

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE LINCOLN ELECTRIC COMPANY, :

Plaintiff-Petitioner, : Case No. 2013-1088

v. : On Certification of a Question of State Law

TRAVELERS CASUALTY AND : from the United States District Court for

SURETY COMPANY, et al., : the Northern District of Ohio, Eastern

Defendants-Respondents. : Division, Case No. 1:11 CV 2253

: :

**PRELIMINARY MEMORANDUM OF DEFENDANTS-RESPONDENTS TRAVELERS  
CASUALTY AND SURETY COMPANY AND ST. PAUL FIRE AND MARINE  
INSURANCE COMPANY IN OPPOSITION TO CERTIFICATION**

Michael E. Smith (0042372)  
FRANTZ WARD LLP  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
Telephone: (216) 515 1660  
Facsimile: (216) 515 1650  
Email: msmith@frantzward.com

COUNSEL FOR DEFENDANTS-  
RESPONDENTS TRAVELERS CASUALTY  
AND SURETY COMPANY AND ST. PAUL  
FIRE AND MARINE INSURANCE  
COMPANY

Dennis R. Lansdowne (0026036)  
Nicholas A. DiCello (0075745)  
William B. Eadie (0085627)  
SPANGENBERG, SHIBLEY & LIBER LLP  
1001 Lakeside Avenue East, Suite 1700  
Cleveland, Ohio 44114  
Telephone: (216) 696 3232  
Facsimile: (216) 696 3924  
Email: dlansdowne@spanglaw.com  
ndicello@spanglaw.com  
weadie@spanglaw.com

COUNSEL FOR PLAINTIFF-PETITIONER  
THE LINCOLN ELECTRIC COMPANY

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Defendants-Respondents St. Paul Fire and Marine Insurance Company (“St. Paul”) and Travelers Casualty and Surety Company (“Travelers Casualty”) (f/k/a The Aetna Casualty and Surety Company, or “Aetna”) (collectively, the “Umbrella Insurers”) respectfully submit this preliminary memorandum in opposition to certification in accordance with S.Ct.Prac.R. 9.05(A).

### **PRELIMINARY STATEMENT**

The Supreme Court should not answer the certified question for three reasons: (i) the existence and terms of some of the contracts at issue are in dispute; (ii) the case is ready for trial and the resolution of outstanding factual and equitable issues can fully resolve the case without reaching the certified question; and (iii) there is no conflict between any court applying Ohio law on the certified question.

The Lincoln Electric Company (“Lincoln Electric”) seeks to have the Umbrella Insurers pay for losses allegedly arising from exposure to Lincoln Electric’s welding products (“Welding Product Claims”). The Umbrella Insurers contend that they are not obligated to pay Welding Product Claims at this time because none of the primary policies underlying the Umbrella Policies (defined below) is exhausted. Lincoln Electric’s primary insurer is, in fact, currently defending and indemnifying Lincoln Electric against Welding Product Claims. It is black letter law that primary policies must exhaust before umbrella insurers pay. Thus, this dispute can be resolved by resolution of factual questions bearing on whether any primary policy is, in fact, exhausted. It would be an inefficient use of judicial resources to address the certified question before resolution of the straightforward and dispositive factual question of whether the primary policies are exhausted. The certified question posed by the District Court may never need to be reached assuming, as the Umbrella Insurers anticipate, a jury concludes that the Umbrella Policies owe no coverage because the primary policies have yet to be exhausted.

Resolution of the certified question is also unnecessary because Lincoln Electric and St. Paul entered into an agreement in 2000 concerning how Lincoln Electric's primary policies would respond to the Welding Product Claims. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Whether Lincoln Electric is entitled to treat its Lincoln Share payments in this manner can be resolved by an examination of the parties' 2000 agreement and documentary and testimonial evidence relating to the parties' course of dealing, without reference to the certified question. It is not sensible to address the certified question without the benefit of further factual development on this contractual issue at trial.

Finally, the District Court's Order of Certification to the Supreme Court of Ohio (the "Referral Order") incorrectly suggests that Ohio law on the certified question is unsettled and that there are conflicts between courts. This Court's decision in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.* found that an insured is entitled to select the "primary policy against which it desires to make a claim." 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 12. Following *Goodyear*, every court that has considered the certified question has reached the same conclusion: *Goodyear* does not permit an insured to change the manner in which it opts to allocate claims *after* implementing its selection. This case was ready to be tried on August 13, 2013. It is unnecessary to delay resolution of this litigation simply to reaffirm this universally-accepted conclusion.

