

IN THE SUPREME COURT OF OHIO

RICHARD SAPIENZA,

Plaintiff-Appellee,

v.

MATERIALS ENGINEERING AND  
TECHNICAL SUPPORT SERVICES  
CORPORATION, et al.,

Defendants-Appellants.

Case No. **11-1252**

On Appeal from the Delaware  
County Court of Appeals,  
Fifth Appellate District

Court of Appeals  
Case No. 10CAE110092

EMERGENCY MOTION OF DEFENDANTS-APPELLANTS MATERIALS ENGINEERING  
AND TECHNICAL SUPPORT SERVICES CORPORATION AND KENNETH HEATER FOR  
STAY OF JUDGMENT ENTRY OF FIFTH DISTRICT COURT OF  
APPEALS PENDING APPEAL

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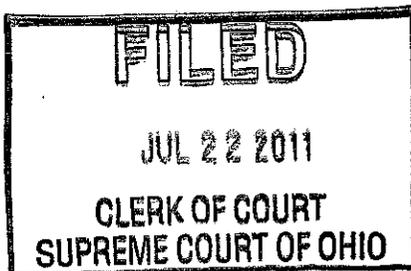
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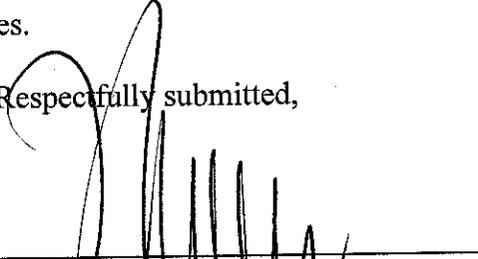


**EMERGENCY MOTION OF DEFENDANTS-APPELLANTS FOR STAY OF COURT  
OF APPEALS' JUDGMENT ENTRY PENDING APPEAL**

Pursuant to S.Ct. Prac. R. II, Section 2.2(A)(3), Defendants-Appellants Materials Engineering and Technical Support Services Corporation and Kenneth Heater ("METSS") move the Court for an immediate stay of the Fifth District Court of Appeals' July 15, 2011 decision (the "Fifth District's Decision").<sup>1</sup> The trial court had exercised the discretion granted to it under R. C. 1701.91(A)(4) and refused to dissolve METSS. By a split vote, however, the Fifth District reversed the trial court's grant of summary judgment in favor of METSS and granted Plaintiff-Appellee Richard Sapienza's Complaint seeking dissolution of METSS.

The need for a stay is obvious: Unless this Court stays the Fifth District's Decision, METSS will be dissolved before this Court has an opportunity to review the Fifth District's split decision—a decision running afoul of the plain language of R.C. 1701.(A)(4) and the decisions of other courts interpreting comparable statutes.

Respectfully submitted,



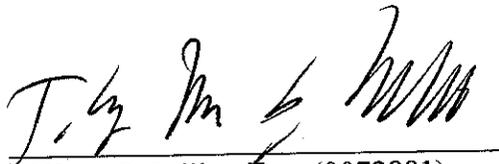
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<sup>1</sup> A copy of the opinion and judgment entry being appealed from is attached as Exhibit A to this Motion in compliance with S.Ct. Prac. R 2.2(A)(3)(a)(ii).



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## **MEMORANDUM IN SUPPORT**

### **I. Introduction**

METSS, a Westerville, Ohio company with 20 employees, has been a successful scientific research, development and commercialization company for nearly the past 15 years. METSS has two 50% shareholders: Dr. Kenneth Heater, who also is METSS' president, and Dr. Richard Sapienza ("Plaintiff"). In 2009, it came to light that Plaintiff was self-dealing—securing equity positions in companies within the line of METSS business and providing consulting services in exchange for personal compensation, all while receiving a full salary and benefits from METSS.

On February 2, 2010, METSS terminated Plaintiff and brought numerous claims against Plaintiff in Franklin County for his self-dealing seeking to disgorge more than \$2 million in compensation Plaintiff had received from METSS during his period of unfaithfulness. In response to his termination and being sued, Plaintiff retaliated by seeking dissolution of METSS to cover-up his misdeeds without a shred of evidence. Initially, Plaintiff filed his dissolution action in Franklin County as a counterclaim. After its dismissal, Plaintiff refiled it in Delaware County.

METSS then moved for, and the trial court granted, summary judgment dismissing Plaintiff's dissolution claim. Plaintiff appealed, and by a 2-1 decision, the Fifth District reversed

and found dissolution to be mandatory. It did so, as the dissent observed, by ignoring the plain and unambiguous language of R.C. 1701.(A)(4)—language making clear that even if Plaintiff had properly offered evidence to support his claim (and he had not), dissolution is not mandatory but rather rests within the discretion of the trial court.

The Fifth District's Decision not only dooms METSS, but is equally fatal to the livelihood of METSS' employees and various third-party contracts. This decision is simply wrong and this Court should be afforded the opportunity to review and remedy this error before the company is destroyed and the employees permanently displaced. In short, absent a stay, the proverbial genie cannot be put back in the bottle.

## **II. Background And Proceedings Below**

METSS, located in Westerville, Ohio, currently employs 20 employees and largely engages in scientific research, development, and commercialization by seeking funding through Department of Defense projects (including SBIR programs), developing technologies and intellectual property and commercializing those technologies in the private sector to apply those technologies to everyday life. [Ex. B, Heater Aff. at ¶ 4.] METSS is actively working on thirteen research and development programs, including contracts with the United States Air Force as well as private industry, worth approximately \$18,000,000. [Id. at ¶ 5.] Additionally, METSS is in the process of negotiating additional contracts with the United States Air Force and is actively seeking contract prospects and funding opportunities worth millions of dollars. [Id. at ¶ 6.]

For most of its existence, METSS has had two 50% shareholders, Dr. Kenneth Heater and Plaintiff. Plaintiff served as a director and also served as a full-time employee of METSS from 1994 (when METSS was an LLC prior to incorporation) through his termination on February 2, 2010. Thus, Plaintiff admittedly owed METSS a fiduciary duty. Practically, during

the time Plaintiff was employed at METSS, Dr. Heater and other METSS employees handled the day-to-day operations of METSS, while Plaintiff himself had no, and indeed, wanted no part of METSS day-to-day operations. Rather, Plaintiff's primary focus was to commercialize METSS technology and move METSS into new research and development areas.

