

IN THE SUPREME COURT OF OHIO

FIRSTMERIT BANK, N.A.,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 DANIEL E. INKS, et al.,)
)
 Defendants/Appellees.)

COURT OF APPEALS CASE NO.: 26182

ON APPEAL FROM THE SUMMIT
COUNTY COURT OF APPEALS, NINTH
APPELLATE DISTRICT

13-0091

13-0203

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I. INTRODUCTION:

The Ninth District, relying on the plain language contained in R.C. 1335.05 and 1335.02(B), held that raising an oral forbearance agreement in a Civil Rule 60(B) motion for relief from judgment was not an “action” and therefore not prohibited by Ohio’s statute of frauds. This decision is consistent with a recent decision of this Court, which interpreted the terms “any civil action brought” to mean the filing of a civil lawsuit.

The Ninth District’s decision is also consistent with the legislature’s definition of “action,” as well as the cases interpreting the scope of that term.

In deciding this appeal, the Court must determine whether to follow the plain meaning of the term “action,” as well as the legislative definition of that term, or whether the term “action” should be expanded to include defenses raised in a civil lawsuit.

II. STATEMENT OF FACTS:

A. Background Facts and the Ashland County Common Pleas Action:

This appeal arises from a cognovit judgment entered in favor of plaintiff/appellant FirstMerit Bank, N.A. against the four defendants/appellees: Daniel E. Inks, Deborah A. Inks, David J. Slyman and Jacqueline Slyman. As such, the factual record is limited to affidavits submitted by FirstMerit and the facts introduced in connection with the appellees’ Civil Rule 60(B) motion for relief from judgment.

Appellees guaranteed a loan FirstMerit had made to non-party Ashland Lakes, LLC, an Ohio limited liability company which owned approximately one hundred thirty acres of mixed-use commercial property in Ashland County, Ohio.

The real estate market in Ohio struggled in 2009. Ashland Lakes was no exception. FirstMerit commenced a foreclosure action in Ashland County Common Pleas Court against Ashland Lakes in 2009. The property was scheduled for sheriff's sale in March 2011.

While the foreclosure action was pending, Ashland Lakes attempted to resolve its dispute with FirstMerit. The parties conducted several meetings which lead to an agreed upon resolution. In January 2011, FirstMerit proposed that, in exchange for \$1,300,000, it would release its claims on Ashland Lakes' property, with the exception of two single-family homes. FirstMerit agreed that upon receipt of an additional \$300,000 by October 15, 2011, it would release its mortgages on those two homes. FirstMerit also demanded that Ashland Lakes pay all delinquent and current property taxes at the time of closing. (Appx. 15).

Under the terms agreed upon, FirstMerit agreed to "walk away" from approximately \$1 Million owed by Ashland Lakes. This concession made the deal marketable for takeout financing. Despite poor market conditions, Ashland Lakes was in fact able to procure takeout financing, partly through a commercial lender and partly through additional investors. (*Id.* at 16).

As part of the settlement, FirstMerit also agreed to cease all legal proceedings against Ashland Lakes and the four guarantors if all the agreed upon payments – including the additional \$300,000 payment - were received by FirstMerit on or before October 15, 2011. (*Id.*).

Appellee Daniel Inks was able to obtain financing from non-party Westfield Bank for a portion of the funds needed to satisfy his arrangement with FirstMerit. (*Id.*). As part of its due diligence in this transaction, Westfield contacted FirstMerit representative Thomas Krumei, who verified the sheriff's sale of Ashland Lake's properties would be postponed and Westfield would be given time to close the deal if Westfield provided a loan commitment. On or about February

14, 2011, Westfield issued a loan commitment to Ashland Lakes. (Appx. 16, 21-24). FirstMerit was given a copy of Westfield's loan commitment.

Less than a week before the scheduled sheriff's sale, FirstMerit provided Ashland Lakes with a Term Sheet. (Id. at 16, 25-26). Although the major, agreed upon conditions were memorialized, the Term Sheet contained some additional items which were not part of the parties' January agreement. For the first time, FirstMerit was requiring a \$200,000 deposit as a condition of canceling the sheriff's sale. (Id.)

On Monday, March 7, 2011, Daniel Inks spoke to Krumel by telephone. (Id. at 17). Inks told Krumel he was only able to raise \$150,000 (of the \$200,000 deposit) over the weekend. (Appx. 17). Inks told Krumel that he could deliver the \$150,000 the next day (Tuesday, March 8, 2011). (Id.).

Krumel said the \$150,000 was acceptable to FirstMerit in lieu of \$200,000 deposit listed in the March 4, 2011 Term Sheet.¹ (Id.). Krumel also told Inks that a Forbearance Agreement was being forwarded to him. However, the Forbearance Agreement would still contain reference to the \$200,000 amount. (Id. at 17, 27-45).

Inks received FirstMerit's Forbearance Agreement shortly thereafter. It contained terms that differed not only from those agreed upon at the January meeting, it contained terms that differed from the Term Sheet of the previous Friday. Inks delivered to Krumel later that day that requested changes to the terms of the Forbearance Agreement. (Appx. 17, 46).

In a subsequent conversation, Krumel told Inks to deliver the \$150,000 deposit on March 8, 2011, along with payment for certain appraisal costs (\$9,000). (Id. at 17). In return, FirstMerit would accept the changes requested in Inks' March 7 letter, with the exception of

¹ Regardless of the amount of the deposit, the total sum FirstMerit agreed upon (\$1,600,000) remained the same.

charges related to the appraisal (which Inks agreed to drop). (Id.). In yet another conversation later that day, Krumel told Inks he would be out of the office on Tuesday, March 8, 2011, but would make himself available via cell phone. (Id.).

On March 8, 2011, Krumel contacted Inks prior to the start of normal banking hours, requesting payment of the agreed upon \$150,000 deposit. Inks told Krumel he would make arrangements to deliver the \$150,000 deposit to the FirstMerit, but that he needed to confirm with his lender the mechanics (where and how) to forward the funds. (Appx. 17-18).

Inks received the payment details from his funding source before noon on March 8, 2011. Upon receipt of these instructions, Inks attempted to call Krumel for deposit instructions. Krumel, however, did not answer Inks' call. (Id.).

Throughout the remainder of the business day of March 8, 2011, Inks repeatedly called Krumel's cell phone. Krumel did not answer Inks' calls until the close of business. When he finally returned Inks' calls, Krumel told him it was too late to deliver the payment and the properties would proceed to sale the next day. A majority of Ashland Lakes' properties were sold at sheriff's sale on or around March 9, 2011. (Id.)

B. The Procedural History of This (Summit County) Action:

On May 17, 2001, FirstMerit commenced the action that lead to this appeal by filing a complaint for cognovit judgment against appellees Daniel Inks, Deborah Inks, David Slyman and Jacqueline Slyman, based on personal guaranties FirstMerit had obtained in connection with its transactions with Ashland Lakes. The Summit County Court of Common Pleas entered judgment in favor of FirstMerit and against the four guarantors in the sum of \$3,337,467.13 that same day.

The guarantors moved, pursuant to Civil Rule 60(B) for relief from the cognovit judgment. Among the defenses raised in the Rule 60(B) motion, the guarantors asserted FirstMerit had entered into an oral settlement agreement with Ashland Lakes.

The guarantors also appealed the entry of the cognovit judgment, asserting FirstMerit failed to produce the original warrants of attorney as required. (9th Dist. Case No. 25980). After filing their appeal, the guarantors moved the Ninth District to remand the action back to the trial court for a ruling on their Rule 60(B) motion.

The trial court denied the guarantors' Rule 60(B) motion, finding, *inter alia*, the defense of an oral settlement agreement barred by the statute of frauds (R.C. 1335.02 and 1335.05) and issue preclusion. The guarantors also appealed the trial court's denial of their Rule 60(B) motion (9th Dist. Case No. 26182). The two appeals were consolidated.

In a decision dated November 7, 2012, the Ninth District affirmed in part, reversed in part, and remanded. *FirstMerit Bank, N.A. v. Daniel E. Inks, et al.*, 9th Dist. Case Nos. 25980 and 26182, 2012-Ohio-5155.

For purposes of this appeal, the relevant holding by the Ninth District was the trial court incorrectly concluded that the guarantors' oral settlement agreement was barred by the statute of frauds:

By its plain language, Section 1335.02(B) prohibits a party from "bringing] an action on a loan agreement" unless the agreement is in writing. In this case, the Slymans and Inkses did not attempt to "bring an action" against FirstMerit, they merely raised the oral forbearance agreement as a defense to FirstMerit's action against them. Accordingly, the trial court incorrectly concluded that their defense was barred under the statute of frauds. R.C. 1335.02(B); see also R.C. 1335.05 (providing that "[n]o action shall be brought . . . upon a contract or sale of lands . . . unless the agreement upon which such action is brought . . . is in writing . . .").

Id. at ¶ 22.

FirstMerit moved the Ninth District to reconsider its decision and to certify the portion of its decision concerning the statute of frauds (R.C.1335.05) as in conflict with the decisions of other appellate districts. The Ninth Circuit denied the motion to reconsider, but granted FirstMerit's motion to certify its decision as being in conflict with the Tenth District Court of Appeals, certifying the following to this Court: "Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to the contract involving an interest in land orally agreed to modify the terms of their agreement."

FirstMerit filed a jurisdictional appeal from the same Ninth District opinion, asserting the certified question did not address R.C. 1335.02 and was therefore too narrow.

This Court certified a conflict between the Ninth District's decision in this matter and the Tenth District's decision in *Nicolazakes v. Deryk Babriel Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 Ohio App. LEXIS 6135 (Dec. 26, 2000). This court also accepted jurisdiction of FirstMerit's jurisdictional appeal and consolidated those two appeals for further proceedings.

III. ARGUMENT:

Appellees' Proposition of Law: Applying the rules of statutory construction, this Court should find the term "action," as used in Ohio's statute of frauds at R.C. 1335.05 and 1335.02(B), does not prohibit a party from raising as a defense an oral modification to the terms of their agreement.

- A. **The term "action," as used in R.C. 1335.05 and 1335.02(B) is clear and unambiguous and does not apply to defenses.**

In deciding this appeal, the Court must determine the legislature's meaning of the term "action" as used in Ohio's statute of frauds. R.C. 1335.05 provides that "[n]o *action shall be brought* * * * upon a contract or sale of lands * * * unless the agreement upon which such action is brought * * * is in writing." (Emphasis added).

Similarly, R.C. 1335.02(B) states “[n]o party to a loan agreement may *bring an action* on a loan agreement unless the agreement is in writing and is signed by the party *against whom the action is brought* or by the authorized representative of the party *against whom the action is brought*.” (Emphasis added).

When interpreting these statutes, the Court must examine the words used by the legislature. *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, ¶ 12. When the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written. *Id.*

The Ninth District relied upon the plain language of R.C. 1335.02(B) when it held the trial court incorrectly applied the statute of frauds to the guarantors’ oral forbearance agreement defense. *Inks*, 2012-Ohio-5155 at ¶ 22.

This Court recently interpreted the terms “any civil action brought” in R.C. 2317.43 to mean the filing of a civil lawsuit. *Estate of Johnson, et al. v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, ¶ 16, 989 N.E.2d 35.

In reaching this decision, the Court relied upon the definition of “civil action” in Black’s Law Dictionary:

The first phrase, “In any civil action brought by an alleged victim,” determines the application of the statute. A “civil action” has been defined as an “[a]ction brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings.” Black’s Law Dictionary 222 (5th Ed.1979). A “cause of action” is defined as “[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitled one person to obtain a remedy in court from another person.” Black’s Law Dictionary 251 (9th Ed.2009).

Id. at ¶ 15.

The statutory language of R.C. 2317.43 (“civil action brought”) is almost identical to that of R.C. 1335.05 (“bring an action”) and R.C. 1335.02(B) (“action is brought”). The language in R.C. 2317.43 was clearly and unambiguously held to mean the filing of a civil lawsuit (after the effective date of the statute). The Ninth District’s finding that the guarantors did not attempt to bring an action against FirstMerit when they raised the oral forbearance agreement as a defense is consistent with this Court’s holding in *Estate of Johnson*. The guarantors did not file a civil lawsuit, they merely raised a defense to FirstMerit’s claim. This Court should similarly hold the term “action,” as used in R.C. 1335.05 and 1335.02(B), means the filing of a civil lawsuit, not a defense².

B. If this Court determines the term “action,” as used in R.C. 1335.05 and 1335.02(B), is ambiguous, then those statutes should be considered *in pari materia* with R.C. 2307.01.

If some doubt or ambiguity exists in statutory interpretation, the *in pari materia* rule of construction may be used. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 584, 651 N.E.2d 995 (1995) (citations omitted). All statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes. *Id.* (citations omitted).