**STATEMENT OF THE FACTS**

**The Insurance Policies**

Lincoln Electric purchased primary insurance policies from St. Paul from 1947 to 1985. Ex. D (Nanzig Aff.) ¶ 2.<sup>1</sup> Lincoln Electric alleges that from April 1969 to August 1, 1985 it purchased excess umbrella insurance from St. Paul or Aetna (the “Umbrella Policies”). District Court Docket No. (“Dkt. No.”) 56 (Am. Compl.) ¶¶ 7, 13. Neither party has located copies of the umbrella policies allegedly in effect from April 1969 to May 16, 1975. Additionally, neither party possesses any evidence indicating that Lincoln Electric paid the premiums required by the Umbrella Policies.<sup>2</sup> Whether the contracts exist and whether required consideration has been paid will be the subject of trial. In addition, because each Umbrella Policy that has been located provides that it applies only after exhaustion of the underlying St. Paul primary policy, trial will focus on whether this condition has been met.<sup>3</sup>

**The 2000 Agreement**

On June 30, 2000, Lincoln Electric and its primary insurer (St. Paul) executed a written agreement (the “2000 Agreement”) [REDACTED]

[REDACTED] 4 [REDACTED]  
[REDACTED]

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<sup>1</sup> All exhibits to this brief are part of the District Court record.

<sup>2</sup> [REDACTED]

<sup>3</sup> [REDACTED]

<sup>4</sup> This dispute was the subject of litigation captioned *Lincoln Electric Co. v. St. Paul Fire & Marine Insurance Co.*, 10 F.Supp.2d 856 (N.D.Ohio 1998), *aff'd in part, rev'd in part*, 210 F.3d 672 (6th Cir.2000).

[REDACTED]

The parties also agreed to other compromises in the 2000 Agreement. [REDACTED]

[REDACTED]

**Post-2000 Agreement Course of Conduct**

[REDACTED]

[REDACTED]. Consistent with the 2000 Agreement, none of the 38 primary policies has been exhausted. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Lincoln Electric's financial statements reflect that Lincoln Electric, not the Umbrella Insurers, is responsible for paying the Lincoln Share.<sup>6</sup>

**This Litigation**

Lincoln Electric now seeks to have the Umbrella Insurers pay the Lincoln Share it agreed to pay in the 2000 Agreement. Lincoln Electric seeks to have the Umbrella Insurers defend and indemnify Welding Product Claims at the same time that the underlying primary insurer is defending and indemnifying Welding Product Claims. Lincoln Electric asserts that the Umbrella Insurers should have begun paying simultaneous with the primary insurer beginning in 2006.

This is a newfound theory. [REDACTED]

[REDACTED]

5 [REDACTED]

6 [REDACTED] In contrast, Lincoln Electric booked the primary policies' obligation to pay as a receivable. Ex. Q (2011 Lincoln Electric 10-K) at F-3, F-47; [REDACTED]

[REDACTED]

[REDACTED]

After engaging in fact and expert discovery, the parties filed three summary judgment briefs. Lincoln Electric's partial summary judgment motion seeks judgment on, and dismissal of, the Umbrella Insurers' First (exhaustion), Fifth (allocation), Sixth (breach of 2000 Agreement) and Seventh (declaration regarding 2000 Agreement) Counterclaims. Lincoln Electric's motion also seeks a declaratory judgment as to allocation. The Umbrella Insurers' two summary judgment motions seek judgment on Lincoln Electric's Cause of Action Nos. 1-2 (duty to defend component) and 3-4 (defense cost component) as well as the Umbrella Insurers' Counterclaim Nos. 1 (duty to defend component) and 3. They also seek a declaration as to allocation.

On July 3, 2013, before the parties filed opposition briefs on the pending summary judgment motions, the District Court issued the Referral Order. It asks this Court to answer the following question:

May an insured who has accrued indemnity and defense costs arising from progressive injuries, and who settles resultant claims against primary insurer(s) on a pro rata allocation basis among various primary insurance policies, employ an 'all sums' method to aggregate unreimbursed losses and thereby reach the attachment point(s) of one or more excess insurance policies?

Referral Order at 1.