However, it was discovered that Plaintiff did not focus on new opportunities for METSS but rather new opportunities for himself. METSS has come to learn that although it was paying Plaintiff a salary and was expecting undivided loyalty in return, Plaintiff had secured for himself, not METSS, various "side" consulting engagements through an entity called Long Island Technical Associates ("LITA"). Plaintiff's disloyalty though did not end there. Plaintiff also secured for himself equity interests in at least four companies directly in METSS' line of business—SAFTech, Hospitable Solutions, Persistent Energy and R3 Synthesis. Simply, Plaintiff was taking a salary for METSS and self-dealing with these other entities. In February 2010, METSS terminated Plaintiff and brought the case styled Materials Engineering and Technical Support Services Corporation v. Richard Sapienza, et al., Case No. 10-CVH-02-1636 (the "Franklin County Action").

Only after the filing of the Franklin County Action did Plaintiff Sapienza first seek dissolution of METSS (or to try to create deadlock for purpose of attempting to dissolve) by way of a counterclaim filed in the Franklin County Action on February 17, 2010. This, of course, was in response to METSS' complaint against him for breach of his fiduciary duties, including misappropriation of corporation opportunities. Among other remedies sought, METSS sought the disgorgement of more than \$2 million. On August 4, 2010, METSS moved for summary judgment on Plaintiff's dissolution claim. By an entry of August 17, 2010, Plaintiff's dissolution claim was dismissed from the Franklin County Action.

On August 5, 2010, the day after METSS moved for summary judgment in the Franklin County Action, Plaintiff filed his complaint in Delaware County seeking to dissolve METSS. Plaintiff named both METSS and Dr. Kenneth Heater. On that same date, Plaintiff filed a Motion for the Appointment of Receiver and for Judicial Dissolution and a Motion to Stay the Franklin County Action. On September 10, 2010, METSS moved for summary judgment and sought dismissal of Plaintiff's one-count complaint on two grounds: that Plaintiff's past self-dealing prohibited him as a matter of law from thereafter invoking judicial dissolution and also that, based upon the undisputed record, there was no operational deadlock. In support, METSS offered the admissions elicited from Plaintiff's deposition in the Franklin County Action documenting his breaches of his fiduciary duty.

At the September 15, 2010 hearing, the trial court did not appoint a receiver but instead continued the hearing. The trial court also denied plaintiff's motion to stay the Franklin County Action. The trial court also directed this matter to mediation and, if unsuccessful, stated it would consider whether the evidence of Plaintiff's prior misconduct was admissible. On October 25, 2010, Plaintiff filed his own summary judgment motion.

On October 26, 2010, the trial court journalized the Judgment Entry (signed October 21) dismissing this lawsuit. Thereafter, Plaintiff first filed a motion for a status conference. Then, on November 10, 2010, Plaintiff filed a document styled a Motion to Vacate, where, among other items, it argued that there was no final appealable order. On November 24, 2010, Plaintiff appealed to the Fifth District Court of Appeals.

The appeal presented several substantive issues, including a construction of R.C. 1701.91(A)(4):

1. Is a trial court's denial of a motion to dissolve subject to an abuse of discretion standard given the permissive language adopted by the General Assembly in crafting R.C. 1701.91(A)(4).
2. Where R.C. 1701.91(A)(4) provides a trial court with discretion by stating that under certain circumstances a "corporation may be dissolved," does a trial court err as a matter of law by electing not to dissolve the corporation in light of Plaintiff's admissions that he has breached his fiduciary duties by self-dealing prior to seeking dissolution, and there was no evidence of an operational deadlock?
3. Does R.C. 1701.91(A)(4) compel the dissolution of a corporation in the event of an alleged deadlock or does the trial court retain discretion to deny the request?
4. Alternatively, where Plaintiff, a 50% shareholder and the other 50% shareholder agree that they are willing to sell the company, is there operational deadlock?
5. Was there evidence of a deadlock upon which to base a dissolution where Plaintiff failed to offer admissible evidence of the deadlock?

On July 15, 2011, the Fifth District reversed the trial court's decision granting METSS' motion for summary judgment. In the 2-1 decision, the majority did not address the issues presented by the appeal. As the dissent appropriately highlighted, the majority's ruling ignored the plain language of Section 1701.91, and the key statutory construction difference between "may" and "shall." The majority's opinion was simply silent on this issue, as well as the alternative issues associated with Plaintiff's purported evidence.

The Fifth District's Decision not only destroys METSS but also displaces its employees, impacts non-parties with whom METSS is currently in contract, and will cause defaults.

- Since April 5, 1996 and continuing today, METSS has remained an operational, viable, profitable corporation. [Heater Aff. at ¶ 3.]
- METSS currently employs 20 employees. [Id. at ¶ 4.]
- METSS has ongoing, substantial client relationships with multiple customers and contracts. On many of its projects, security clearance from the Department of Defense is required. [Id. at ¶ 5.]
- METSS President, Ken Heater, has been and remains responsible for the day-to-day operations of METSS and responsible for generating approximately 80% of METSS' revenue, including US Air Force Contract FA8650-07-D-6739, "Joint Services and Air Force Chemical, Biological and Radiological Defense Science and Technology Support," which generates millions in annual revenue for METSS. [Id. at ¶¶ 1 and 2.]
- METSS remains subject to intrusive annual and unannounced spot audits (including, financial, cost accounting, security, time accounting and property accounting) by the government on each and every one of its government contracts. [Id. at ¶ 9.]
- Dissolution and Appointment of a receiver constitutes a default under METSS' Loan Agreement with Insight Bank, and threatens to adversely affect the viability of a related corporation involving the parties. [Id. at ¶ 10.]

Needless to say, METSS, its shareholders, and nonparties are irreparably harmed by the dissolution and lack an adequate remedy at law.