In *Klopfleisch*, this Court considered R.C. 733.08 *in pari material* with R.C. 3513.19(A)(3) and R.C. 3513.05 after it determined the term “affiliated,” as used in R.C. 733.08, was ambiguous. *Id.* at 585.

² “Defense” is defined as “[t]hat which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks. That which is put forward to diminish plaintiff’s cause of action or defeat recovery. Evidence offered by accused to defeat criminal charge.” *Black’s Law Dictionary* 419 (6th Edition 1990). The plain meaning demonstrates a “defense” it is not an action, but is a response to an action.

Revised Code Chapter 2307 concerns civil actions in the common pleas courts. R.C. 2307.01 defines the term “action.” As will be demonstrated herein, Ohio courts have used this definition when interpreting the term “action” in a variety of statutory constructs. If this Court finds the term “action,” as used in R.C. 1335.05 and 1335.02(B) is ambiguous, then it should determine the legislature’s intent by reading those provisions of the statute of frauds *in pari materia* with R.C. 2307.01. The term “action”, as defined by the legislature, does not include defenses raised in an action.

Appellees’ Response to Appellant’s Proposition of Law No. 1: A Civil Rule 60(B) motion for relief from judgment is not an “action,” and therefore a Civil Rule 60(B) motion which raises an oral agreement in connection with an agreement involving an interest in land is not barred by the statute of frauds.

A. R.C. 2307.01 defines “action” as the term pertains to civil actions.

R.C. 2307.01 defines action as “an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense.”

This definition has remained unchanged since its codification in 1910. See *Sellman v. Schaaf*, 17 Ohio App.2d 69, 74-75, 244 N.E.2d 494 (3rd Dist. 1969).

B. Courts have utilized R.C. 2307.01 to determine the legislative intent when using the term “action” in a variety of statutory constructs.

Over the years, Courts throughout Ohio have read various statutes *in pari materia* with R.C. 2307.01 to determine the meaning of the term “action.”

One such instance is *Gregory v. Bureau of Workers’ Compensation*, 115 Ohio App.3d 798, 686 N.E.2d 347 (10th Dist. 1996). In *Gregory*, the court held the plaintiff was not involved in an “action,” as the term was used in R.C. 4123.93(D), when he settled his claim with a third-party tortfeasor without initiating any proceedings in court.

In reaching its decision, the Tenth District relied heavily upon R.C. 2307.01:

In determining legislative intent, a court must give effect to the words the legislature used, not deleting words used, nor inserting words not used. * * *. In that regard, R.C. 1.42 specifies that "words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Applying those parameters to the issue before us, we note "action" is defined in R.C. 2307.01: "An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense." While the definition of "action" found in R.C. 2307.01 does not appear in R.C. Chapter 4123, the definition nonetheless has bearing in determining the issue before us. Title 23 involves the common pleas courts; R.C. Chapter 2307 involves civil actions in the common pleas courts; R.C. 2307.01 specifically defines an action in those courts; and plaintiff's proceedings to recover against a third-party tortfeasor would in all probability be filed in the common pleas court. As a result, we cannot ignore the definition set forth in R.C. 2307.01 in terms of defining an "action" for purposes of R.C. 4123.93. Indeed, had the legislature intended "action" to include something beyond that set forth in R.C. 2307.01, it presumably would have included such a definition with the legislation granting defendant subrogation rights.

Id. at 115 Ohio App.3d 801 (citations omitted).

Similarly, had the legislature intended "action" as the term is used in R.C. 1335.05 and 1335.02(B) to include something beyond the definition set forth in R.C. 2307.01, it presumably would have included such a definition in the statute of frauds. The legislature did not include such a definition in the statute of frauds. The legislature did not include the term "defense" in R.C. 1335.05 or R.C. 1335.02(B). As such, this Court should interpret the term action as it is defined in R.C. 2307.01. The assertion of a defense would not fall within that definition.

R.C. 2307.01 was also utilized by the First District Court of Appeals when it determined the application to a court of common pleas required by R.C. 305.14 was not an "action." *State ex rel. The Cincinnati Enquirer v. Hamilton County Commissioners*, 1st Dist. No. C-10605, 2002-Ohio-2038.

This Court previously used the definition of “action” in R.C. 2307.01 when it determined to allow a writ of prohibition. *State ex rel. Jefferson County Children Services Bd. v. Hallock*, 28 Ohio St. 3d 179, 502 N.E.2d 1036 (1986).

For purposes of this appeal, perhaps the most illustrative line of cases are those interpreting the term “action” as it is set forth in R.C. 1703.29(A).

Revised Code Chapter 1703 governs foreign corporations. Pursuant to R.C. 1703.03, all corporations not incorporated in Ohio must hold an uncanceled and unexpired license to transact business in Ohio.

R.C. 1703.29(A) provides, in relevant part, that no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license.

Utilizing the definition of “action” in R.C. 2307.01, the Second District held a foreign corporation was required to obtain a license in order to maintain a cross-claim. *P.K. Springfield v. Hogan*, 86 Ohio App.3d 764, 621 N.E.2d 1253 (2nd Dist. 1993).

Meanwhile, courts in Ohio have held R.C. 1703.29(A) does not prevent an unlicensed corporation from defending a suit brought against it in Ohio. *Colegrove v. Handler*, 34 Ohio App.3d 142, 621 N.E.2d 1253 (10th Dist. 1986). See also *Tomovich v. USA Waterproofing & Foundation Services, Inc.*, 9th Dist. No. 07-CA-9150, 2007-Ohio-6214.

Both *Colegrove* and *Tomovich* held R.C. 1703.29(A) did not prevent unregistered companies from seeking stays of the proceedings pending arbitration. *Tomovich* expressly stated the unlicensed foreign corporation was not “seeking redress” and therefore a motion to stay was not an action as defined in R.C. 2307.01. *Tomovich* at ¶ 17.

Applying the holdings of *P.K. Springfield*, *Colegrove* and *Tomovich* to this appeal, claims (made by way of a complaint, counterclaim, cross-claim and/or third-party claim) could arguably

fall within the scope of an “action” and therefore be prohibited by R.C. 1335.05 and 1335.02(B). Raising an oral agreement as a defense, however, would not be barred by the statute of frauds. A defense would not be considered an action.

C. A Civil Rule 60(B) Motion for Relief from Judgment is not an “Action.”

The legislature’s definition of (R.C. 2307.01) requires that an “action” involves process and pleadings, ends in a judgment or decree, and is a mechanism by which a party prosecutes another for the redress of a legal wrong.

A Rule 60(B) motion does not involve process.

A Rule 60(B) motion is not a pleading. *McIntyre v. McIntyre*, 7th Dist. No. 03-CO-63, 2005-Ohio-7083, ¶ 38.

Similarly, a Rule 60(B) motion is not the prosecution of another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense. By definition, a motion is an application to the court for an order. Ohio Rule of Civil Procedure 7(B). Filing a Rule 60(B) motion does not commence an action:

A motion for production of documents may be served "upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party." Civil Rule 34(B). Civil Rule 60(B) provides that a motion for relief from judgment "does not affect the finality of a judgment or suspend its operation." Reading these two provisions *in pari materia*, it is apparent that appellant was not entitled to the requested discovery. One cannot seek production of documents until after the commencement of an action. No action was pending in the case at bar because the previous judgment was not disturbed by the filing of a motion under Rule 60(B) (at 8-9, emphasis added).

Whelan v. Whelan, 8th Dist. No. 44521, 1982 Ohio App. LEXIS 12347, *6 (Nov. 4, 1982).

Based on the above, the guarantor’s Rule 60(B) motion should not be considered an “action.”

D. The Case in Conflict with the Ninth District's Decision Was Based on the Parol Evidence Rule, Not the Statute of Frauds.

The case determined to be in conflict with the Ninth District's opinion in this matter (*Nicolozakes*) relied entirely on *Marion Prod. Credit Assn. v. Cochran*³ in reaching its decision.

This Court later found *Marion* to be a parol evidence rule case, not one involving the statute of frauds. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 29, 734 N.E.2d 782 (2000), footnote 2. Regardless, the *Nicolozakes* court failed to adequately defend its finding that the statute of frauds prohibited a party from raising an oral contract as a defense in an action involving an interest in land.

FirstMerit argues the Ninth District's holding that a Civil Rule 60(B) motion is not an "action" for purposes of R.C. 1335.05 would lead to absurd results, asserting defendants would be permitted to use as a defense arguments that were prohibited from use as affirmative claims.

Such situations occur frequently in Ohio when the defenses of setoff and/or recoupment are asserted. When faced with an action for the recovery of legal fees, clients may assert legal malpractice as a defense, even if the statute of limitations has expired and an affirmative claim for legal malpractice would be time-barred. See, e.g., *Riley v. Montgomery, et al.*, 11 Ohio St.3d 75, 463 N.E.2d 1246 (1984).

The bottom line is a Rule 60(B) motion for relief from judgment does not rise to the level of an "action." The legislature chose to use the term "action" in both R.C. 1335.05 and 1335.02(B). Had the legislature intended "action" to include anything beyond what is set forth in R.C. 2307.01, it presumably would have done so by definition, the term "action" within Revised Code Chapter 1335.

³ 40 Ohio St.3d 265, 533 N.E.2d 325 (1988).

R.C. 1335.05 does not prohibit a party from raising as a defense that the parties to a contract involving an interest in land orally agreed to modify the terms of their agreement.

The Ninth District's decision should be affirmed.

Appellee's Response to Appellant's Proposition of Law No. 2: An oral settlement agreement of pending litigation involving an interest in land is enforceable.

In addition to the arguments set forth concerning R.C. 1335.05 (which are incorporated herein), this Court has previously held oral settlement agreements are enforceable:

It is preferable that a settlement be memorialized in writing. * * * However, an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract. * * * Terms of an oral contract may be determined from "words, deeds, acts, and silence of the parties." * * * .

Kostelnik v. Helper, 96 Ohio St. 3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 15 (citations omitted).

FirstMerit has gone to great lengths to paint the agreement it reached with Ashland Lakes as an oral forbearance agreement. It was, however, a settlement agreement of pending litigation between Ashland Lakes and FirstMerit (the Ashland County Common Pleas case).

Regardless of the statute of frauds, an out of court, oral settlement agreement in a foreclosure action was held enforceable in *Bankers Trust Company of California v. Wright*, 6th Dist. No. F-09-009, 2010-Ohio-1697.

In *Bankers Trust*, appellee bank filed a foreclosure action against the homeowners. The bank's counsel telephoned the court, indicating that the parties had reached a full settlement. Approximately one week later (before the settlement paperwork had been executed), this Court's decision in *Gullotta*⁴ was announced. After the *Gullotta* decision, the homeowners' position on

⁴ *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St. 3d 399, 2008-Ohio-6268, 899 N.E.2d 987.

settlement had changed. They refused to sign the settlement agreement and the bank filed a motion to enforce the settlement agreement.

In opposing the bank's motion, the homeowners in *Bankers Trust* asserted a complete agreement was never reached because they never did not sign the loan modification agreement, nor did they tender the \$2,000 payment set forth in the agreement. Despite the fact that *Bankers Trust* involved an interest in land, the trial court granted the bank's motion to enforce the settlement agreement. It did not require a signed loan modification agreement.

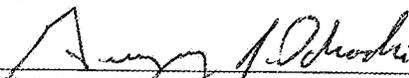
The Sixth District affirmed the trial court's ruling, concluding the parties had entered into a valid settlement agreement. In reaching this decision, the court concluded that the words, deeds and actions of the parties demonstrated that they had a binding settlement agreement.

IV. CONCLUSION:

If the legislature had intended the term "action" to include defenses raised in connection with an action, it would have included such a definition with Revised Code Chapter 1335. As it did not, this Court should give effect to the words the legislature used and not expand the definition of "action" to include defenses raised in connection with a Civil Rule 60(B) motion.

For the reasons set forth herein, the decision of the Ninth Appellate District in this action should be affirmed.

Respectfully submitted:

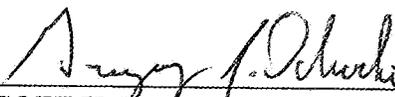


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I hereby certify that a copy of the foregoing was sent, via regular U.S. mail to the following this 12th day of **August 2013**:

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APPENDIX

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2011 JUN -3 AM 9: 05

FIRSTMERIT BANK, N.A.

CASE NO.: CV 2011 05 2676

Plaintiff,

SUMMIT COUNTY
CLERK OF COURTS JUDGE HUNTER

vs.

DANIEL E. INKS, ET AL.

DEFENDANTS' CIVIL RULE 60(b)
MOTION FOR RELIEF FROM
JUDGMENT

Defendants.