**STANDARD**

The Supreme Court Rules of Practice permit a federal court to certify a question by issuing "a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." S.Ct.Prac.R. 9.01(A). This Court has discretion not to answer a certified question. *See id.* ("The Supreme Court *may* answer a question certified to it by a court of the United States.")

(emphasis added); *Broadview S. & L. Co. v. Riestenberg*, 49 Ohio St.3d 133, 134, 550 N.E.2d 949 (1990) (declining to answer certified question as “exercise [of] our discretion”).

### ARGUMENT

#### **I. The Court Should Decline To Address The Certified Question Because The Dispute Can Be Resolved Without An Answer To The Question**

This litigation involves several contract disputes that can be decided based on the terms of the policies at issue and the 2000 Agreement. The Court should decline to respond to the certified question because its resolution is not necessary to dispose of this proceeding and may not significantly further the proceedings.

The Umbrella Insurers assert that Lincoln Electric’s attempt to collect the Lincoln Share from the Umbrella Insurers breaches Lincoln Electric’s contractual undertaking in the 2000 Agreement. Dkt. No. 63 (Answer) ¶¶ 59-71; [REDACTED]. The Umbrella Insurers also contend that Lincoln Electric’s claims are barred by waiver and/or estoppel because it failed to provide the Umbrella Insurers with an opportunity to assume the defense of insured claims as required by the insurance contracts. Dkt. No. 63 (Answer) at 13 (twenty-second affirmative defense); [REDACTED]

[REDACTED]. The Umbrella Insurers further contend that Lincoln Electric is estopped and has waived and released St. Paul from paying a large percentage of the damages sought by Lincoln Electric. Dkt. No. 63 (Answer) at 9 (third affirmative defense), 13 (twenty-second affirmative defense).<sup>7</sup> The Court should not answer the certified question because if the Umbrella Insurers win these issues, the question is moot.

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<sup>7</sup> [REDACTED]

This case involves contractual issues that, once resolved by the fact-finder, may render a response to the certified question unnecessary. An advisory opinion as to whether an insured may allocate claims vertically for the purpose of accessing one or more excess policies after allocating the same claims pro rata for coverage under primary policies is premature at best. At bottom, this contract dispute is not appropriate for this Court to consider without the benefit of a full factual record. *See Copper v. Buckeye Steel Castings*, 67 Ohio St.3d 563, 563, 621 N.E.2d 396 (1993) (“[I]t is not appropriate for this court to answer certified questions of state law that are so factually specific in nature.”).

By way of example, the certified question appears to assume that Lincoln Electric has “unreimbursed losses.” However, the evidence shows that in the 2000 Agreement, Lincoln Electric actually agreed to pay these costs out of its own pocket. Lincoln Electric’s [REDACTED] SEC filings confirm that it, and not the Umbrella Insurers, is responsible for paying the Lincoln Share regardless of the answer to the certified questions. *See, e.g.,* [REDACTED]; [REDACTED]; Ex. Q (Lincoln Electric 2011 10-K) at F-47. The evidence supporting the Umbrella Insurers’ interpretation of the 2000 Agreement was set forth in the Umbrella Insurers’ opposition to Lincoln Electric’s summary judgment motion. The District Court did not have the benefit of this evidence before the Referral Order was issued.

Further, the Referral Order inappropriately asks this Court to opine on the parties’ respective rights and obligations under insurance policies without the benefit of a full factual record regarding their existence and/or terms.<sup>8</sup> Additionally, the Referral Order misconstrues the

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<sup>8</sup> [REDACTED]

requirements of the insurance policies that have been located. The District Court asks this Court to determine whether an insured may “aggregate unreimbursed losses . . . [to] reach the attachment point(s) of one or more excess insurance policies.” Referral Order at 1. But the plain language of each Umbrella Policy states that it responds when the available underlying insurance has been exhausted, not upon an “attachment point” being reached, as the certified question states. [REDACTED]

[REDACTED]

[REDACTED]. This case can be resolved by the fact-finder’s review of the relevant evidence to determine whether any underlying primary policy is actually exhausted. If the fact-finder finds that the primary policies are not exhausted, the conditions for coverage under the Umbrella Policies have not been met and the issue posed by the certified question is moot. The Umbrella Insurers respectfully submit that it would be more expedient to have the fact-finder resolve the straightforward factual issues relating to exhaustion prior to this Court addressing the allocation question certified to it.