### **III. Law and Argument**

#### **A. This Court is Empowered to Issue an Entry Staying the Fifth District's Decision.**

S.Ct. Prac. R. II, Section 2.2(A)(3)(a) empowers this Court to prevent such harm. It reads:

- (a) In a claimed appeal of right or a discretionary appeal, if the appellant intends to seek from the Supreme Court an immediate stay of the court of appeals judgment that is being appealed, the appellant may file a notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction, provided both of the following conditions are satisfied:

- (i) A motion for stay of the court of appeals judgment shall accompany the notice of appeal.
- (ii) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the motion for stay.

METSS – the prevailing party before the trial court – cannot obtain effective relief on appeal and the *status quo* cannot be preserved, unless this Court immediately stays the Fifth District’s Decision during the pendency of this appeal.

**B. The Fifth District Made Numerous Errors Requiring Reversal By This Court.**

The foregoing rule authorizes the Court to grant such relief and the facts and proceedings make clear that it should.

The Fifth District’s decision was not warranted by either statute or applicable case law. The principal legal issue before the Fifth District was: Did the trial court abuse its discretion in electing not to dissolve a corporation where such relief was sought by a 50% shareholder and the evidence was uncontroverted that he had misappropriated numerous corporate opportunities, had been caught, and was seeking dissolution to effectively conceal his misconduct, and the record was otherwise lacking of an operational deadlock. We submit this issue is easily answered “no,” and the Fifth District’s decision was wholly unsupported by the statute.

**1. Section 1701.91(A)(4) Provides a Court “May,” Not “Shall,” Dissolve A Corporation—The Ultimate Decision Is Within The Discretion of The Trial Court.**

While two members of the Fifth District reached the conclusion that Ohio’s judicial dissolution statute *requires* the court of common pleas to dissolve a corporation in the event of director and shareholder deadlock, the statute provides just the opposite: Section 1701.91(A)(4) provides that “[a] corporation *may* be dissolved judicially and its affairs wound up” in certain

circumstances. (Emphasis added.) In construing a statute, a court must look first to the statute itself. If the wording of the statute is unambiguous, the statute must be applied accordingly and the interpretative effort is at an end. See, e.g., State v. Elam, 68 Ohio St. 3d 585, 587 (1994) (“Where the wording of a statute is clear and unambiguous, this court’s task is to give effect to the words used.”).

Here, there is no ambiguity. Nor is there any ambiguity as to the consequence of this verbiage under Ohio law. “The general rule of statutory construction provides that the word ‘may’ should be construed as ‘optional, permissive, or discretionary.’” State v. Sturgeon, 138 Ohio App. 3d 882, 885 (1<sup>st</sup> Dist. 2000). This Court recently reaffirmed this settled rule of construction in the context of Ohio’s Public Records Act, which provides, in pertinent part, that a court “may” award attorneys’ fees to a prevailing party. State ex rel. Doe v. Smith, 123 Ohio St. 3d 44, 49 (2009). Specifically, the Court recognized that “[t]he “usage of the term ‘may’ is generally construed to render optional, permissive, or discretionary the provision in which it is embodied.” Id. at 49.<sup>2</sup>

This general rule of construction applies with particular force where “the word ‘shall’ [with its mandatory connotation] appears in close juxtaposition [to the word “may”] in other parts of the same statute.” U.S. v. Tapor-Ideal Dairy Co., 175 F. Supp. 678, 682 (N.D. Ohio 1959); see also Doe, 123 Ohio St. 3d at 50 (“In fact, when the General Assembly has intended to require an award of attorney fees in its amendment to R.C. 149.43, it has done so with specific language, *by stating in the same subsection* that the “court *shall* award reasonable attorney’s fees ...”) (emphasis added). Here, like in Doe, the applicable statute juxtaposes the word “may” with

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<sup>2</sup> Accord: Hack v. Sand Beach Conservancy Dist., 176 Ohio App. 3d 309, 317 (6<sup>th</sup> Dist. 2008) (“The word ‘may’ used in [Civil Rule 41(B)(2)] ordinarily constitutes a word of permission, as opposed to a command.”).

“shall” as part of the same subsection. See R.C. 1701.91(A)(4) (“[a] corporation *may* be dissolved judicially and its affairs wound up [in the stated circumstances] .... Under these circumstances, dissolution of the corporation *shall* not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit”) (emphasis added).

There can be no dispute as to the trial court’s clear discretion.

**2. The Plain Language of Section 1701.91(A)(4) Contradicts Plaintiff’s Argument.**

The trial court’s exercise of its discretion is subject to only two exceptions.<sup>3</sup> On its face, Section 1701.91(A)(4) precludes the trial court’s consideration of two defenses: “dissolution of the corporation shall not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.” No other limitations upon the trial court’s discretion can be read into the statute under “the maxim ‘*expressio unius est exclusio alterius*.’” That doctrine “prevents [a court’s] addition of an additional statutory exclusion not expressly incorporated into this statute by the legislature.” Weaver v. Edwin Shaw Hospital, 104 Ohio St. 3d 390, 394 (2004). See also Thomas v. Freeman, 79 Ohio St. 3d 221, 224-25 (1997) (“*Expressio unius est exclusio alterius* means ‘the expression of one thing is the exclusion of the other.’ Under this maxim, ‘if a statute specifies

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<sup>3</sup> If dissolution was automatic under the statute, obviously there was no need for the General Assembly to exclude certain arguments/defenses from the trial court’s consideration. It is, of course, a basic tenet of statutory construction that “in enacting a statute, it is presumed that the entire statute is intended to be effective. R.C. 1.47(B); see also State v. Arnold, 61 Ohio St. 3d 175, 178 (1991) (it is a “cardinal rule” of statutory construction that a statute must be interpreted to give effect to every part of it). Under Plaintiff’s construction, Section 1701.91(A)(4) would be rendered a nullity, thus violating yet another basic tenet of statutory construction. State v. Baker, 131 Ohio App. 3d 507 (7th Dist. 1998) (reading a statute to render it a nullity is improper; if the General Assembly had intended such a result it would not have bothered to enact the statute in the first place).

one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.”); Investors REIT One v. Jacobs, 46 Ohio St. 3d 176, 181 (1989) (“The legislature’s express inclusion of a discovery rule for certain torts arising under R.C. 2305.09, including fraud and conversion, implies the exclusion of other torts arising under the statute, including negligence.”).