Now come Defendants Daniel E. Inks, Deborah A. Inks, David J. Slyman and Jacqueline Slyman (hereinafter the "Guarantor Defendants"), and move for an order vacating the cognovit judgment entered in favor of FirstMerit Bank, N.A. (the "Bank") and against the Guarantor Defendants on or about May 17, 2011.

These reasons are set forth in greater detail in the attached *Brief in Support*, along with the exhibits, incorporated therein.

Respectfully submitted,

OF COUNSEL:

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**BRIEF IN SUPPORT OF DEFENDANTS' CIVIL RULE 60(B)
MOTION FOR RELIEF FROM JUDGMENT**

I. INTRODUCTION:

This case arises out of a dispute between the Bank and Ashland Lakes, LLC ("Ashland Lakes") an Ohio limited liability company which owns approximately one hundred thirty (130) acres of mixed-use commercial property.

Ashland Lakes along with the Defendants (Collectively, "Ashland") and the Bank agreed to settle their dispute at a January 2011 meeting. One of the terms to this settlement was that the Bank agreed not to pursue any legal proceedings against the Guarantor Defendants (Daniel E. Inks, Deborah A. Inks, David J. Slyman and Jacqueline Slyman).

On March 8, 2011, Ashland was ready and willing to perform pursuant to the settlement agreement. The Bank, however, prevented Ashland from performing by refusing to respond to Ashland's request for instructions on the protocol for making the agreed-upon deposit. Had the Bank honored its settlement agreement, it would have no claims to prosecute in this action against the Guarantor Defendants.

In deciding this Motion, the Court must determine whether the Guarantor Defendants have timely moved to vacate the judgment and whether they have alleged operative facts which, if proven, would give rise to a meritorious defense.

As will be demonstrated in the attached Brief in Support, this Court should vacate the cognovit judgment.

II. STATEMENT OF THE FACTS:¹

The Bank filed a complaint for foreclosure against Ashland Lakes on or about January 12, 2009. A judgment entry appointing a receiver was issued on or around October 9, 2009, and amended by judgment entry on or around January 22, 2010.

A. The January Meeting:

On or around January 7, 2011, Ashland and the Bank met to discuss possible solutions to resolve their disputes concerning the Ashland Lakes properties. (the "January Meeting"). Daniel Inks, David Slyman, Anthony Slyman and Stephen Hobt, Esq. attended the January Meeting on behalf of Ashland.² Patrick Lewis, Esq. (the Bank's counsel) and Bank representative Thomas Krumel represented the Bank at the January Meeting.

At the January Meeting, the Bank stated that, in exchange for \$1,300,000, it would release all of the Ashland Lakes' parcels of property in which it had a mortgage - except the two single family homes at 170 Summerset Drive and 200 Summerset Drive. The Bank agreed to accept an additional \$300,000 (by October 15, 2011) in exchange for a release of the two parcels with the single family homes and to release Ashland from any deficiency under the loan. In addition, Ashland was to pay all delinquent and current property taxes at the time of closing.

Under the terms agreed upon at the January Meeting, the Bank agreed to "walk away" from approximately \$1 Million owed by Ashland Lakes. This concession made the deal marketable for takeout financing.³

The Bank also agreed to cease all legal proceedings against Ashland Lakes and the four Guarantor Defendants (Daniel Inks and his wife, Deborah Inks, and David Slyman and his wife,

¹ The Factual Allegations contained in this Brief are supported by affidavit of Daniel Inks, attached hereto as Exhibit "A".

² Daniel Inks and David Slyman are two of the Guarantor Defendants in this action.

³ Ashland was in fact able to procure takeout financing, partly through a commercial lender and partly through additional investors.

Jacqueline Slyman) if all the agreed upon payments – including the additional \$300,000 payment - were received by the Bank on or before October 15, 2011.

B. Daniel Inks' Arrangement with Westfield Bank:

Shortly after reaching this agreement in principle with the Bank at the January Meeting, Daniel Inks met with a representative of non-party Westfield Bank on or around January 13, 2011. The purpose of this meeting was to obtain financing for a portion of the funds needed to meet the Bank's requirements.

Westfield Bank was agreeable to provide financing. However, as part of its due diligence, it needed the Bank to verify the information provided by Daniel Inks. The Bank verified that the sheriff's sale of the properties would be postponed and Westfield would be given time to close the deal if Westfield Bank provided a loan commitment for Daniel Inks. On or around February 14, 2011 Westfield Bank issued a solid loan commitment to Daniel Inks. See Exhibit "B" attached hereto. Westfield Bank provided a copy of its loan commitment to the Bank.

C. The Events of March 3-4, 2011:

On Thursday, March 3, 2011, six calendar days before the scheduled sheriff's sale (three business days before the sale), the Bank's representative, Thomas Krumel, told Daniel Inks, for the first time, that the Bank was requiring an additional \$200,000 deposit as a condition of canceling the March 9, 2011 sheriff's sale. On March 3, 2011, the Bank also finally agreed to memorialize, in writing, the terms the parties had relied upon since the January Meeting.

On Friday, March 4, 2011, Daniel Inks received a Term Sheet for the Settlement signed by the Bank's representative. See Exhibit "C" attached hereto. The recently added \$200,000

deposit requirement was contained in the March 4th Term Sheet, along with several other terms which had not been discussed previously.

D. The Events of March 7, 2011:

The following Monday (March 7, 2011), Daniel Inks spoke to the Bank's Thomas Krumel by telephone. Inks told Krumel he was only able to raise \$150,000 (of the \$200,000 deposit) over the weekend. Inks told Krumel that he could deliver the \$150,000 the next day (Tuesday, March 8, 2011).

Krumel said the \$150,000 was acceptable. The Bank would accept that amount in lieu of \$200,000 deposit listed in the March 4th Term Sheet.⁴ Krumel also told Inks that the Forbearance Agreement was being forwarded to him. However, the Forbearance Agreement would still contain reference to the \$200,000 amount. See Exhibit "D" attached hereto.

Inks received the Forbearance Agreement shortly thereafter. The Forbearance Agreement contained terms that differed not only from those agreed upon at the January Meeting, it contained terms that differed from the Term Sheet of the previous Friday.

Inks requested changes to the terms of the Agreement, which were incorporated into a letter delivered to Krumel later that day. See Exhibit "E" attached hereto

Krumel and Inks had a subsequent conversation on March 7, 2011. Krumel explicitly stated that if Inks could deliver the \$150,000 the following day (Tuesday, March 8, 2011), along with payment for certain appraisal costs (\$9,000), the Bank would accept the changes requested in Inks's March 7th letter (Exhibit "E"), excepting the changes related to the appraisal, which Inks agreed to drop.

⁴ While the amount of the deposit was negotiated, the total sum agreed to be paid to the Bank remained the same (\$1,600,000).

In yet another conversation later that same day, Inks was informed that Krumel would be out of the office on Tuesday, March 8, 2011. Krumel assured Inks, however, that he would be available via cell phone. Krumel then gave his cell phone number to Inks.

E. March 8, 2011:

On March 8, 2011, Krumel contacted Inks prior to the start of a normal business day. Krumel called to request payment of the agreed upon \$150,000 deposit. Inks said he would make arrangements to deliver the \$150,000 deposit to the Bank in order to cancel the sheriff's sale and only needed to confirm with his lender where and how to forward funds.

Around 10:00 AM that day, Inks and Krumel had another telephone conversation with Krumel. Inks said he would call Krumel later for instructions on the protocol for delivering the \$150,000 later that day, to which again Krumel confirmed that the \$150,000 was acceptable and that he wanted it that day.

Inks received the payment details from his source for the funds before noon on March 8, 2011 and tried to call Krumel for deposit instructions. Krumel, however, did not answer Inks' call.

Throughout the remainder of the business day of March 8, 2011, Inks repeatedly called Krumel's cell phone. Krumel did not answer Inks' calls until the close of business. Krumel then finally returned Inks' calls. Krumel told Inks it was too late to deliver the payment. The property would proceed to sale the next day.

A majority of Ashland Lakes' properties were sold at sheriff's sale on or around March 9, 2011. Ashland Lakes has opposed the Bank's efforts to confirm the wrongful sale and has moved the Ashland County Common Pleas Court to set aside the sale.⁵

⁵ A copy of the Ashland County Court of Common Pleas Docket (Case No. 09-CFR-022) is attached hereto as Exhibit "F". Ashland Lakes' objections to the sale remain pending.

III. LAW AND ARGUMENT:

A. Standard for Granting Relief from Judgment Under Civil Rule 60(B)

In order to prevail on a motion for relief from judgment, the moving party must demonstrate: (1) the motion was timely filed; (2) the movant is entitled to relief under one of the grounds enumerated in Civil Rule 60(B) (1) through (5); and (3) the movant has a meritorious defense or claim to present should relief be granted. *Cuyahoga Support Enforcement Agency v. Guthrie* (Ohio 1999), 84 Ohio St.3d 437, 439 (citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph 2 of the syllabus).

However, in a situation where the judgment is one entered by confession pursuant to a warrant of attorney (as in the present case), courts have dispensed with the requirement to establish grounds for relief. Instead, the movant is only required to demonstrate that the motion is timely made and to allege a meritorious defense or claim. See, *Medina Supply Company, Inc. v. Corrado* (1996), 116 Ohio App.3d 847, 850. ("Because of the special circumstances of a cognovit note, courts have dispensed with the requirement of grounds for relief and allowed relief from judgment when only two of the three elements are satisfied.").⁶

Relief from the Cognovit Judgment should be entered in favor of the Guarantor Defendants. They can establish the required Civil Rule 60(B) elements.

B. The Guarantor Defendants' Civil Rule 60(B) Motion is Timely

In determining whether a Civil Rule 60(B) motion for relief is timely made, a trial court should consider whether the period of time between the entry of judgment and the application to

⁶ See also *Meyers v. McGuire* (1992), 80 Ohio App.3d 644, 646, *Maston v. Marks* (Franklin Cty. 1972), 32 Ohio App. 2d 319. Furthermore, "[w]here the movant has established the ... criteria noted above, overruling a Civ. R. 60(B) motion would be an abuse of discretion by the trial court." *Resolution Trust Corporation v. J.B. Centron Development Company* (1993), 92 Ohio App.3d 643, 647.

the Court for relief under Rule 60(B) is reasonable in light of the particular circumstances of the case. *In re Murphy* (1983), 10 Ohio App.3d 134, 138, 461 N.E.2d 910, 915-916.

In the present case, this Motion is timely made. It has been filed within a reasonable period after the entry of the cognovit judgment. Specifically, this Motion has been filed less than three weeks (twelve business days) after the entry of the cognovit judgment on May 17, 2011. Furthermore, pursuant to the Court's Docket, only two of the Guarantor Defendants have been served with Complaint (that being on May 23, 2011).

The Guarantor Defendants believe nine days to review the Complaint for Cognovit Judgment, its numerous attachments, the Judgment Entry, as well as to fully research the applicable legal issues and prepare a Civil Rule 60(B) Motion is reasonable under any set of circumstances.

The facts demonstrate the Guarantor Defendants' Motion for Civil Rule 60(B) Relief from Judgment was timely filed.

C. The Guarantor Defendants Have Meritorious Defenses

1. Burden of Proof:

This Court should grant relief from the cognovit judgment because the Guarantor Defendants have meritorious defenses to the claim (and counterclaims to raise against the Bank). The meritorious defenses raised by the Guarantor Defendants are nondefault (because Ashland Lakes and the Bank entered into a settlement agreement) and novation.

Collateral attacks on cognovit judgments are "liberally permitted" and the burden on the party moving for relief is "somewhat lessened."

By executing a cognovit provision in a note and allowing a confession of judgment, the maker of the note waives his or her rights to notice and a prejudgment hearing. * * * Consequently, collateral attacks on cognovit

judgments are liberally permitted, and the burden on the party moving for relief is 'somewhat lessened.' (Citations omitted).

Second Natl Bank v. Web Producers, Inc., Columbia App. No. 03-CO-68, 2004-Ohio-5786, ¶ 14.⁷

While the Guarantor Defendants assert there was a settlement agreement between the Bank and Ashland, as well as a novation, Civil Rule 60(B)'s standard does *not* require them to actually prove the existence of these defenses. Rather, a Civil Rule 60(B) Motion should be granted *when the movant has alleged operative facts which, if proven, would give rise to a meritorious defense.* *Society Natl. Bank v. Val Halla Athletic Club and Recreation Center* (1989), 63 Ohio App.3d 413, 418, 579 N.E.2d 234, 238 (emphasis added).

The Guarantor Defendants have alleged operative facts (if not conclusive, undisputed evidence) of a settlement agreement between the Bank and Ashland Lakes and of a novation.