**II. There Is No Conflict Between Any Court Applying Ohio Law Regarding The Certified Question**

The Court also need not address the certified question because the issue it poses is not unsettled in Ohio case law. Since this Court’s 2002 decision in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, it has been settled that an insured is entitled to select the “primary

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[REDACTED]

policy against which it desires to make a claim.” 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 12.<sup>9</sup> Since then, every court ruling on the issue has held that an insured cannot retroactively change the method by which it opted to access insurance policies *after* making its selection.<sup>10</sup>

**A. Courts Applying Ohio Law Have Consistently Declined To Read *Goodyear* As Permitting Changes To The Policy Selection Method**

In 2003, the United States District Court for the Northern District of Ohio issued the first post-*Goodyear* opinion addressing whether an insured could change its approach to assigning losses to insurance policies after having made and implemented its policy selection. *See GenCorp, Inc. v. AIU Ins. Co.*, 297 F.Supp.2d 995 (N.D. Ohio 2003), *aff'd*, 138 F.App'x 732 (6th Cir.2005). *GenCorp* held that a policyholder cannot rely on *Goodyear* to allocate claims to primary and excess policies under different approaches. *GenCorp*, 297 F.Supp.2d at 1007 (“*GenCorp* has already made its allocation of liability . . . . *GenCorp* made that allocation when it settled with its primary insurers.”).<sup>11</sup> In *GenCorp*, the policyholder accessed its primary policies on a pro rata basis before trying to access excess policies vertically by aggregating unreimbursed losses just as Lincoln Electric is trying to do here. *Id.* at 998-99, 1006-07. The

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<sup>9</sup> This principle was reaffirmed in *Pennsylvania General Insurance Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, ¶¶ 11-12.

<sup>10</sup> This Court has observed that where “the Sixth Circuit Court of Appeals has given its answer, we believe it would be inappropriate to intervene between the federal appellate and district courts.” *Broadview S. & L. Co. v. Riestenberg*, 49 Ohio St.3d 133, 134, 550 N.E.2d 949 (1990) (declining certification from district court). This, of course, “does not preclude the Sixth Circuit Court of Appeals from seeking [this Court’s] opinion should this case again reach it on appeal.” *Id.*

<sup>11</sup> The Referral Order incorrectly states that “[t]he *GenCorp* court did not explain how its result could be brought into consonance with the all sums approach in *Goodyear*.” Referral Order at 8 fn. 8. To the contrary, the *GenCorp* decision discusses *Goodyear* extensively and explains in detail how it fits within the *Goodyear* framework. *See GenCorp*, 297 F.Supp.2d at 1006 (discussing *Goodyear*).

*GenCorp* district court rejected the policyholder's effort to access excess coverage and required the policyholder to maintain a consistent approach. *Id.* at 1007-08.

On appeal, the Sixth Circuit affirmed the district court's decision, noting that "the record and the applicable law fully support the district court's conclusions" and that "the district court's opinion carefully and correctly sets out the law governing the issues raised, and clearly articulates the reasons underlying its decision." 138 F.App'x at 734. The Sixth Circuit agreed with the district court that "by settling with its primary and umbrella insurers, GenCorp had made the choice to allocate its liability as broadly as possible, which meant that it had to demonstrate that its liabilities would exceed the cumulative limits of all the primary and umbrella policies before it could trigger the excess policies." *Id.*

Just last year, the Court of Common Pleas of Ohio, Montgomery County reached the very same conclusion in *MW Custom Papers LLC v. Allstate Insurance Co.*, Montgomery C.P. No. 2012 CV 03228, 2012 WL 6565832 (Sept. 21, 2012). The *MW Custom Papers* court dismissed claims made against umbrella insurers under a vertical exhaustion theory because the policyholder had accessed its primary policies on a pro rata basis:

MW Custom Papers already has allocated its asbestos claims 'horizontally' and across all triggered underlying coverage by entering cost share agreements with the underlying carriers. In this regard, the 6th Circuit's decision in *GenCorp, Inc. v. AIU Ins. Co.*, 138 Fed. Appx. 732, 2005 U.S. App. LEXIS 13669 (6th Cir.) is on point.