Thus in Weaver, for example, the Supreme Court construed a statute that tolled the statute of limitations while the “claimant is ‘within the age of minority or of unsound mind.’” Id. at 393. The defendant argued that the limitations period ran upon the appointment of a guardian because that removed the plaintiff’s unsound mind. The Court rejected this argument, however, and held that the limitations period did not commence upon the appointment of the guardian because the “only two descriptions of the term ‘disability’ are referred to in the statute—the claimant’s being ‘within the age of minority or of unsound mind’” and had “the General Assembly intended to include such a provision [triggering the limitations period upon appointment] it could have done so.” Id. at 393.

So, too, here. If the Ohio General Assembly had intended to impose other limitations on the trial court’s discretion or otherwise deny the non-movant the opportunity to advance other defenses, it certainly was within its prerogative to do so. But where, as here, it “would have been simple” for the legislature to use certain, clear language, and if the legislature chose not to, it must have “had some different meaning in mind.” State, ex rel. Pickrel v. Industrial Commission, 1988 WL 35809, \*2 (Ohio App. 10<sup>th</sup> Dist. 1988). See also State, ex rel. Darby v. Hadaway, 113 Ohio St. 658, 661 (1925) (rejecting construction that could have been conveyed by “very simple and concise language”). Thus, under the maxim *expressio unius est exclusio alterius*, Plaintiff’s argument fails. The language of the statute must be applied as written and

Plaintiff's request for a judicial rewrite of Section 1701.91(A)(4) to place other limitations upon the trial court's discretion should have been summarily rejected.

### **3. The Case Law Supports METSS' Defense Against Plaintiff's Retaliatory Dissolution Claim.**

Courts which have specifically addressed this game have denied a corporate dissolution based upon the misconduct of one of the shareholders. As one hornbook summarized it:

Courts occasionally *limit a shareholder's right to seek dissolution for oppression under the "unclean hands" doctrine.* The New York Court of Appeals has stated that *"the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing involuntary dissolution, give rise to the complained act of oppression, should be given no quarter in the statutory protection."*

[2 O'Neal and Thompson, Close Corporations and LLCs: Law and Practice, § 9:27 at 9-196 (emphasis added).]

The New York decision referenced by O'Neal, In re Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984), appropriately notes that it would be *"contrary to this remedial purpose to permit [the dissolution statute's] use by minority shareholders as merely a coercive tool ....* Therefore, the minority shareholder *whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression should be given no quarter in the statutory protection ...."* Id. at 1174 (emphasis added).

Thus, in Cassata v. Brewster-Allen-Wichert, Inc., 670 N.Y.S.2d 552, 553 (N.Y. App. Div. 1998), the court reversed an order dissolving a company because issues of fact remained regarding the bad faith of the shareholder seeking dissolution:

We conclude, however, *that it was error to grant Cassata's motion without a hearing as there are issues of fact with respect to the majority shareholders' defense of bad faith.* A minority shareholder "whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression" is not entitled to redress under the statute .... The shareholders of a close corporation owe each other a duty to act in good faith .... The parties' affidavits present disputed issues of fact with respect to the claim by the majority shareholders that Cassata's actions were undertaken with a view

toward forcing a judicial dissolution of BAW in order to aid the competing insurance agency in which he had a financial interest .... (Emphasis added.)

The same result was reached in Bauer v. Bauer, 54 Cal. Rptr. 2d 377 (Cal. Ct. App. 1996), where the minority shareholder of a corporation was fired after he set up a competing corporation. After his termination, the shareholder sought statutory judicial dissolution which the court declined to grant because “[i]t would be tantamount to sanctioning abuse to permit minority shareholders acting in bad faith to use [the dissolution statute] as a coercive tool to force an involuntary dissolution.” Id. at 384 (emphasis added).

Here, the trial court (as approved by Judge Edwards’ dissent) could and did readily exercise its discretion to conclude, on the basis of the uncontroverted record that a dissolution should not be had.<sup>4</sup>

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<sup>4</sup> Plaintiff had previously relied upon in Lautenschleger v. Monarch Management, Inc., 2004 WL 1948701 (Ohio App. 5<sup>th</sup> Dist. 2004), which the Fifth District’s Decision does not even cite. That decision is inapposite. Plaintiff has argued that Lautenschleger is on point by recasting the facts to say that in August 2002 appellant started a competing business and in September she filed her complaint for judicial dissolution. Not surprisingly, Plaintiff omits the key fact which distinguishes Lautenschleger from the instant case: “On July 30, 2002, appellant and appellee held a shareholder’s meeting. Appellant voted her shares in favor of voluntarily dissolving the corporation and appellee voted his shares in opposition.” Id. at \*2 (emphasis added). Thus, the appellant in Lautenschleger first attempted to dissolve the corporation and only after that proved unsuccessful did she start a competing business.

Lautenschleger presents the *opposite* factual situation from that presented here. Plaintiff here has been admittedly self-dealing for years. He did not seek to dissolve METSS until February 17, 2010, as a counterclaim to the suit against him for breaching his fiduciary duties to METSS. And, when he finally sought dissolution, it was only based upon him being allegedly improperly terminated from METSS. It was only *after* Plaintiff had been caught self-dealing, *after* Plaintiff was sued, and *after* the Franklin County court granted summary judgment for METSS on the alleged wrongful termination issue that Plaintiff then attempted to manufacture deadlock by conducting unsworn *after-the-fact* self serving board meetings for the whole purpose of creating deadlock.