2. The Bank and Ashland Reached a Settlement Concerning the Underlying Transaction, Pursuant to Which the Bank Agreed to Cease All Legal Proceedings Against the Guarantor Defendants:

Ashland and the Bank verbally agreed to settle their dispute in principle at the January Meeting. As part of the settlement, the Bank agreed to cease all legal proceedings against the Guarantor Defendants and release them from all obligations they may have owed the Bank.

An oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract. *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, 39, 285 N.E.2d 324. Evidence of the exact words of offer and acceptance in proof of an oral contract is not essential – it is sufficient if the words, deeds, acts, and silence of the parties disclose the intent to contract and the terms of the agreement. *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, 75 N.E.2d 605, paragraph 1 of syllabus.

⁷ A copy of the Second National Bank option is attached hereto as Exhibit "G".

As demonstrated herein, the words, deeds, acts and silence of both Ashland and the Bank sufficiently disclose the parties' intent to contract and the material terms of their agreement. The Bank agreed to cancel the sheriff's sale and cease all legal proceedings against the Guarantor Defendants if Ashland raised the necessary funds (which it did).

The Bank may argue that the settlement agreement was never signed by the parties.

However:

An agreement to make a written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as the written contract itself would be if executed. The mere fact that parties who have reached a verbal agreement also have agreed to reduce their contract to writing does not prevent the agreement from being a contract if the writing is not made. However, no contract exists when the written agreement is neither signed nor approved by one of the parties, where the parties intend that there be no contract until the agreement is reduced to writing and signed, or that the contract is to be reduced to writing and signed before the agreement is finally consummated.

Union Savings Bank v. White Family Companies, 183 Ohio App.3d 174, 916 N.E.2d 816, 2009-Ohio-2075 at ¶ 26, citing 17 Ohio Jurisprudence 3d, Contracts, § 68.

It is anticipated the Bank will argue the settlement agreement is not enforceable because the Bank and Ashland Lakes did not execute the March 7, 2011 forbearance agreement. That argument, however, is legally flawed and demonstrates the Bank's bad faith in these negotiations.

Ashland was ready, willing and able to perform pursuant to its settlement agreement with the Bank. Bank representative Thomas Krumel would not answer his cell phone to provide Ashland Lakes with the arrangements for making the \$150,000 deposit. Krumel waited until after business hours to return Ashland's calls. Krumel stated it was too late to make the payment

and that the property was proceeding to sale.⁸ However, the Bank's refusal to accept Ashland Lakes' performance does not negate the settlement agreement.

Ashland complied with or attempted to comply with all its obligations under the settlement agreement. The Bank cannot rely on its own refusal to accept the deposit and execute the forbearance agreement to avoid being bound by the settlement. It is well settled that a party who prevents performance by the adverse party cannot take advantage of such a non-performance. More specifically, where obligations arising under a contract have attached and subsequent thereto one party, without the consent of the other, does some act or makes some new arrangement that prevents the carrying out of the contract according to its terms, he or she cannot avail itself of its misconduct to avoid liability to the other party. *Suter v. Farmers' Fertilizer Co.* (Ohio 1919), 100 Ohio St. 403, 126 N.E. 304, *Dynes Corporation v. Seikel, Koly & Co.*, 100 Ohio App.3d 620, 647, 654 N.E.2d 991, 1008, *Davidson v. Klosterman Baking Co.*, Montgomery App. No. 21948, 2008-Ohio-2583, ¶ 22, citing 18 Ohio Jurisprudence 3d (2001 Supp. 2007) 119, Contracts, Section 214.⁹

Ashland was ready, willing and able to perform. The repeated telephone calls to Krumel for instructions on the arrangements for delivering the deposit evidence this fact. As a matter of law, the Bank cannot refuse to accept Ashland's performance and then try to use that "non-performance" as a basis for excusing its own performance.

The Bank's conduct is retaliatory and vindictive, as one of the Defendants (David Slyman) previously sued the Bank and won in an unrelated shareholder's dispute.

⁸ Krumel's conduct on March 8, 2011 was just the latest illustration of his bad faith in connection with this settlement. Previously, Krumel told Westfield Bank representatives that he had an appraisal of the property for \$2,000,000. Westfield then advised Krumel they wanted to purchase the appraisal. Only after a significant amount of stalling did Krumel admit the Bank's appraisal was inaccurate. Krumel also unilaterally tried to quash the takeout financing based on his (not Westfield's) loan-to-value ratio calculations. The last minute \$200,000 (later reduced to \$150,000) deposit requirement is another example.

⁹ A copy of the *Davidson* opinion is attached hereto as Exhibit "H."

The facts and authorities set forth herein demonstrate there was in fact a settlement agreement reached between Ashland Lakes and the Bank. Pursuant to the settlement, the Bank agreed to cease all legal proceedings against the Guarantor Defendants. This Court should vacate the cognovit judgment entered May 17, 2011 and should permit the Guarantor Defendants to file their own Answer (not a confessed Answer) to the Complaint, along with their Counterclaims. The Guarantor Defendants should be entitled to a determination of these claims (and their counterclaims) on the merits.¹⁰

3. Novation:

The settlement agreement between the Bank and Ashland Lakes acts as a novation. Novation constitutes a meritorious defense to a cognovit judgment and upon which a Civil Rule 60(B) motion should be granted where the movant presents sufficient operative facts demonstrating the existence of a novation. *National City Bank v. Reat Corp.* (1989), 64 Ohio App.3d 212, 580 N.E.2d 1147.

Again, while the Guarantor Defendants contend that the parties did in fact enter into a contract of novation, the Civil Rule 60(B) standard only requires them to allege operative facts which, if proven, would give rise to a meritorious defense. *Society National Bank v. Val Halla Athletic Club & Recreation Center, Inc.*, supra.

IV. CONCLUSION:

As demonstrated herein, the Guarantor Defendants have valid, meritorious defenses to the Bank's claims.

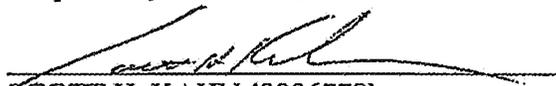
¹⁰ At a minimum, the Guarantor Defendants are entitled to a hearing to determine if an enforceable settlement agreement exists. "[I]f there is uncertainty as to the terms, then the court should hold a hearing to determine if an enforceable settlement exists." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 770 N.E.2d 58, 2001-Ohio-2985, ¶ 17, citing *Rulli v. Fan Co.* (1997), 79 Ohio St. 3d 374, 376, 377, 683 N.E.2d 374, 377.

The Bank agreed in exchange for \$1,300,000, it would release all of the Ashland Lakes' parcels of property in which it had a mortgage - except the two single family homes at 170 Summerset Drive and 200 Summerset Drive. The Bank agreed to accept an additional \$300,000 (by October 15, 2011) in exchange for a release of the two parcels with the single family homes and to release Ashland from any deficiency under the loan. (In addition, Ashland was to pay all delinquent and current property taxes at the time of closing.)

Central to the action before this Court, the Bank also agreed to cease all legal proceedings against Ashland Lakes and the four Guarantor Defendants (Daniel Inks and his wife, Deborah Inks, and David Slyman and his wife, Jacqueline Slyman) if all the agreed upon payments - including the additional \$300,000 payment - were received by the Bank by October 15, 2011. Ashland was ready, willing and able to perform pursuant to this agreement. The Bank should be compelled to honor the terms of the agreement, making its suit on a cognovits basis improper and without merit.

WHEREFORE, Defendants Daniel Inks, Deborah Inks, David Slyman and Jacqueline Slyman respectfully request that this Honorable Court vacate the cognovit judgment and permit them to file their own Answer to the Complaint ,along with a Counterclaim seeking to enforce performance of the settlement agreement and to recover their damages.

Respectfully submitted,



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Ashland Lakes, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANTS' CIVIL RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT was served via ordinary U.S. mail this 1st day of June 2011 upon:

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Daniel E. Inks, Deborah A. Inks,
David J. Slyman and Jacqueline Slyman

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

FIRSTMERIT BANK, N.A.)
)
Plaintiff,)
)
vs.)
)
ASHLAND LAKES, LLC, ET AL.)
)
Defendants.)

CASE NO.: 09-CFR-022
JUDGE DEBORAH E. WOODWARD
AFFIDAVIT OF DANIEL E. INKS

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

I, Daniel E. Inks, being first duly sworn according to law depose and sayeth as follows.

1. On or around January 7, 2011 ("January Meeting") a meeting was held between myself, David Slyman, Anthony Slyman, Stephen Hobt, Esq., FirstMerit Bank's counsel Patrick Lewis, and a FirstMerit Bank representative, Tom Krumel.

2. The purpose of that meeting was an attempt to resolve the disputes between First Merit and Ashland Lakes and the guarantors of the FirstMerit to Ashland Lakes' loan.

3. At that meeting, FirstMerit indicated that it would accept a payment of \$1,300,000.00 in exchange to release all of the parcels of property in which it had a mortgage on from Ashland Lakes, except the two single family homes at 170 Summerset Drive and 200 Summerset Drive and wanted an additional \$300,000.00 by October 15, 2011 in exchange for releasing the remaining two parcels, and to release the balance of any deficiencies under the loan made to Ashland Lakes.

4. As part of this understanding in principle, I was required to pay all delinquent and current property taxes by the time of closing.

5. It was understood at this meeting, that if I and David Slyman on behalf of Ashland Lakes, LLC could raise and pay the sums set forth in paragraph 3 above by October 15, 2011, FirstMerit would cease all legal proceedings against myself, my wife, David Slyman, his wife and Ashland Lakes, LLC, and would further release us from all obligations to FirstMerit.
6. On January 13, 2011 I met with a representative from Westfield Bank.
7. The purpose of the January 13, 2011 meeting was to obtain financing for a portion of the \$1,600,000.00 needed to resolve our obligations to FirstMerit.
8. Westfield Bank agreed to provide financing to take out a portion of the existing indebtedness to FirstMerit, the balance of which was to be satisfied from additional investors I had commitments from and the sale of a parcel of the subject property, which was under contract.
9. FirstMerit requested a loan commitment from Westfield Bank, which if provided, FirstMerit agreed to stop the sheriff's sale.
10. On February 14, 2011 Westfield Bank issued a solid loan commitment, which I provided to FirstMerit. See attached Exhibit "1", which is a true and accurate copy of the Westfield commitment provided to FirstMerit pursuant to our understanding.
11. On March 3, 2011, FirstMerit finally agreed to memorialize, in writing, the terms that we had been relying on since our January 7, 2011 meeting.
12. In a conversation I had with Tom Krumel late in the afternoon on March 3, 2011, Krumel for the first time stated that a deposit of \$200,000.00 would be required to stop the sheriff's sale scheduled for March 9, 2011. This was a surprise to me, and as I understand it, a surprise to Westfield Bank as well, who had been in communications with FirstMerit.
13. In the same conversation on March 3, 2011, Krumel stated to me that I would have a term sheet memorializing the terms of our agreement by the next morning.

14. I received a hard copy of the terms of the agreement on Friday, March 4, 2011 (hereinafter "Term Sheet"), attached hereto as Exhibit "2", which was received late in the afternoon.

15. The Term Sheet, Exhibit "2", contained the new \$200,000.00 deposit requirement along with other terms which had never been discussed.

16. Early Monday morning, March 7, 2011 I advised Mr. Krumel that I could only raise \$150,000 for the deposit as opposed to the \$200,000.00 and that I could deliver the same on Tuesday, March 8, 2011. He said the \$150,000.00 was "doable", but that the Forbearance Agreement contained the \$200,000.00 but that he was going to send it over as written.

17. Following the earlier conversation of March 7, 2011, Mr. Krumel delivered the formal Forbearance Agreement (Exhibit "3") shortly after our prior phone conversation. In response to Exhibit "3", I provided Mr. Krumel with my written objections to Exhibit "3", which are attached hereto as Exhibit "4" and delivered the same to Mr. Krumel by mid afternoon of March 7, 2011.

18. After delivery of Exhibit "4", on Monday, March 7, 2011 Mr. Krumel and I had another phone conversation, wherein Mr. Krumel said if I could deliver the \$150,000.00 by Tuesday and pay for the \$9,000 appraisal, FirstMerit had no problem with what we asked for in Exhibit "4".

19. We had another conversation at the end of the business day on March 7, 2011, wherein Mr. Krumel explained that he would be out of the office on March 8, 2011 but gave me his cell phone so we could communicate.

20. On Tuesday, March 8, 2011, Mr. Krumel contacted me before the start of the business day seeking the \$150,000.00 payment and complaining that Westfield was not

answering its phone. I stated that I would contact Westfield Bank and make the arrangements for the payment.

