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

#### **A. Response to Proposition of Law No. 1**

Appellant contends that under R.C. § 505.49(B), a township chief of police is required to be returned to the position he held prior to becoming the chief of police after being removed as chief for reasons other than for cause. Although not stated in the statute, Appellant contends further that this is true, even if R.C. § 505.49(C) does not apply to the township. However, it is only in R.C. § 505.49(C) that there is any mention by the legislature that a person appointed chief of police and who is removed by the board shall be entitled to return to the position that individual held prior to his appointment as chief. It is undisputed that R.C. §505.49(C) does not apply to Sugarcreek Township. Appellant maintains though, that the language in R.C. § 505.49(C)(2) is somehow applicable to the entire statute and as such, although he could be terminated as chief of police, that the Township should have returned him to a prior position as a

police officer.

Section 505.49 provides that the board of township trustees of a township may appoint a chief of police, and a person so appointed, serves at the pleasure of the board. R.C. § 505.49. To that end, this Court has held that a township police chief serves at the pleasure of the board of trustees and may be dismissed from his position as chief without cause in the absence of any reason to believe that he has committed one of the offenses listed in R.C. § 505.491. *Smith v. Fryfogle*, 70 Ohio St.2d 58, 434 N.E.2d 1346 (1982). If this Court were to interpret R.C. § 505.49 differently, it would essentially give no effect to the specific language of the statute that explicitly states that the chief of police “serves at the pleasure of the board.” This clause makes no distinction whatsoever as to what additional status, if any, the township police chief holds, such as being a certified peace officer under R.C. § 109.77, a prior police officer with the same department in a lesser rank, pay grade, or position, or a constable secondarily designated under this same division, or a civilian with no peace officer certification under R.C. § 109.77. Regardless of the particular nuances of the particular chief of police involved here, the chief of police serves at the pleasure of the trustees.

B. Response to Proposition of Law No. 2

Appellant contends that the Second District Court of Appeals set an impossibly high standard in determining that he did not administratively appeal anything regarding his status as a former certified police officer with the Township. Appellant contends that his Amended Notice of Appeal was sufficient to raise such an issue. However, it is important to note the procedural history of this matter and a review of the original appeal to the Second District reveals that the appeal was taken by the Board of the initial trial court’s Decision reversing the Board. The Trial Court adopted the Magistrate’s Decision “terminating Appellant as a police constable and ordering Appellant reinstated with back pay and benefits consistent with that position.” The

Board objected and appealed this portion of the decision only. Blair did not object or appeal the fact that the decision did not address any contention that he should have been reinstated to a position he held before becoming Chief.

Even if the Notice of Appeal was sufficient to raise the issue of Appellant's return to a patrol position, it is well settled by authority, and is a doctrine sound in principle, that all questions which existed on the record, and could have been considered on the first petition in error, must ever afterward be treated as settled by the first adjudication of the reviewing court. *Pollock v. Cohen* (1877), 32 Ohio St. 514,519; accord *Burton v. Durkee* (1954), 162 Ohio St. 433, 123 N.E.2d 432. The Second District recognized that the parties agreed with the magistrate in the original March 2007 hearing that its purpose was to take "evidence relating to whether or not Kelly Blair is a constable or police chief." *Blair II*, p. 3. Appellant did not correct the trial court and the hearing went forward on those issues. A party who fails to bring an alleged error to the attention of the trial court at a time when the error may be corrected waives the error on appeal. Civil Rule 52 provided the Appellant with a means after entry of the judgment to obtain separate findings of fact and conclusions of law by which a reviewing court could test the trial court's judgment on all issues. Having failed to raise these issues on objection, Appellant cannot now be heard to complain that the court did not make the necessary findings." *Pawlus v. Bartrug* (1996), 109 Ohio App.3d 796, 801, 673 N.E.2d 188.

C. Response to Proposition of Law No. 3

After applying *noscitur a sociis*, the Second District Court of Appeals opined in its October 2008 decision that in reviewing Resolution 2006-09-18-12, "Blair was terminated from his appointment as Chief of Police only, and not from his appointment as a police constable." *Blair I* at ¶17. Appellant did not appeal that finding. The law of the case in this administrative appeal is that Appellant was properly and lawfully terminated as Chief of Police and that

Appellant was never terminated as a police constable. As a result, there was simply no order related to his removal as police constable that was capable of judicial review in an administrative appeal. As such, any further review is not appropriate.

Notwithstanding the fact that Appellant failed to appeal the finding that Appellant was terminated as a constable, even if this court were to consider the issue, the law is clear that a public board, commission, or other deliberative body speaks through its minutes or its written record of resolutions, directives, and action. *Grimes v. Cleveland* (1969), 17 Ohio Misc. 193, 195, 243 N.E.2d 777. Until such written record is made and approved, not only is the act in question subject to all the vagueness and uncertainty that characterizes oral pronouncements, but it lacks the degree of finality necessary to form the predicate for further action or challenge. *Swafford v. Northwood Brd. Of Educ.* (1984), 14 Ohio App.3d 346, 471 N.E.2d 509. Here, the Board's resolution only terminated Appellant as the Chief of Police.

D. Response to Proposition of Law No. 4

Appellant was promoted to Chief of Police in May 1998. In August 1998, Appellant was secondarily designated a police constable for the first time in his career. As part of that constable appointment, the resolution did not provide for any additional compensation. The compensation of constables is fixed by the appointing authority. *State ex rel. Stiles v. Cooper* (1916), 7 Ohio App. 218. The statutes governing constables provide for the Board of Trustees to establish the compensation, if any, of a constable. R.C. § 505.49(B)(2).

Here, the Board did not include in the township police district "any constable appointed pursuant to section 509.01," but instead, alternatively designated the chief of police as a constable. There was no resolution passed by the Board establishing a salary schedule for constables. As such, the fees for which a constable may be entitled is set pursuant to statute (i.e., R.C. §§ 1901.32 and 509.15). To the extent Appellant performed such services as prescribed in

those sections, compensation would be governed by statute. However, there is no evidence of such and therefore, the Court of Appeals properly found that there was no compensation associated with Appellant's designation as constable.

**IV. CONCLUSION**

For the reasons discussed above, there is no need for this Honorable Court to exercise its jurisdiction in this case. This case does not involve matters of public or great general interest or constitutional question.

Respectfully submitted,

SURDYK, DOWD & TURNER, CO., L.P.A.



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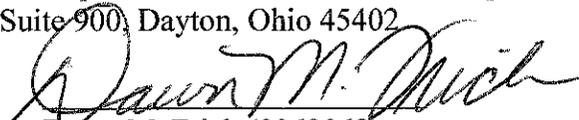
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**V. CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been sent by regular U.S. Mail this 16th day of June, 2011, to Dwight D. Brannon, Esq. and Matthew C. Schultz, Esq., BRANNON & ASSOCIATES, 130 West Second Street, Suite 900, Dayton, Ohio 45402



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