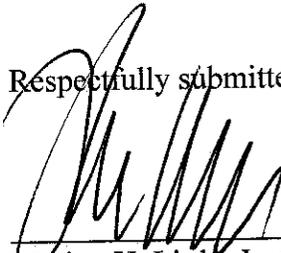
4. **Even if his Misconduct Were Ignored, Plaintiff Still Did Not Carry His Burden Under Section 1701.91(A)(4).**

Even disregarding the documented misconduct, the Fifth District erred in reversing the trial court's decision because there was *no* evidence in the record establishing a deadlock. As the movant, Plaintiff had the burden of "establish[ing] that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock..." R.C. §1701.91(A)(4). This is not a perfunctory test as Plaintiff suggests. As the dissent recognized, the record reflects: that, ultimately, there was no "operational" deadlock because both shareholders are prepared to sell the company; Plaintiff stated he was "willing to sell METSS." Similarly, Dr. Heater was willing to sell; indeed, he had already submitted a purchase offer. Moreover, as the dissent recognized, that there is no operational deadlock because Plaintiff admittedly has no part in the day-to-day operation of METSS and that "deadlock was deliberately manufactured by appellant because he was angry over the breach of fiduciary duty suit and simply trying to get even with Heater." [Dissent, ¶56.] Plaintiff cannot be heard to cry "deadlock" where the shareholders had agreed on the election of directors; both were willing to sell the company; Plaintiff was not involved in the operation of the business and the only possible disagreement related to the termination of Plaintiff's employment—an issue already judicially resolved.

**IV. Conclusion**

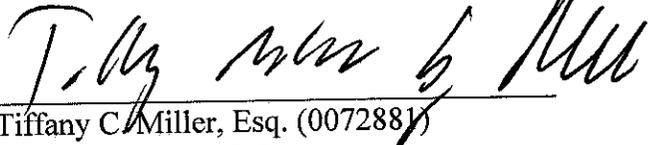
For all of these reasons, Defendants-Appellants METSS and Kenneth Heater request the Court to grant an immediate stay of the Fifth District Decision to prevent the dissolution of METSS pending a determination of the merits on appeal. No bond is required inasmuch as no monetary award is at issue.

Respectfully submitted,



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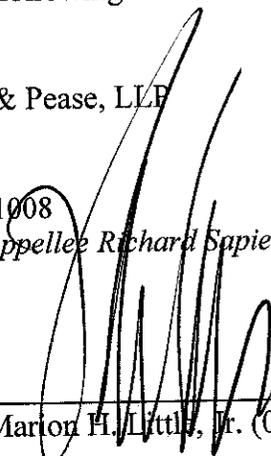
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served this 22nd day of July, 2011, via hand delivery, upon the following:

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COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RICHARD SAPIENZA  
Plaintiff-Appellant

-vs-

MATERIAL ENGINEERING AND  
TECHNICAL SUPPORT SERVICES  
CORPORATION, ET AL.

Defendants-Appellees

JUDGES:  
Hon. Sheila G. Farmer, P.J.  
Hon. John W. Wise, J.  
Hon. Julie A. Edwards, J.

Case No. 10CAE110092

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 10CVH081164

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

MICHAEL G. LONG  
WILLIAM D. KLOSS, JR.  
ROBERT J. KRUMMEN  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008

For Defendants-Appellees

MARION H. LITTLE, JR.  
MATTHEW S. ZEIGER  
41 South High Street  
Suite 3500  
Columbus, OH 43215

Court of Appeals  
Delaware Co., Ohio  
I hereby certify the within be a true  
copy of the original on file in this office.  
Jan Antonopoulos, Clerk of Courts  
By *[Signature]* Deputy

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
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JAN ANTONOPOLOS  
CLERK

EXHIBIT  
A

*Farmer, P.J.*

{¶1} Materials Engineering and Technical Support Services Corporation (hereinafter "METSS") is an Ohio corporation with its principal office in Delaware County, Ohio. Appellant, Richard Sapienza, and appellee, Richard Heater, are the only directors and shareholders of METSS, each owning a 50% share of the corporation. Appellant resides in New York, developing technologies which the company would then market commercially. Appellee resides in Delaware County and manages the day-to-day operations of METSS.

{¶2} Appellee received information that appellant was diverting opportunities from METSS by consulting with companies other than METSS, including several corporations in which appellant held an ownership interest. Meanwhile, METSS was the sole member of Geo-Tech Polymers, LLC, a limited liability company. A disagreement arose between appellant and appellee over Geo-Tech which led to appellant divesting his interest in Geo-Tech. Following his divestment, appellant believed there were financial irregularities between Geo-Tech and METSS, with appellee diverting METSS assets to the insolvent Geo-Tech.

{¶3} On February 2, 2010, METSS filed an action against appellant in the Court of Common Pleas of Franklin County, Ohio, alleging breach of fiduciary duties, including misappropriation of corporate opportunities. On the same day, appellee fired appellant from his employment at METSS. Appellant filed a counterclaim seeking the dissolution of the corporation. On August 17, 2010, the Franklin County court dismissed the dissolution claim from the action.

{¶4} Following the filing of the Franklin County action, appellant scheduled three special shareholders meetings of METSS – the first on March 2, 2010; the second on March 18, 2010; and the third on April 14, 2010. Appellee did not appear, thereby preventing a quorum and any business from being transacted.

{¶5} An annual shareholders meeting was held on May 3, 2010 wherein appellant and appellee re-elected themselves to the board of directors. Upon considering various resolutions, the two did not agree on a single one. Appellant voted for a resolution dissolving the corporation while appellee voted against the resolution. Appellee removed the resolutions dealing with the election of corporate officers from the shareholders meeting agenda because the resolutions were to be heard during the board of directors meeting which was to be held immediately following the shareholders meeting. Before any business could be discussed at the board of directors meeting, appellee left. The election of corporate officers never took place.

{¶6} On August 5, 2010, appellant filed the instant action against appellee and METSS seeking dissolution of the corporation. He also filed a motion for appointment of a receiver and a motion to stay the Franklin County action. On September 10, 2010, appellees filed a motion for summary judgment. A non-evidentiary hearing was held on September 15, 2010. The trial court denied appellant's motion to stay the Franklin County action, and directed the matter to mediation. The remaining issues were scheduled to be heard on November 8, 2010.

{¶7} On October 25, 2010, appellant filed a cross-motion for summary judgment. By judgment entry filed October 26, 2010, the trial court granted appellees' motion for summary judgment and dismissed the complaint for dissolution.

{¶8} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶9} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO JUDICIALLY DISSOLVE THE CORPORATION PURSUANT TO R.C. 1701.91(A)(4) IN THE FACE OF UNDISPUTED EVIDENCE THAT THE PARTIES ARE DEADLOCKED REGARDING THE CONTINUED EXISTENCE OF THE CORPORATION."