21. After the before hours phone call on March 8, 2011 Mr. Krumel and I had another conversation at or about 9:50 a.m. wherein he was asking where the money was and I assured him I would call him back and advise where and how I would deliver the money that day. At this time Mr. Krumel advised that he could not put the appraisal numbers in the Forbearance Agreement as requested in Exhibit "4". He again asked when he was getting the \$150,000.00 and I again assured him it I do it that day.

22. Later that same morning, once I had the payment details, I attempted to contact Mr. Krumel, and continued my attempts throughout the business day of March 8, 2011.

23. Mr. Krumel would not answer his phone nor return my calls throughout the business day.

24. Mr. Krumel finally returned my phone at the close of business and stated that it was too late to make the payment and that the property was proceeding to sale.

25. I advised him that I had the money and wanted to deliver it but could not because he would not take my calls.

26. I am an experienced real estate investor and have been investing in apartments and manufactured housing communities since 1975. The property at issue includes a large track of land that is uniquely zoned for manufactured housing, making it exceptionally valuable and rare.

27. I am the managing member of Ashland Lakes LLC, the owner of the parcels of land that were subject to the auction that took place on March 9, 2011.

28. I am familiar with the 5 parcels of property and as the owner I am knowledgeable as to the real value of the parcels. The 5 parcels have a real value in money in excess of \$3,000,000.00.

29. In fact the county tax records as of March of 2011, list the fair market value of the properties that were subject to the March 9, 2011 sale at \$3,810,640.00. A true and accurate copy of the County's real estate tax bills are attached hereto as Exhibit "5". This is nearly twice what the home owners who appraised the property for sale valued the property at. The approximate \$1,900,000 appraisal tendered by the three home owners who acted as appraisers for the sheriff's sale, grossly, and unfairly materially undervalued the property.

30. I did not object to the appraisals previously, as Ashland Lakes and the guarantors of the FirstMerit's loan had reached a settlement and forbearance agreement with FirstMerit and FirstMerit had promised to cancel the sale. In reliance on that agreement I believed that the sale was not going forward and spent my time, resources and money on getting money and loan commitments to honor our settlement agreement with FirstMerit.

31. The Ashland Lakes property that was the subject of the March 9, 2011 sale is extremely unique and valuable property. The uniqueness includes Parcel One has \$900,000 of underground improvements that will literally support an additional 100 apartments.. Additionally the parcel has eight separate apartment buildings, each with 3 units, along with four 6 car garage buildings, a seven bay garage building, and 5000 square foot office warehouse, all of which are located in the City of Ashland with city water and sewer.

32. Parcel Two has very unique zoning for manufactured housing and is located within the City limits of Ashland. It too has city water and sewer, except for thirteen (13) acres which are located in Ashland Township.

33. Parcel Three has a 2 story, 3 family apartment along with a single family, 4 bedroom colonial.

34. Parcel Four is approximately a 1/2 acre with a single family home.

35. Parcel Five is approximately .7 of an acre and is a two story brick home with a 2 story indoor pool, 3 car attached garage, 1 car detached garage and consists of approximately 5,000 sq. ft. not including the indoor pool.

36. Attached hereto as Exhibit "6", are the appraisal that were done on the subject properties on December 31, 2008, which are true and accurate copies of the originals and which are maintained in the ordinary course of our business as business records.

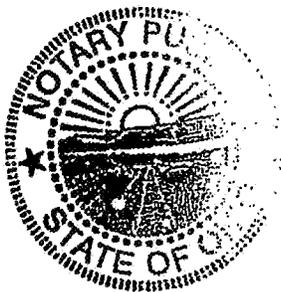
37. The original purchase price of the properties in July of 2005 was \$3,710,120.00. The original loan against the properties was \$3,500,000.00. The current principal balance is on the loan with FirstMerit is \$2,583,266.00. In addition to the nearly one million dollars in equity, Ashland has made over \$200,000 in capital improvements to the properties.

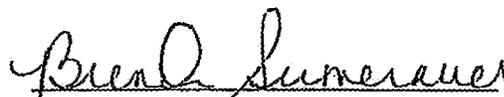
38. Attached hereto as Exhibit "7", are the Auctioneer's ads depicting the properties.

FURTHER AFFIANT SAYETH NAUGHT.


DANIEL E. INKS

Sworn to before me and subscribed in my presence this 7th day of April 2011.




NOTARY PUBLIC

BRENDA SUMERAUER
Notary Public - State of Ohio
My Commission Expires May 3, 2012
(Recorded in Medina County)



WESTFIELD
BANKSM

Sharing Knowledge. Building Trust.SM

February 14, 2011

Daniel E. Inks
Michael Charnas
Michael Lavelle
Entity to Be Formed
6 Corporation Center
Broadview Heights, OH 44147

Dear Daniel, Michael, and Michael:

Thank you for the opportunity to commit banking services for your company. We are eager to further develop our relationship with The Entity to be Formed, Daniel E. Inks, Michael M. Charnas, and Michael D. Lavelle and have provided this structure as a token of our sincerity in becoming a valued partner.

Borrower: Entity to be Formed

Amount: **Facility:**
1) \$850,000
2) \$400,000

Purpose: Payoff FirstMerit Bank and pay Ashland County taxes current.

Term: 1) 5 year commercial real estate balloon note on a 20 year amortization.
2) 90 day time note



Two Park Circle • P.O. Box 5002 • Westfield Centre, Ohio 44291-5002 • 1.800.368.8930 • fax 330.827.2470 • www.westfield-bank.com

Interest Rate:

1) 6.85% fixed for 5 years

2) Westfield Bank prime rate floating + 2.50%
(6.50% as of 2/14/2011)

Fees:

The loan fee will be 1 point for the aggregate loan amount (\$12,500)

Expenses:

Borrower will reimburse the Bank for any out-of-pocket expenses incurred in relation to the extension of this credit, including but not limited to, Phase I, appraisals, legal fees and title work.

Collateral:

1) 1st lien on Parcels:
P431330000200
P431320000300

2) 1st lien on parcels:
P431340000100
I250050003400

Cross collateralized and cross defaulted

Assignment of Life Insurance as follows:
\$1,250,000 on Daniel Inks

Guarantors:

Unconditional, unlimited, and continuing personal guarantees of:

Daniel E. Inks
Michael M. Charnas
Michael D. Lavelle

Other requirement:

- Appraisal on parcels # P431330000200 and #P431320000300 not to exceed 80% Loan to Value
- Appraisal on parcels #P431340000100 and #I250050003400 not to exceed 65% Loan to Value



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- Phase I Environmental required on parcels: # P431330000200 and #P431320000300
- Understand tax liability to Ashland County
- Delinquent taxes on properties need to be paid through closing
- Establish a reserve account of \$150,000, release to be at the discretion of Westfield Bank.
- Escrow account set up for tax payments
- Signed release from David Slyman
- Review Charnas Trust Agreement
- \$400M in escrow before closing
- Subordination agreement with Marc Byrnes

Loan Covenants: Finalized commercial loan covenants yet to be determined but may include the following:

- change in legal structure, management, ownership (New Organizations)
- loans or advances to insiders, subsidiaries or affiliates (Dealings with Insiders)
- new debt evidenced by notes, bonds or similar obligations (Other Liabilities)
- purchase money obligations (Other Liabilities)
- liens, pledges, security interest on assets (No Other Liens)
- guarantees, debt assumptions or endorsements other than normal course of business (Guaranties)
- release, redeem, retire, purchase or otherwise acquire any capital stock (No Change in Capital)
- payment of cash dividends limited to taxes, which may be carried as short term debt until year end distributions are calculated (Dividend Limit)
- The debt service coverage ratio [defined as (Net Income plus Depreciation & Amortization plus Interest Expense) divided by (Current Maturities of Long Term Debt plus Interest Expense) to be not less than 1.20 to 1.00, measured annually beginning December 31, 2011.



Two Park Circle • PO Box 5002 • Westfield Center, Ohio 44251-5002 • 1.800.368.8930 • fax 330.897.6450 • www.westfield-bank.com

- Daniel Inks, Michael Charnas, and Michael Lavelle to provide annual personal tax returns and personal financial statements.
- Annual rent roll of Entity to be Formed
- Annual tax returns for the Entity to be Formed

This commitment is good through February 21, 2011.

Sincerely,



Ryan P. Gilbert
Vice President
Commercial Lending

Daniel E. Inks, Michael M. Charnas, and Michael D. Lavelle accept Westfield Bank's commitment this _____ day of February 2011.

By: _____

Title: _____
Daniel E. Inks

By: _____

Title: _____
Michael M. Charnas

By: _____

Title: _____
Michael D. Lavelle



Iron Park Circle • P.O. Box 5002 • Westfield Center, Ohio 44251-5002 • 1.800.368.6920 • fax 330.807.6420 • www.westfield-bank.com

March 4, 2011

Mr. Daniel Inks
6 Corporation Center
Broadview Heights, OH 44147



Re: Terms for cancellation of the March 9, 2011 Auction of the Ashland Lakes LLC Property

Dear Dan:

Listed below are the terms that must be agreed to and executed upon to stop the auction scheduled for Wednesday, March 9, 2011:

- All terms and conditions must be agreed upon and a Forbearance Agreement (the "Agreement"), in form and substance acceptable to FirstMerit Bank, N.A. ("FirstMerit") in its sole and absolute discretion; must be executed between FirstMerit, Ashland Lakes LLC ("Ashland"), the Inks and Slymans (collectively, the "Guarantors"), no later than Monday, March 7, 2011;
- On or before March 7th, receipt of a \$200,000 non-refundable deposit placed in escrow or paid directly against the Ashland note balance at FirstMerit;
- On or before, March 7th, receipt of a \$9,000 payment for release of the FirstMerit appraisal;
- Upon execution of the Agreement and receipt of the above-referenced payments, FirstMerit shall cancel the March 9th auction and will agree to stand still from exercising its rights and remedies under the loan documents for a period of forty-five (45) days.
- At the end of the 45 day period, FirstMerit must receive the balance of the agreed upon \$1,300,000 payment on the Ashland note.
- At the end of the 45 day period, FirstMerit must receive a payment of \$20,000 for the advertising fees associated with the cancelation of the March 9, 2011 auction;
- At the end of 45 day period, FirstMerit must have received verification, in form and substance satisfactory to FirstMerit in its sole and absolute discretion, that real estate taxes have been brought current on the two houses (170 and 200 Sommerset Drive).
- Upon receipt of the payments and verification described above, FirstMerit will release all properties (except the 170 and 200 Sommerset Drive properties) from its Mortgage, the Judgment Lien and foreclosure proceedings;
- At the end of the 45 day period, assuming compliance with the above-listed conditions, FirstMerit will stand still from exercising its rights and remedies under the loan documents until 10/15/11. During this forbearance period, Ashland and the Guarantors will be required to make payments of interest against a notional amount of \$300,000 at a rate of 7%. On or before 10/15/11, Ashland and the Guarantors will make the \$300,000 payment. Upon receipt of the \$300,000 payment; FirstMerit will release the properties

from its mortgage and will deliver to Ashland and the Guarantors either a covenant not to sue or a release of any remaining obligations due under the Ashland loan.

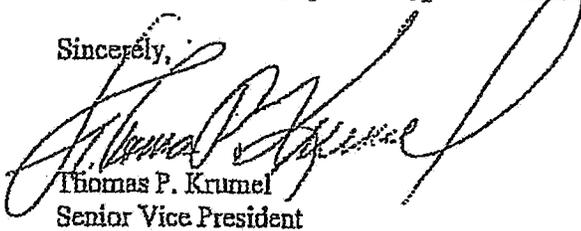
- Upon the occurrence of any default, FirstMerit can exercise its rights and remedies contained in the loan documents for the full amount of the deficiencies for Ashland and the Guarantors.

It is also understood that until such time that FirstMerit executes a written agreement providing for forbearance that there is no forbearance granted and the bank reserves all rights which it has by law and by agreement to proceed at any time with whatever remedies it possesses.

This letter and the terms set forth above remain subject to a definitive forbearance agreement and nothing herein should be construed as an agreement to forbear or a waiver of any rights which the bank possesses or a modification of any loan agreement. Nothing herein should be construed as an admission of liability on the part of FirstMerit. This term sheet shall expire if all documents necessary to implement the agreements outlined herein are not fully completed to FirstMerit's satisfaction and executed by the Ashland and the Guarantors by March 7, 2011.

Should you have any questions, please contact me at (330) 252-8347.

Sincerely,



Thomas P. Krumel
Senior Vice President

035944, 000046, 503275093

SECOND FORBEARANCE AGREEMENT

THIS SECOND FORBEARANCE AGREEMENT (this "Agreement") is entered into as of March __, 2011 by and among FirstMerit Bank, N.A. ("FirstMerit"), Ashland Lakes LLC, an Ohio limited liability company ("Ashland" or the "Borrower"), David J. Slyman, Jacqueline Slyman, Daniel E. Inks, and Deborah A. Inks, all individuals residing in Summit County, Ohio (and, together with Ashland, the "Ashland Parties").