*Id.* at \*2.<sup>12</sup>

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<sup>12</sup> Less than three months ago, in *IMG Worldwide, Inc. v. Westchester Fire Insurance Co.*, \_\_\_ F.Supp.2d \_\_\_, N.D. Ohio No. 1:11 CV 1594, 2013 WL 1975678 (May 13, 2013), a federal court applying Ohio law relied on *GenCorp* and agreed that it and other decisions "make it clear that the insured may not shift the risk of settling for a reduced amount with the primary carrier to the excess carrier." *Id.* at \*13.

Even Goodyear (the company) was unsuccessful in trying to convince a court that *Goodyear* (the decision) permitted it to alter the past and deviate from a previously-selected allocation approach. After this Court's issuance of the *Goodyear* decision, Goodyear litigated with its excess insurers regarding how asbestos claims should be allocated to excess policies. *Goodyear Tire & Rubber Co. v. Hartford Acc. & Indem. Co.*, W.D.Pa.No. 97-933, 2005 WL 6244202 (Mar. 11, 2005) ("*Goodyear II*") (applying Ohio law). While litigating with the excess insurers, Goodyear reached a settlement with its primary carriers that allocated claims on a pro rata basis across multiple primary policies. The *Goodyear II* court found that Goodyear could not do an about face and allocate claims on a different basis for purposes of reaching its excess policies. The court explained that:

[i]n settling fully with its primary insurers, [the insured] allocated the liability it accrued during any policy period as broadly as possible among all primary policies in effect during that period. The excess insurers have liability, therefore, only if, after distributing liability as broadly as possible during any primary policy period, the payment limits of any primary policy are exceeded.

*Id.* at \*6 (quoting *GenCorp*, 297 F.Supp.2d at 1008).

Quite simply, every court that has considered whether this Court's *Goodyear* decision permits a policyholder to alter the allocation approach it used to access primary policies for purposes of accessing excess coverage has reached the same conclusion: no. Such a rule promotes predictability and consistency because, once the policyholder has selected its allocation approach, it and its insurers all know where they stand. There is no reason why the Court should reaffirm what is already uniformly accepted.<sup>13</sup>

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<sup>13</sup> The Referral Order also states that "there is a high likelihood that . . . this question of Ohio law will be relitigated . . . in insurance actions in state and federal courts." Referral Order at 10-11. This is belied by the fact that this issue has only arisen a handful of times in the more than a decade since *Goodyear* was decided.

**B. The *Goodrich* Decision Does Not Permit A Change In Policy Selection Method**

The Referral Order suggests that this Court should answer the certified question because of the existence of “conflicts between precedent issued by Ohio courts” and “conflicts between precedent from Ohio courts and the United States Court of Appeals for the Sixth Circuit.” Referral Order at 1-2. The Referral Order points to a single decision, the unpublished decision in *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, 2008 WL 2581579, as being in conflict with the uniform holdings of *GenCorp* (N.D. Ohio), *GenCorp* (Sixth Circuit), *MW Custom Papers* (Ohio C.P.), *IMG* (N.D. Ohio), and *Goodyear II* (W.D. Pa.). The District Court misreads *Goodrich*.

The *Goodrich* decision does not consider the same issue as *GenCorp*, *MW Custom Papers*, *IMG*, and *Goodyear II*. The very first page of the *Goodrich* decision indicates that there was no dispute in that case that the policyholder “had exhausted its \$20 million in primary insurance coverage.” *Goodrich*, 2008 WL 2581579, at \*1. Thus, the key issue here – whether the primary policies are exhausted – was assumed to be true in *Goodrich*. *Goodrich* addressed whether an insured’s settlement with certain excess insurers was “for the same damages” that the jury awarded the insured against other, non-settling, excess insurers. *Id.* at \*7. The issue was setoff, or “settlement credits.” *Id.* The insured in *Goodrich* brought suit against several of its excess insurers for coverage related to environmental cleanup costs. *Id.* at \*1. During the suit, *Goodrich* settled with most of the excess insurers. *Id.* The jury found against the remaining excess insurers, and the *Goodrich* Court decided only whether settlement dollars paid by other excess insurers should be credited towards the verdict against the non-settling excess insurers.