II

{¶10} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY CONSIDERING EVIDENCE NOT RELEVANT TO THE SPECIAL STATUTORY PROCEEDING OF A JUDICIAL DISSOLUTION PURSUANT TO R.C. 1701.91(A)(4)."

III

{¶11} "IF THERE IS ANY DISPUTE AS TO THE EXISTENCE OF DEADLOCK, THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE MATERIAL ENGINEERING AND TECHNICAL SUPPORT SERVICES CORPORATION ('APPELLEE' OR 'METSS')."

IV

{¶12} "THE TRIAL COURT ERRED BY AWARDING SUMMARY JUDGMENT TO METSS BASED ON A DEFENSE THAT REQUIRES THE ADJUDICATION OF GENUINE ISSUES OF MATERIAL FACT - SPECIFICALLY QUESTIONS OF MATERIAL FACT OVER WHICH THE TRIAL COURT HAD NO JURISDICTION TO DECIDE BECAUSE THOSE ISSUES ARE BEFORE THE FRANKLIN COUNTY COURT OF COMMON PLEAS, OHIO, IN CASE NO. 10 CVH-02-1636."

V

{¶13} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE METSS BASED SOLELY ON THE FACT THAT PLAINTIFF-APPELLANT DR. RICHARD SAPIENZA ('APPELLANT' OR 'SAPIENZA') FAILED TO RESPOND TO METSS'S SUMMARY JUDGMENT MOTION WITHIN 14 DAYS."

I, III

{¶14} We address these assignments of error together as they both challenge the trial court's granting of summary judgment to appellees and failure to judicially dissolve the corporation.

{¶15} At the outset, we note that while couched in the context of a Civ.R. 56 summary judgment proceeding, this is not the type of case that would go forward with a full trial. It is the practice of Ohio courts to decide the issue of corporate dissolution by means of an evidentiary hearing rather than a full trial. *Callicoa v. Callicoa* (1994), 73 Ohio Misc.2d 38, citing *Hunt v. Kegerreis* (November 8, 1979), Monroe App. No. 523; *Sergakis v. White* (October 2, 1984), Jefferson App. No. 83-J-13. Because each party filed motions for summary judgment, it appears they tacitly agreed to allow the trial court to decide the issue based on the undisputed facts.

{¶16} R.C. 1701.91 governs judicial dissolution and provides the following in pertinent part:

{¶17} "(A) A corporation may be dissolved judicially and its affairs wound up:

{¶18} "(4) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by one-half of the

directors when there is an even number of directors or by the holders of shares entitling them to exercise one-half of the voting power, when it is established that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, or when it is established that the corporation has an uneven number of directors and that the shareholders are deadlocked in voting power and unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors. Under these circumstances, dissolution of the corporation shall not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.

{¶19} "(D) After a hearing had upon such notice as the court may direct to be given to all parties to the proceeding and to any other parties in interest designated by the court, a final order based either upon the evidence, or upon the report of the special master commissioner if one has been appointed, shall be made dissolving the corporation or dismissing the complaint.\*\*\*\*"

{¶20} Because R.C. 1701.91(A)(4) involves an analysis of the facts presented by the complaining shareholders and directors, our standard of review is essentially a sufficiency of the evidence standard.

{¶21} Appellant argues the uncontroverted facts establish a deadlock exists between the parties, each owning a 50% interest in the corporation. In support of this proposition, appellant cites to the May 3, 2010 annual shareholders meeting. At this meeting, various resolutions were considered wherein the parties did not agree, including a resolution for a forensic audit of METSS and the appointment of a receiver

for METSS. May 3, 2010 Shareholders Meeting T. at 7-8. Another resolution was presented to dissolve the corporation with appellant voting for and appellee voting against. Id. at 8. Resolutions relative to other litigation, to the removal of appellant as an employee, and to make a monetary distribution to the shareholders for fiscal year 2009 were split for and against. Id. at 8-11.

{¶22} The shareholders meeting was adjourned and appellee immediately called a board of directors meeting and refused to entertain any issues and adjourned the meeting. Id. at 12-13.

{¶23} Appellant attempted to call a shareholders meeting on September 1, 2010, but appellee refused to participate. September 1, 2010 Shareholders Meeting T. at 6. A board of directors meeting was held immediately thereafter wherein appellee, as chair, left. Id. Appellant read into the record the reasons for the meeting, including three offers to purchase the corporation. Id. at 7-8. One resolution called for the filing of criminal charges against appellee for the misappropriation of funds from METSS to Geo-Tech. Id. at 12-13.

{¶24} Previously, three other special shareholders meetings were called by appellant and appellee failed to participate resulting in the lack of a quorum (March 2 and 18, 2010, and April 14, 2010).

{¶25} It is uncontested that appellant and appellee are each 50% shareholders of the corporation. Appellee runs and manages the day-to-day activity of the corporation. Appellant alleges financial misconduct by appellee in his ownership of GeoTech and his failure to fulfill the obligations to METSS as memorialized in a Memorandum of Understanding dated November 1, 2005, including the repayment of

loans, the payment of accounts receivable, and the payment of rent by GeoTech to METSS. Appellee alleges appellant has violated his duty to the corporation by engaging in outside activities. As a result, appellee as CEO terminated appellant's employment at METSS and appellant was sued by his own corporation.

{¶26} During appellee's deposition, he testified that he saw no basis and had no desire to dissolve the corporation while acknowledging that appellant sought dissolution. Heater depo. at 146-147. Appellee argues the day-to-day activity of the corporation is on-going and despite the lack of cooperation in the shareholders meetings, dissolution is not warranted. See, Appellees' Motion for Summary Judgment filed September 10, 2010.

{¶27} It is clear from the record that the issues of dissolution and sale of the corporation to another have been stonewalled by appellee in his failure to attend the three special shareholders meetings and his vote against dissolution at the May 3, 2010 annual shareholders meeting. In fact, during the operational arm of the corporation, the board of directors meeting which appellee called, appellee immediately adjourned and left.

{¶28} There is no doubt that the parties are in complete deadlock. One party wishes to end the corporation while the other wishes to continue on. Although the day-to-day activities are still happening, the governance of the corporation is at a standstill.