RECITALS

A. **The Subject Loans.** The subject of this Agreement (the "Subject Facilities") is listed on Exhibit A. The Subject Facilities have been guaranteed by Mr. and Mrs. Slyman and Mr. and Mrs. Inks (together, the "Guarantors"). The Subject Facilities are evidenced by various financing documents (these documents, the "Prior Agreements," and all amendments and/or supplements thereto are collectively referred to herein as the "Loan Documents"), including, but not limited to, those documents listed on Exhibit B.

B. **Collateral.** The Subject Facilities are secured by, among other things, approximately 130 acres of real property located in the City of Ashland, Ohio, and more particularly described in the Loan Documents (the "Property"), together with all fixtures, rents, leases, and other personal property, and proceeds therefrom, wherever any of the foregoing are located (all the above collectively referred to as the "Collateral").

C. **Designated Default.** The Ashland Parties are in default of their obligations under the Loan Documents. Ashland has failed to pay the amounts due to FirstMerit pursuant to the terms of the Loan Documents, and the Ashland Parties have failed to make payments despite proper demand from FirstMerit (the "Designated Default"). By reason of the Designated Default, FirstMerit has full legal right to exercise its rights and remedies under the Loan Documents and/or applicable law.

D. **Prior Agreements.** The parties acknowledge that they are parties to that certain *Standstill Agreement* dated on or about February 6, 2009 (the "First Standstill Agreement"), that certain *Second Standstill Agreement* dated on or about June 12, 2009 (the "Second Standstill Agreement"), and that certain *Forbearance Agreement* dated on or about December 12, 2009 (the "First Forbearance Agreement" and, together with the First and Second Standstill Agreements, the "Prior Agreements"). The Ashland Parties acknowledge that they defaulted under the terms of the Prior Agreements by failing to secure takeout financing for the Subject Facilities or otherwise pay their obligations in full by the maturity date of the First Forbearance Agreement. The Ashland Parties acknowledge that all documents executed in connection with the Prior Agreements are still binding, valid, and enforceable, and the enforceability and validity of those documents shall not be affected by this Agreement.

E. **Exercised Remedies.** Due to the Designated Default, FirstMerit has exercised certain rights and remedies under the Loan Documents and/or applicable law, including, but not limited to, (i) declaring the full amount of the Indebtedness, as defined herein, to be due and owing in its aggregate amount, together with accrued interest plus applicable fees, expenses and/or charges; (ii) taking judgment against the Ashland Parties for the full amount of the

Indebtedness in the Cuyahoga County Court of Common Pleas, Case No. CV-08-679775 (the "2008 Judgment"); (iii) recording judgment liens in the Cleveland Municipal Court (2008CVH031983) and the common pleas courts of Ashland (08-CJ-D30-P253), Cuyahoga (JL-08-356444) and Summit (J2008-11424) Counties (collectively, the "2008 Judgment Liens") and (iv) commencing an action for foreclosure of the Property and the appointment of a receiver over the Property in the Ashland County Court of Common Pleas, Case No. 09-CFR-022 (the "Foreclosure"). Pursuant to the First Standstill Agreement, FirstMerit agreed to, and did, release its 2008 Judgment Liens as against Mr. and Mrs. Slyman individually, without prejudice to refile them upon a default under the Prior Agreements. Upon the default of the Ashland Parties under the Second Standstill Agreement, FirstMerit exercised additional rights and remedies, including: (i) taking judgment against Mr. and Mrs. Slyman for the full amount of the Indebtedness and against the remaining Ashland Parties for an unpaid \$25,000 fee owed under the Second Standstill Agreement in the Cuyahoga County Court of Common Pleas, Case No. CV-09-703065 (the "2009 Judgment" and, together with the 2008 Judgment, the "Judgments"); (ii) recording judgment liens pursuant to the 2009 Judgment in the Cleveland Municipal Court (2009CVH019038) and the common pleas courts of Cuyahoga (JL-09-385996) and Summit (J2009-6706) Counties (collectively, the "2009 Judgment Liens" and, together with the 2008 Judgment Liens, the "Judgment Liens"), which 2009 Judgment Liens were subsequently released as to Guarantors; (iii) filing the *Stipulation and Consent To Foreclosure* in the Foreclosure action and causing Ag Real Estate Group, Inc. ("Ag" or the "Receiver") to be appointed as the receiver over the Collateral by order dated October 9, 2009, as such order was amended effective January 22, 2010; (iv) obtaining a *Judgment Entry and Decree of Foreclosure* on or about August 20, 2010 in the Foreclosure action; and (v) scheduling a public auction of the Collateral to be conducted on or about March 9, 2011 (the "Collateral Auction"), pursuant to that certain *Judgment Entry Authorizing Appointment of a Private Auctioneer to Conduct a Public Auction of Real Property, Amending the Foreclosure Decree, Fixing Auctioneer's Compensation, and Granting Certain Related Relief*, by Bambeck Auctioneers, Inc. ("Bambeck"), a licensed Ohio auctioneer. Any rights and/or remedies under the Loan Documents and/or applicable law not specifically exercised by FirstMerit as of the date of this Agreement are referred to herein as the "Remaining Rights and Remedies."

F. **Request to Forbear & Standstill.** The Ashland Parties have requested that FirstMerit postpone the Collateral Auction and forbear for a period of time from exercising its Remaining Rights and Remedies under the Loan Documents, its rights and remedies with respect to the Judgment and/or applicable law in order for FirstMerit to attempt to settle and compromise their obligations under the Subject Facilities and this Agreement.

G. **Agreement to Forbear & Standstill.** Except as provided herein, FirstMerit is willing to forbear until October 15, 2011 from exercising certain of its Remaining Rights and Remedies under the Loan Documents, the Judgments and/or applicable law on the terms and conditions set forth in this Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Acknowledgements.** The Ashland Parties acknowledge that the Designated Default has occurred and exists and is continuing as of the date hereof. The Ashland

Parties unconditionally acknowledge and agree that they are jointly and severally obligated to pay the full amount of the Indebtedness and the additional interest, fees, costs, expenses or charges permitted under the Loan Documents, this Agreement or applicable law, without set off, recoupment, defense or counterclaim of any kind or nature.

2. **Outstanding Indebtedness.** The Ashland Parties acknowledge and agree that (A) as of March 7, 2011, there was due and owing for FirstMerit, under the Loan Documents the amounts set forth in Exhibit C, which amounts do not include costs and/or expenses of collection charge backs, and future and contingent liabilities or additional interest, fees, costs, expenses or charges permitted under the Loan Documents, this Agreement and/or applicable law that have accrued after March 7, 2011, unless expressly set forth therein (the "Indebtedness"); (B) the Indebtedness is valid and binding and there are no claims, setoffs or defenses to the payment by the Ashland Parties of the Indebtedness; and (C) the Ashland Parties are jointly and severally obligated to pay and will pay the full amount of the Indebtedness and all additional interest, fees, expenses, or charges permitted under the Loan Documents, this Agreement and/or applicable law. The outstanding Indebtedness under this Agreement does not include any personal debt between the Ashland Parties and FirstMerit, if any.

3. **Consideration.** In consideration of FirstMerit's forbearance of its rights under the Loan Documents, the Borrower and Guarantors agree to the following:

a. By not later than the close of business on March 7, 2011, Ashland and Guarantors shall tender payment in the amount of \$209,000 to FirstMerit. \$200,000 of the payment shall be applied to reduce the amount of the Indebtedness, with the remainder applied to reimburse FirstMerit for a certain appraisal ordered by FirstMerit in connection with the Collateral.

b. By not later than the close of business on April 21, 2011, Ashland and Guarantors shall tender an additional payment to FirstMerit in an amount not less than \$1,120,000. \$1,100,000 of the payment shall be applied to reduce the amount of the Indebtedness, with the remainder applied to reimburse FirstMerit in connection with advertising and other expenses incurred in connection with the Collateral Auction. Subject to the terms and conditions set forth in Section 11 of this Agreement, FirstMerit agrees to partially release certain of its Collateral from its liens and claims in connection with this payment.

c. By not later than April 21, 2011, Ashland shall pay all past-due real estate taxes, assessments, penalties and interest relative to the following two parcels that partially comprise the Collateral: 200 Sommerset Drive, PPN P-43-133-00002-01, and 170 Sommerset Drive, PPN P-43-133-00002-02 (together, the "Residual Collateral"). By such date, Ashland shall further deliver to FirstMerit proof of such payment, in form and substance acceptable to FirstMerit in its sole and absolute discretion.

d. By not later than October 15, 2011, Ashland and Guarantors shall tender an additional payment to FirstMerit in an amount equal to the greater of (i) \$300,000 and (ii) 100% of the net proceeds of the sale of the Residual Collateral. Subject to the terms and conditions set forth in Section 11 of this Agreement, FirstMerit agrees to release the Residual Collateral from its liens and claims in connection with this payment.

e. Ashland shall continue to perform under the terms of any delinquent tax installment agreement(s) with any taxing authorities, and shall otherwise remain current on all existing and future real estate taxes and other taxes due and owing on the Collateral during the Forbearance Period.

4. **Loan Documents in Effect.** All terms and conditions of the Loan Documents remain in full force and effect, except as modified herein. Nothing herein shall be deemed to void, release, waive or cancel any Loan Document.

5. **Forbearance.** Absent a Forbearance Default, as defined below, and except as otherwise provided herein, FirstMerit shall (A) not require payment in full of the Indebtedness and all additional interest, fees, costs, expenses and charges permitted under the Loan Documents, this Agreement and/or applicable law from the Ashland Parties, or enforce its Remaining Rights and Remedies until October 15, 2011 (the "Forbearance Period" or "Maturity Date"); and (B) FirstMerit shall not take any additional actions in furtherance of enforcement of its Judgment until the Maturity Date, except as otherwise indicated in Section 6 herein. The Ashland Parties acknowledge and agree that, notwithstanding the foregoing sentence: (A) FirstMerit reserves the right to enforce each and every term of this Agreement and/or the Loan Documents; (B) FirstMerit is under no duty or obligation of any kind or any nature to grant the Ashland Parties any additional period of forbearance beyond the Maturity Date; (C) FirstMerit's actions in entering into this Agreement shall not be construed as a waiver or relinquishment of, or estoppel to assert, any of FirstMerit's rights under the Loan Documents or applicable law; and (D) FirstMerit's actions in entering into this Agreement are without prejudice to FirstMerit's right to pursue any and all remedies available to it on or after the Maturity Date if no default occurs prior to said dates, or immediately upon the occurrence of a default (other than the Designated Default).

6. **Foreclosure Proceedings Partially Stayed.** The parties agree that the Foreclosure proceedings shall be exempt from the forbearance described in Section 5, except as modified herein. Specifically, the parties agree as follows:

a. The Receiver shall remain in control of the Collateral upon the terms and conditions of the October 9, 2009 *Judgment Entry Appointing A Receiver* as amended by the January 22, 2011 *Amended Judgment Entry Appointing A Receiver*. To the extent that the Receiver decides, in the exercise of its business judgment, to retain a property management company to perform day-to-day management functions for the Collateral during the Forbearance Period, FirstMerit shall not object to the selection of I&R Properties, Inc. merely on the basis that it is controlled by an "insider" of Ashland, as that term is defined in 11 U.S.C. § 101(31). Any management company selected by the Receiver (i) shall operate under terms and conditions agreed to between FirstMerit, the Receiver, and such management company, which consent FirstMerit agrees not to unreasonably withhold, (ii) shall serve under the Receiver's exclusive control, and (iii) may be terminated by the Receiver at its discretion.

b. Upon receipt of the payment described in Section 3(a) above, FirstMerit shall cause the Collateral Auction to be cancelled.

c. To the extent that FirstMerit shall agree, under the terms and conditions of this Agreement, to release certain Collateral from its liens and claims, FirstMerit shall also take appropriate actions within seven (7) days of the date of such release to cause any such released Collateral to be discharged from the Receiver's jurisdiction, with all rent receipts prorated to the date of release.

d. Absent a Forbearance Default, as defined below, FirstMerit shall not take any actions to enforce any such Foreclosure judgment including, without limitation, requesting the issuance of an order of sale or other writ of execution affecting the Property, during the Forbearance Period.

7. **Confirmation of Security Interests and Liens; Reaffirmation of Guarantees and Security Documents.** All of the Loan Documents and any and all other documents granting FirstMerit collateral security, and the liens and security interests granted thereby, shall remain in full force and effect. The Ashland Parties, by their signatures hereto, hereby affirm, confirm and ratify their separate guarantees of the obligations with respect to the Subject Facilities, and acknowledge and agree that such guarantees shall continue in full force and effect in respect of, and to secure, the obligations with respect to the Subject Facilities.