*Id.* at \*7. The issue presented to the District Court in this case has absolutely nothing to do with the *Goodrich* decision.<sup>14</sup>

No court opinion, published or unpublished, federal or state, has suggested that the *Goodrich* decision on settlement credits rejected the holding in *GenCorp*. Indeed, only one other decision that mentions both *GenCorp* and *Goodrich* has been located, and it follows *GenCorp*'s reasoning. See *OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co.*, 679 F.3d 456, 463 (6th Cir.2012) (following *GenCorp*). In the five years since *Goodrich*, courts have continued to cite *GenCorp* and have uniformly endorsed its holding that policyholders are required to access insurance policies by allocating claims in a consistent manner. See *MW Custom Papers*, 2012 WL 6565832, at \*2; *IMG*, 2013 WL 1975678, at \*13.

There is no conflict of Ohio law with respect to whether *Goodyear* permits a policyholder to allocate losses vertically to access one or more excess policies after having allocated the same losses pro rata to access coverage under multiple primary policies. There is no need for the Court to address this purely illusory conflict.

### **III. The Certified Question Misstates The Issue**

To the extent this Court is inclined to address the issue raised by the certified question at this time, it should address the following question instead:

Where an umbrella policy requires exhaustion of the underlying insurance, may an insured receive payment under such policy prior to the actual exhaustion of applicable underlying insurance?

### **CONCLUSION**

For the foregoing reasons, St. Paul and Travelers Casualty respectfully request that the Court decline to answer the certified question.

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<sup>14</sup> Indeed, *Goodrich* does not cite to or even mention *GenCorp*.

Dated: July 29, 2013

Respectfully submitted,

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Michael E. Smith (0042372)  
msmith@frantzward.com  
FRANTZ WARD LLP  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
Telephone: (216) 515-1660  
Facsimile: (216) 515-1650

COUNSEL FOR DEFENDANTS-  
RESPONDENTS

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the \_\_\_\_ day of July, 2013, a copy of the foregoing was served via e-mail upon the following:

Dennis R. Lansdowne (0026036)  
Nicholas A. DiCello (0075745)  
William B. Eadie (0085627)  
SPANGENBERG, SHIBLEY & LIBER LLP  
1001 Lakeside Avenue East, Suite 1700  
Cleveland, Ohio 44114  
Telephone: (216) 696 3232  
Facsimile: (216) 696 3924  
Email: dlansdowne@spanglaw.com  
ndicello@spanglaw.com  
weadie@spanglaw.com

Anna P. Engh  
Elliott Schulder  
Timothy D. Greszler  
COVINGTON & BURLING LLP  
1201 Pennsylvania, N.W.  
Washington, D.C. 20004  
Telephone: (202) 662 6000  
Facsimile: (202) 662 6291  
Email: aengh@cov.com  
tgreszler@cov.com  
smacdonald@cov.com

---

Michael E. Smith (0042372)  
msmith@frantzward.com  
FRANTZ WARD LLP  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
Telephone: (216) 515-1660  
Facsimile: (216) 515-1650

Dated: July 29, 2013

Respectfully submitted,



---

Michael E. Smith (0042372)  
msmith@frantzward.com  
FRANTZ WARD LLP  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
Telephone: (216) 515-1660  
Facsimile: (216) 515-1650

COUNSEL FOR DEFENDANTS-  
RESPONDENTS

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 29<sup>th</sup> day of July, 2013, a copy of the

foregoing was served via e-mail upon the following:

Dennis R. Lansdowne (0026036)  
Nicholas A. DiCello (0075745)  
William B. Eadie (0085627)  
SPANGENBERG, SHIBLEY & LIBER LLP  
1001 Lakeside Avenue East, Suite 1700  
Cleveland, Ohio 44114  
Telephone: (216) 696 3232  
Facsimile: (216) 696 3924  
Email: dlansdowne@spanglaw.com  
ndicello@spanglaw.com  
weadie@spanglaw.com

Anna P. Engh  
Elliott Schulder  
Timothy D. Greszler  
COVINGTON & BURLING LLP  
1201 Pennsylvania, N.W.  
Washington, D.C. 20004  
Telephone: (202) 662 6000  
Facsimile: (202) 662 6291  
Email: aengh@cov.com  
tgreszler@cov.com  
smacdonald@cov.com

  
\_\_\_\_\_  
Michael E. Smith (0042372)  
msmith@frantzward.com  
FRANTZ WARD LLP  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
Telephone: (216) 515-1660  
Facsimile: (216) 515-1650

**EXHIBITS A-R**  
**FILED UNDER SEAL**