{¶29} Upon review, we find sufficient evidence in the record of an actual deadlock of the corporation. We find judicial dissolution to be mandated by the clear language of R.C. 1701.91.

{¶30} Assignments of Error I and III are granted.

II, IV, V

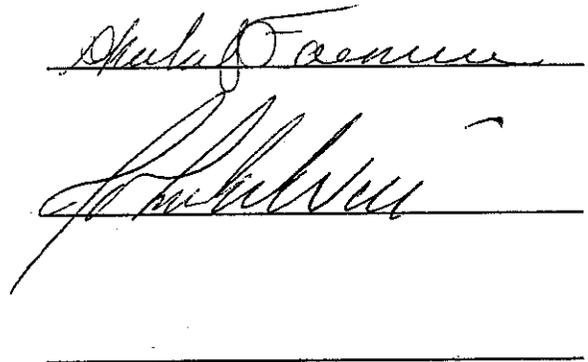
{¶31} Based upon our decision in the previous assignments, these assignments of error are moot.

{¶32} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby reversed.

By Farmer, P.J.

Wise, J. concurs.

Edwards, J. dissents.



Donald Farmer  
J. Wise  
J. Edwards

JUDGES

EDWARDS, J., DISSENTING OPINION

{¶33} I respectfully dissent from the majority opinion.

{¶34} R.C. 1701.91 provides in pertinent part:

{¶35} “(A) A corporation may be dissolved judicially and its affairs wound up:

{¶36} “(4) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by one-half of the directors when there is an even number of directors or by the holders of shares entitling them to exercise one-half of the voting power, when it is established that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, or when it is established that the corporation has an uneven number of directors and that the shareholders are deadlocked in voting power and unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors. Under these circumstances, dissolution of the corporation shall not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.

{¶37} “(D) After a hearing had upon such notice as the court may direct to be given to all parties to the proceeding and to any other parties in interest designated by the court, a final order based either upon the evidence, or upon the report of the special master commissioner if one has been appointed, shall be made dissolving the corporation or dismissing the complaint. . . .”

{¶38} I would find that based on the language of this statute, the court has discretion to grant or deny dissolution even where there is evidence of deadlock.

{¶39} The Ohio Supreme Court has discussed the issue of statutory use of the words "may" and "shall" in *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 107-108, 271 N.E.2d 834, 837-838:

{¶40} "The character of a statute, as mandatory or permissive, is commonly determined by the manner in which particular terms used therein are construed.

{¶41} "In determining whether a statute is mandatory or permissive, it is often necessary, as in this case, to trace its use of the terms 'may' and 'shall.'

{¶42} "The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary (*Dennison v. Dennison* (1956), 165 Ohio St. 146, 134 N.E.2d 574), at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation (*State ex rel. John Tague Post v. Klinger* (1926), 114 Ohio St. 212, 151 N.E. 47).

{¶43} "The word 'shall' is usually interpreted to make the provision in which it is contained mandatory (*Dennison v. Dennison*, supra), especially if frequently repeated (*Cleveland Ry. Co. v. Brescia* (1919), 100 Ohio St. 267, 126 N.E. 51).

{¶44} "Ordinarily, the words 'shall' and 'may,' when used in statutes, are not used interchangeably or synonymously. *State ex rel. Wendling Bros. Co. v. Board of Edn.* (1933), 127 Ohio St. 336, 188 N.E. 566.

{¶45} "However, in order to serve the basic aim of construction of a statute-to arrive at and give effect of the intent of the General Assembly-it is sometimes necessary to give to the words 'may' and 'shall' as used in a statute, meanings different from those given them in ordinary usage (*State v. Budd* (1901), 65 Ohio St. 1, 60 N.E. 988; *State*

*ex rel. Myers v. Board of Edn.* (1917), 95 Ohio St. 367, 116 N.E. 516), and one may be construed to have the meaning of the other (*State v. Budd*, supra; *State ex rel. Myers v. Board of Edn.*, supra; *Gallman v. Board of County Commrs.* (1953), 159 Ohio St. 253, 112 N.E.2d 38).

{¶46} "But when this construction is necessary, the intention of the General Assembly that they shall be so construed must clearly appear (*General Electric Co. v. International Union* (1952), 93 Ohio App. 139, 108 N.E.2d 211), from a general view of the statute under consideration (*State v. Budd*, supra; *State ex rel. Myers v. Board of Edn.*, supra), as where the manifest sense and intent of the statute require the one to be substituted for the other (*State ex rel. Mitman v. Greene County* (1916), 94 Ohio St. 296, 113 N.E. 831; *State ex rel. Methodist Children's Home v. Board of Edn.* (1922), 105 Ohio St. 438, 138 N.E. 865).

{¶47} "As Judge Stewart of this court said in *Dennison v. Dennison*, supra: 'Although it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion.'"

{¶48} In the instant statute, I do not find that the General Assembly clearly intended that "may" be interpreted as "shall." In subsection (D), the legislature used the word "shall" to direct the trial court to issue a final order either dissolving the corporation or dismissing the complaint. By the use of both "may" and "shall" in the same statute, it would appear the General Assembly intended the words to be given their ordinary meaning.

{¶49} I would therefore find that our standard of review is whether the court abused its discretion in denying judicial dissolution. Appellant's verified complaint demonstrates that the parties were deadlocked on the issue of dissolution of the corporation and also had failed to elect directors after Heater walked out of a meeting. However, there was evidence that the parties were not hopelessly deadlocked. The evidence demonstrates that the parties were both willing to sell the company. Appellant had no involvement in the day-to-day management of the business, and the company continued to operate in the usual manner in spite of the obvious animosity between appellant and Heater. The meetings which appellant claims demonstrate deadlock were called by appellant after he had been sued by METSS for breach of fiduciary duty and the court could have determined that he was deliberately attempting to create deadlock for the purpose of dissolving the corporation. In his deposition testimony, appellant cited three reasons for wanting to dissolve the corporation, none of which was an inability to operate the company due to deadlock:

{¶50} "Q. And you're seeking to dissolve METSS even though you've made 95 percent of your entire income over your time at METSS through METSS?"

{¶51} "A. Yes."