8. **Payments on Loan During Forbearance Period.** During the Forbearance Period, interest shall accrue on the unpaid principal balance of the Indebtedness at a variable rate of interest defined as the Variable Rate (as that term is defined in the *Promissory Note* dated June 27, 2005) plus 3.00% per annum, provided no Forbearance Default exists. During the Forbearance Period, in lieu of regular monthly payments of principal and interest, the Ashland Parties shall make monthly payments of partial interest, equal to the amount of interest that would have accrued during the preceding month had interest only been charged on the first \$300,000 of outstanding principal at a fixed rate of 7.00% per annum. FirstMerit reserves the right to apply said monthly payments against the Indebtedness in any manner it chooses. Except as set forth herein, the payment and other obligations of the Subject Facilities remain in full force and effect.

9. **Covenant Not To Sue Upon Completion of Forbearance Period; Dismissal of the Judgments.** Upon the termination of the Forbearance Period and receipt by FirstMerit of all payments described in Section 3 hereof, provided that a Forbearance Default (as defined below) has not occurred and Ashland and Guarantors shall have timely performed or cause to be performed, in full, all of their obligations and agreements pursuant to this Agreement to the full satisfaction of FirstMerit, FirstMerit shall thereafter execute and deliver to Borrower and Guarantors a Covenant Not To Sue Agreement, substantially in the form attached hereto as **Exhibit D**, and shall thereafter file an appropriate motion seeking that the Judgments be vacated and dismissed without prejudice. The Covenant Not To Sue Agreement shall be effectively only upon delivery by FirstMerit and on the conditions set forth in this Agreement. Any such Covenant Not To Sue Agreement delivered by FirstMerit to Ashland and Guarantors pursuant to this Section shall be void and will be of no force or effect as to Ashland and Guarantors' obligations under the Loan Documents if any one or more of the following matters occurs: (A) any of the payments, assignments, or transfers made by Ashland and/or Guarantors pursuant to this Agreement are ever rendered void or are rescinded by operation of law, or by order of any state or federal court of competent jurisdiction, by reason of any order arising out of any claim or

proceeding initiated or commenced on behalf of Ashland or Guarantors, or any of their agents, employees, representatives, affiliates, successors or assigns; or (B) if the release of claims against FirstMerit, set forth in Section 18 of this Agreement, is ever rendered void, is rescinded or adjudicated unenforceable by operation of law or by order of any state or federal court of competent jurisdiction, by reason of an order arising out of any claim or proceeding initiated or commenced on behalf of Ashland or Guarantors, or any of their agents, employees, representatives, affiliates, successors or assigns.

10. **Forbearance Fees and Charges.** The Ashland Parties agree that the following shall be added to the principal balance of the Indebtedness: (A) costs of appraisals of any and all collateral that secures the Ashland Parties' obligations to FirstMerit under the Loan Documents, to the extent not reimbursed pursuant to Section 3 hereof; (B) title and lien search fees and expenses, costs of title reports, or insurance required by FirstMerit with respect to any interest in real or personal property offered to FirstMerit as security for the Indebtedness; and (C) FirstMerit's attorneys' fees and other costs related to this Agreement (collectively, the costs and expenses outlined in subsections (a) through (c) of this Section are sometimes referred to herein as the "Forbearance Charges").

11. **Partial Collateral Releases.** Purely as an accommodation to the Ashland Parties, strictly upon the terms and conditions set forth in this Section, FirstMerit shall agree to partially release portions of its Collateral from its mortgage lien, Judgment Lien(s), and the Foreclosure action.

a. Provided that the payment described in Section 3(b) and the tax payment and verification described in Section 3(c) shall have been made and/or provided to FirstMerit on or before April 21, 2011, FirstMerit shall agree to release, within a commercially reasonable time, all Collateral *except* the Residual Collateral from its liens and claims.

b. Provided that the payment described in Section 3(d) shall have been made to FirstMerit on or before the Maturity Date, FirstMerit shall agree to release, within a commercially reasonable time, the Residual Collateral from its liens and claim.

Notwithstanding anything to the contrary in this Section, any obligation of FirstMerit to release any portion of the Collateral from its liens and claims shall terminate upon the occurrence of a Forbearance Default.

12. **Cross Default.** To induce FirstMerit to enter into this Agreement, the Ashland Parties agree and acknowledge that, other than the Designated Default, a breach or default under any provision of any Loan Document, this Agreement or any other agreement to which FirstMerit and any of the Ashland Parties are a party, whether previously, now or hereafter executed, delivered to FirstMerit by the Ashland Parties shall constitute a default under each and every document executed and delivered to FirstMerit by such Ashland Party.

13. **Representations, Warranties and Covenants.**

a. To induce FirstMerit to enter into this Agreement, the Ashland Parties each represent, warrant and covenant that they will do the following:

(i) Comply with all requirements of all Loan Documents to the extent not inconsistent with this Agreement;

(ii) Provide to FirstMerit such true, complete and accurate financial information as FirstMerit shall deem necessary in its sole discretion;

(iii) Not enter into any agreements with any of their other creditors that might impair its ability to perform under this Agreement. The Ashland Parties shall promptly provide FirstMerit with copies of any and all such agreements that the Ashland Parties may have entered into before the date of this Agreement and any agreements with any other creditor that may constitute an agreement that the Borrower may enter into during the Forbearance Period;

(iv) Permit FirstMerit or its agents to enter onto Ashland's premises for the purpose of inspecting the books of the Ashland Parties or to determine the Ashland Parties' compliance with the terms of this Agreement; and That, except as is required by law, no distribution, bonus, severance payment, incentive payment or other distribution outside the ordinary course of business or any increase to the salary or benefits of any insider, executive, vice president, secretary, treasurer, officer or director shall be made without FirstMerit's express written authorization.

b. The Ashland Parties further represent, warrant and covenant that:

(i) This Agreement is a valid and binding agreement of the Ashland Parties enforceable against them in accordance with its terms. All of the Loan Documents shall remain in full force and effect with respect to any other party to the Loan Documents, if any (the "Other Parties"). FirstMerit's actions in entering into this Agreement shall not be construed as a waiver, relinquishment or impairment of, or estoppel to assert, any rights, powers or remedies of FirstMerit under the Loan Documents and/or applicable law as against the Other Parties;

(ii) No consent or approval of any party is required in connection with the execution and delivery of this Agreement by the Ashland Parties, and the execution and delivery of this Agreement does not (a) contravene or result in a breach or default under any other agreement or instrument to which any or all of the Ashland Parties are a party or by which any of their properties are bound or (b) violate any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award applicable to any or all of the Ashland Parties;

(iii) All representations, warranties and/or covenants contained in this Agreement, including, but not limited to, the recitals herein, and in any and all of the other Loan Documents are true and correct as of the date of this Agreement, and all such representations, warranties and covenants shall survive the execution of this Agreement. The Loan Documents and this Agreement represent unconditional, absolute, valid and enforceable obligations against the Ashland Parties. The Ashland Parties have no claim, defense or offset against FirstMerit with respect to the Loan Documents or otherwise. The Ashland Parties understand and acknowledge that FirstMerit is entering into this Agreement in reliance upon, and

in partial consideration for, this acknowledgment and representation, and agree that such reliance is reasonable and appropriate;

(iv) The Ashland Parties shall take any and all actions of any kind or nature whatsoever, either directly or indirectly, that are necessary to prevent FirstMerit from suffering any loss with respect to the Collateral or impairment of any rights and/or remedies of FirstMerit with respect to the Loan Documents and/or this Agreement in the event of default by the Ashland Parties under this Agreement or the Loan Documents or any future obligations of the Ashland Parties to FirstMerit;

(v) As to the Ashland Parties, other than the Designated Default, no event of default under the Loan Documents has occurred and is continuing as of the date of this Agreement; and FirstMerit has and will continue to have a valid lien and security interest in all Collateral, and the Ashland Parties expressly reaffirm all security interests and liens granted to FirstMerit pursuant to the Loan Documents and the Judgment.

c. The Ashland Parties further represent, warrant and covenant that:

(i) The Ashland Parties shall continue to comply strictly with all representations, warranties, covenants and terms and conditions of this Agreement and the Loan Documents;

(ii) The Ashland Parties shall not enter into any contract that pertains to or affects the Collateral in any way, except as authorized in this Agreement or in the ordinary course of business and upon terms and conditions that are commercially reasonable; and The Ashland Parties will provide FirstMerit with copies of any communication with any governmental authorities, including notices and correspondence, that refer or relate to any (a) obligations owed by the Ashland Parties to those governmental authorities or (b) liens placed upon the assets of any of the Ashland Parties by the same; and

(iii) During the Forbearance Period, except as otherwise permitted herein, Guarantors shall not sell, transfer, hypothecate, or remove from the jurisdiction of the federal and state courts of Cuyahoga, Summit, or Ashland Counties any of their real property, motor vehicles, watercraft, aircraft, farming equipment, or mobile homes, regardless of their fair market value, nor money or items of personal property not otherwise enumerated herein with a fair market value in excess of \$5,000.00. Guarantors agree that any such transfers would be fraudulent within the meaning of Sections 1336.04 and 1336.05 of the Ohio Revised Code.

14. **Forbearance Defaults.** Each of the following shall constitute a Forbearance Default: (A) the existence of an Event of Default, as defined under any of the Loan Documents or the Standstill Agreement (other than the Designated Default); (B) the failure by the Ashland Parties to timely keep or perform any of the representations, warranties, covenants or agreements contained herein including, without limitation, the payment obligations set forth in Section 3 of this Agreement; (C) if in FirstMerit's judgment there is a material adverse change in the financial condition of the Ashland Parties; (D) if any representation or warranty of the Ashland Parties contained herein, including any exhibit, schedule, certificate or document furnished in connection with this Agreement, shall be false, misleading or incorrect in any

material respect; (E) if any of the Ashland Parties shall commence a case, proceeding or other action: (i) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to them, or seeking to adjudicate them bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, composition or other relief with respect to the Ashland Parties or their debts; or (ii) seeking the appointment of a receiver, trustee, custodian or other similar official for them or for all or any substantial part of any of their assets, or for the benefit of their creditors; (F) if there shall be commenced against any of the Ashland Parties any case, proceeding or other action of a nature referred to in this Section which is not dismissed within thirty (30) days from the filing thereof; (G) if there shall be commenced against any of the Ashland Parties any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of any of their assets, which is not vacated, discharged or bonded over (without use of any funds of any of the Ashland Parties); (H) any representations by any of the Ashland Parties as to their financial condition, assets, liabilities, indebtedness, or other information is determined to be false or misleading by FirstMerit in FirstMerit's sole discretion; or (I) any of the Ashland Parties shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in this Section.

15. **Remedies in Event of Default.** Upon the occurrence of a Forbearance Default, the amounts due under this Agreement, the Loan Documents and the Judgment shall, at FirstMerit's option, with or without notice to the Ashland Parties, be immediately due and payable, and FirstMerit shall be entitled immediately to exercise all of its rights and remedies under the Loan Documents, the Judgments, this Agreement or pursuant to applicable law. FirstMerit shall also, at its option and with or without notice to the Ashland Parties, pursue judgment against the Ashland Parties for the full amount of the Indebtedness and any costs or fees imposed by this Agreement. Further, interest shall accrue on the outstanding Indebtedness and Forbearance Charges at the maximum default rate applicable under each of the Loan Documents plus an additional four (4.000) percentage points. All rights and remedies shall be cumulative and not exclusive, and FirstMerit shall have the right to exercise any and all other rights and remedies which may be available. Any action by FirstMerit against any property or party shall not serve to release or discharge any other security, property or person in connection with this transaction.

16. **Conditions of Effectiveness.** This Agreement shall become effective (the "Effective Date") upon (a) this Agreement being executed by the parties and (b) the receipt by FirstMerit of the payment described in Section 3(a).

17. **No Offsets.** The Ashland Parties agree that they shall not raise, allege or assert any claims or counterclaims, offsets or defenses of any kind against FirstMerit arising out of or relating in any way to this Agreement, any agreement referenced herein, the Loan Documents, the Judgment and/or the Subject Facilities. To the fullest extent permitted by law, the Ashland Parties waive all present and future defenses, offsets, claims and counterclaims in any action or proceeding commenced by FirstMerit to enforce FirstMerit's rights under this Agreement, any agreement referenced herein, the Loan Documents and/or the Subject Facilities, including the recovery and disposition of the Collateral, and the Ashland Parties further waive their right to contest any actions commenced by FirstMerit to recover any amount due under this

Agreement and/or the Collateral. The Ashland Parties will not take any action to impede, delay or hinder such actions by FirstMerit or sales of the Collateral.