{¶52} "Q. And you're willing to dissolve the company and put all those families out of work?"

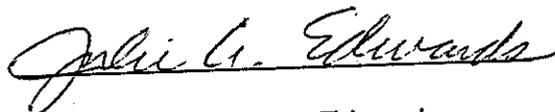
{¶53} "A. Yes."

{¶54} "Q. Why?"

{¶55} "A. I told you, I have three reasons. The first one is I'm not involved in the management or the operations of the company. Two, my partner's actually sued me to

say that I don't work and don't do things for the company. And, three, my partner is a crook. So those are all very, very good reasons. Three wonderful reasons right there to dissolve the company, because I don't need it." Sapienza Deposition, p. 103.

{¶56} By his own admission, appellant was not involved in the day-to-day management or operations of the business, and, therefore, his deadlock with Heater on some issues did not extend to how the company was managed. As there was some evidence that the parties were not completely deadlocked and/or such deadlock was deliberately manufactured by appellant because he was angry over the breach of fiduciary duty suit and simply trying to get even with Heater, I would find that the court did not abuse its discretion in denying dissolution.



Judge Julie A. Edwards

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RICHARD SAPIENZA

Plaintiff-Appellant

-vs-

MATERIALS ENGINEERING AND  
TECHNICAL SUPPORT SERVICES  
CORPORATION, ET AL.

Defendants-Appellees

JUDGMENT ENTRY

CASE NO. 10CAE110092

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Delaware County, Ohio is reversed. Costs to appellees.

*Shelby Faunce*  
\_\_\_\_\_  
*Shelby Faunce*  
\_\_\_\_\_

JUDGES

JAN ANTONOPLOS  
CLERK

2011 JUL 15 AM 11:37

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FILED

IN THE SUPREME COURT OF OHIO

RICHARD SAPIENZA	:	On Appeal from the Delaware
	:	County Court of Appeals,
Plaintiff-Appellee,	:	Fifth Appellate District
v.	:	
	:	Court of Appeals
MATERIALS ENGINEERING AND	:	Case No. 10CAE110092
TECHNICAL SUPPORT SERVICES	:	
CORPORATION, et al.,	:	
	:	
Defendants-Appellants.	:	

**AFFIDAVIT OF KENNETH HEATER**

Kenneth Heater being first duly sworn, deposes and states on personal knowledge as follows:

1. I am a director and 50% shareholder of Materials Engineering and Technical Support Services Corporation ("METSS"). I also am the president of METSS and run the day-to-day operations of METSS. While Dr. Sapienza was never involved in METSS' day-to-day operations, after his termination and the initiation of legal proceedings in February of 2010, I have continued and will continue in the future to manage the operations of METSS as required to maintain our standing with the U.S. Government, to protect METSS and its assets, and to continue to grow the business of METSS.

2. I am personally responsible for generating approximately 80% of METSS' revenue, including US Air Force Contract FA8650-07-D-6739, "Joint Services and Air Force Chemical, Biological and Radiological Defense Science and Technology Support," which generates millions in annual revenue for METSS.

3. METSS was incorporated in 1996 and for the past 15 years has been a successful scientific research, development and commercialization company. In fact,

**EXHIBIT**

**B**

since April 5, 1996 and continuing today, METSS has remained an operational, viable, and profitable corporation.

4. Currently METSS has approximately 20 full and part time employees, all but one of which resides in Central Ohio. On average, employees receive compensation and benefits in excess of \$80,000 per year.

5. METSS has ongoing, substantial contracts and client relationships with multiple customers. The majority of our contracts are with various Department of Defense ("DoD") agencies, some of which require security clearances and secured facilities to execute. Currently, METSS is actively executing on approximately thirteen research and development programs. Specifically METSS is working on: active task order contracts under US Air Force Contract FA8650-07-D-6739, having a combined contract ceiling value of \$12,595,421; active Small Business Innovative Research ("SBIR") contracts funded by multiple DoD agencies with a combined contract ceiling value of \$4,943,845; and industrial contracts with a combined contract ceiling value of \$249,610.

6. In addition to executing on the above referenced thirteen research and development programs, METSS also has multiple ongoing funding opportunities that it is currently negotiating or pursuing, including: a new task order contract under US Air Force Contract FA8650-07-D-6739 having contract ceiling value of \$2,998,701; pending proposals in response to DoD Broad Agency Announcements with a combined contract value of \$1,267,222; pending SBIR proposals with a combined contract value of \$893,055; and pending industrial funding totaling \$263,799. METSS is also actively engaged in the pursuit of additional funding opportunities with the DoD and industry, both individually and as part of multi-disciplinary teams involving unrelated third parties.

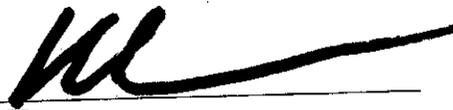
7. Disruption in our DoD contracts does not just adversely affect METSS but can adversely affect unrelated third parties. Examples of unrelated third parties that would be adversely affected include companies like Battelle, General Dynamics, and University of Dayton Research Institute.

8. As our primary income is derived from DoD contracts, any disruption in our business operations could result in termination of these contracts, which would deprive METSS of its only source of income and profitability, thereby causing irreparable harm to our business, our reputation, our employees, and our shareholders.

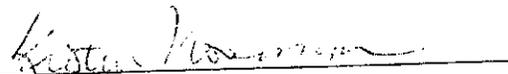
9. Because of METSS being involved in Department of Defense contracts, METSS remains subject to intrusive annual and unannounced audits (including, financial systems, cost accounting, security, time accounting, property accounting) by the government on each and every government contract.

10. METSS has an outstanding loan with Insight Bank. Dissolution and Appointment of a receiver constitutes a default under METSS' Loan Agreement with Insight Bank, and threatens to adversely affect the viability of a related corporation involving the parties.

AFFIANT FURTHER SAYETH NAUGHT.

  
\_\_\_\_\_  
Kenneth Heater

Sworn to and subscribed in my presence this \_\_\_ day of July 22, 2011.

  
\_\_\_\_\_  
Notary Public

**KRISTIN L. NONEMAN**  
Notary Public, State of Ohio  
My Commission Expires 09-25-2013