18. Ashland Parties Release. The Ashland Parties hereby release, remise, acquit and forever discharge FirstMerit, and FirstMerit's employees, agents, representatives, consultants, attorneys, fiduciaries, officers, directors, partners, predecessors, successors and assigns, subsidiary corporations, parent corporations and related corporate divisions and affiliates (all of the foregoing hereinafter called the "Released Parties"), from any and all actions and causes of action, judgments, executions, suits, debts, claims, demands, liabilities, obligations, damages and expenses of any and every character, known or unknown, direct and/or indirect, at law or in equity, of whatsoever kind or nature, for or because of any matter or things done, omitted or suffered to be done by any of the Released Parties prior to and including the date of execution hereof, and in any way directly or indirectly arising out of or in any way related to this Agreement, the Subject Facilities or the Loan Documents (all of the foregoing hereinafter called the "Released Matters"). The Ashland Parties acknowledge that the release in this Section is intended to be in full satisfaction of all or any alleged injuries or damages arising in connection with the Released Matters. This paragraph is intended to be broad and encompassing in order to release any claims that the Ashland Parties may have and shall be interpreted in such manner.

19. Governing Law and Venue. This Agreement shall be deemed to be made in the State of Ohio and shall be interpreted in accordance with the laws of the State of Ohio, without regard to conflict of law principles. By executing this Agreement, the Ashland Parties agreed that in the event litigation arises between the parties in connection with this Agreement or any other agreement between the parties, the Ashland Parties consent to the jurisdiction and venue of any court or courts in the State of Ohio selected by FirstMerit, including, but not limited to, the courts of Cuyahoga County and Ashland County, Ohio.

20. Confession of Judgment. The Borrower and Guarantors hereby irrevocably authorize and empower any attorney-at-law, including an attorney hired by FirstMerit, at any time after the indebtedness evidenced by the Agreement and/or any Loan Document becomes due, whether by acceleration or otherwise, to appear in any court of record, to waive the issuing and service of process, and to confess judgment against such Borrower or Guarantors for the unpaid amounts under this Agreement or any Loan Document, plus interest, expenses, the costs of suit and reasonable attorney's fees, and to release all errors, and waive all rights of appeal. If a copy of this Agreement, verified by an affidavit, shall have been filed in the proceeding, it will not be necessary to file the original as a warrant of attorney. The Borrower and Guarantors waive the right to any stay of execution and the benefit of all exemption laws now or hereafter in effect. No single exercise of the foregoing warrant and power to confess judgment will be deemed to exhaust the power, whether or not any such exercise shall be held by any court to be invalid, voidable or void; but the power will continue undiminished and may be exercised from time to time as FirstMerit may elect until all amounts owing on this Agreement and the Loan Documents have been paid in full. The Borrower and Guarantors waive any conflict of interest that an attorney hired by FirstMerit may have in acting on behalf of the Borrower or Guarantors in confessing judgment against such Borrower or Guarantors while such attorney is retained by FirstMerit. The Borrower and/or Guarantors expressly consent to such attorney acting for such Borrower or Guarantors in confessing judgment, and to such attorney being paid by FirstMerit for his or her services in connection with confessing judgment.

21. **Indemnification.** The Ashland Parties agree to jointly and severally indemnify, defend, by counsel reasonably acceptable to FirstMerit, and hold FirstMerit harmless from and against any and all liabilities, claims, demands, losses, damages, costs and expenses, including, without limitation, reasonable attorneys' fees, actions or causes of action, arising out of or relating to any breach of any covenant or agreement by the Ashland Parties or the incorrectness or inaccuracy of any representation, warranty and/or covenant of the Ashland Parties contained in this Agreement or the Loan Documents.

22. **Notices.** Unless otherwise provided herein, any notices with respect to this Agreement shall be given by (A) personal delivery; (B) overnight mail; (C) first class mail, return receipt requested; or (D) facsimile; and addressed as follows:

If to Ashland:

Ashland Lakes, LLC
c/o Daniel E. Inks
9 Corporation Center
Broadview Heights, Ohio 44147

With a copy to:

Bernard Mandel, Esq.
1775 East 45th Street
Cleveland, Ohio 44103

If to Daniel E. Inks or Deborah A. Inks:

Daniel E. Inks or Deborah A. Inks
3617 Chapelton Court
Richfield, Ohio 44286

With a copy to:

If to David J. Slyman or Jacqueline Slyman:

David J. Slyman or Jacqueline Slyman
3349 Kintyre Circle
Richfield, Ohio 44286

With a copy to:

Bernard Mandel, Esq.
1775 East 45th Street
Cleveland, Ohio 44103

If to FirstMerit:

Thomas P. Krumel, Sr. Vice President
Managed Assets Department
FirstMerit Bank, N.A.
III Cascade Plaza (CAS61)
Akron, OH 44308

With a copy to:

Brett A. Wall, Esq.
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485

23. **Miscellaneous.**

A. **Effect and Construction of Agreement.** Except as expressly provided herein, the Loan Documents and the Judgment shall remain in full force and effect in accordance with their respective terms. Further, the Agreement shall not additionally be construed to: (i) impair the validity, perfection or priority of any lien or security interest securing the Subject Facilities and/or the Indebtedness; (ii) waive or impair any rights, powers or remedies of FirstMerit under, or constitute a waiver of, any provision of the Loan Documents upon termination of the Forbearance Period; or (iii) constitute an agreement by FirstMerit to

require FirstMerit to extend the Forbearance Period, grant additional forbearance periods, or extend the time for payment of the Subject Facilities.

B. **Conflicts**. In the event of any express conflict between the terms of this Agreement and any of the Loan Documents, this Agreement shall govern.

C. **Presumptions**. The Ashland Parties acknowledge that they have consulted with and been advised by their counsel and such other experts and advisors as they have deemed necessary in connection with the negotiation, execution and delivery of this Agreement, and have participated in the drafting hereof. This Agreement is the result of good faith arm's length bargaining between the Ashland Parties and FirstMerit. Therefore, this Agreement shall be construed without regard to any presumption or rule requiring that it be construed against any one party causing this Agreement or any part hereof to be drafted.

D. **Entire Agreement**. This Agreement and the Loan Documents set forth the entire agreement among the parties hereto with respect to the subject matters set forth herein. The Ashland Parties have not relied on any agreements, representations or warranties of FirstMerit or any of its representatives, except as specifically set forth herein. Any promises, representations, warranties or guarantees not herein contained and hereinafter made shall have no force and effect unless in writing, and signed by each of the parties hereto. The Ashland Parties agree that this Agreement shall supersede a certain letter agreement dated on or about October 28, 2009 and the accommodation referenced in Recital G hereto. The Ashland Parties acknowledge that they are not relying upon oral representations or statements in entering into this Agreement.

E. **Severability**. Should any part, term or provision of this Agreement be decided by the courts to be illegal, unenforceable or in conflict with any law of the State of Ohio, federal law or any other applicable law, the validity and enforceability of the remaining portions or provisions of this Agreement shall not be affected thereby.

F. **Further Assurance**. The Ashland Parties shall execute such other and further documents and instruments FirstMerit may reasonably request to implement the provisions of this Agreement and to perfect and/or protect FirstMerit's liens and security interests in the Collateral.

G. **Time Periods and Dates**. Time is of the essence as to all time periods and dates for the Ashland Parties' performance required under this Agreement.

H. **Counterparts**. This Agreement may be executed in any number of counterparts and by different parties to this Agreement on separate counterparts, each of which, when so executed, shall be deemed an original, but such counterparts shall constitute one and the same agreement. Any signature delivered by a party by a facsimile transmission shall be deemed to be an original signature hereto.

I. **No Waiver**. The failure or delay of FirstMerit in enforcing any right or obligation or any provision of this Agreement in any instance shall not constitute a waiver thereof in that or any other instance. FirstMerit may only waive such right, obligation or provision by an instrument in writing signed by it.

J. Remedies. The rights and remedies provided in this Agreement are cumulative and not exclusive of any other rights or remedies provided in the Loan Documents, by law or by any other agreement. The exercise by FirstMerit of any right or remedy will not preclude FirstMerit from exercising any other right or remedy. FirstMerit may pursue its rights and remedies in such order as it determines.

K. Survival. All indemnities, waivers and releases by the Ashland Parties contained herein and in the Loan Documents shall survive payment in full of the obligations.

L. Amendments in Writing. No amendment, modification, rescission, waiver or release of any provision of this Agreement shall be effective unless the same shall be in writing and signed by the parties hereto.

M. Reversal of Payments. If FirstMerit receives any payment or proceeds of Collateral which are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be paid to a trustee, debtor-in-possession, estate, receiver or any other party under any bankruptcy law, common law, equitable cause or otherwise, then, to such extent, the obligations or part thereof intended to be satisfied by such payments or proceeds shall be reversed and continue as if such payments or proceeds had not been received by FirstMerit.

N. Integration. This Agreement and the Loan Documents and the documents referenced therein are intended by the parties as the final expression of their agreement and therefore incorporate all negotiations of the parties hereto and are the entire agreement of the parties hereto. The Ashland Parties acknowledge that they are relying on no written or oral agreement, representation, warranty or understanding of any kind made by FirstMerit or any employee or agent of FirstMerit except for the agreements by FirstMerit set forth herein or in the Loan Documents. Except as expressly set forth in this Agreement, the Loan Documents remain unchanged and in full force and effect.

O. Recitals. Each term of this Agreement is contractual and not merely a recital.

[Remainder Of Page Left Intentionally Blank]

IN WITNESS WHEREOF, this Agreement has been duly executed in Cleveland, Ohio as of the date set forth above.

Notice — for this Notice, "You" means Ashland Lakes, LLC, David J. Slyman, Jacqueline Slyman, Daniel E. Inks, and Deborah A. Inks.

WARNING - BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON THE CREDITOR'S PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

ASHLAND LAKES, LLC;
an Ohio limited liability company,

DAVID J. SLYMAN,
an individual,

By: _____
Its: _____

By: _____

WARNING - BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON THE CREDITOR'S PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

JACQUELINE SLYMAN,
an individual,

DANIEL E. INKS,
an individual,

By: _____

By: _____

WARNING - BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON THE CREDITOR'S PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

DEBORAH A. INKS,
an individual,

By: _____

Countersigned:

FIRSTMERIT BANK, N.A.,
a national banking association,

By: _____
Thomas P. Krumel, its Senior Vice President

EXHIBIT A

SUBJECT FACILITIES

Ashland Lakes, LLC (Customer Number 0000025349)

- #0003848

EXHIBIT B

LOAN DOCUMENTS

The Loan Documents include the following promissory notes and all documents and agreements related thereto, including, but not limited to, all guaranties, mortgages and security agreements.

- That certain *Promissory Note*, dated June 25, 2005, among Ashland Lakes, LLC, Daniel E. Inks, and David J. Slyman as Borrowers, and FirstMerit Bank, N.A. as Lender, in the principal amount of \$3,500,000.00, as amended.

EXHIBIT C

INDEBTEDNESS

As of March 7, 2011, the Indebtedness owed by Borrower and Guarantors under the Loan Documents is set forth on the table below, with the exception of FirstMerit's attorneys' fees. FirstMerit reserves the right to correct or adjust this amount pending further review of its accounting system and any payments which may have been made but not credited by the Ashland Parties.

<u>Loan No.</u>	<u>Principal</u>	<u>Accrued Interest</u>	<u>Late & Other Fees</u>	<u>Total¹</u>
0003848	\$2,583,266.71	\$266,954.04	\$652,902.82	\$3,504,469.01

¹ This figure does not include FirstMerit's attorneys' fees, which are also a part of the Indebtedness and are owed by the Ashland Parties. The sum of FirstMerit's attorneys' fees shall be provided to the Ashland Parties on or after the Maturity Date.

EXHIBIT D

FORM OF COVENANT NOT TO SUE

Ashland Lakes, LLC.

9 Corporation Center, Broadview Heights, OH 44147

Dear Tom: I have reviewed the agreement, and I just had a couple of comments:

The actual amount that will be delivered tomorrow is \$150,000 with the \$9,000 to be paid on or before April 21, 2011.

The section dealing with the Residential property release should be for \$300,000 and not for the higher of what we sell the homes for. That was always our understanding and that is what is in your letter you sent me on Monday.

As to the rents held by the Receiver, they should be paid to the Borrower after payment of the Receiver's fees, the Receiver's attorney fees and the other cost incurred by the Receiver.

In terms of the release prices, there will not be any addition for costs of appraisals, title charges and or attorney fees. This again was never agreed to and is not in your letter you sent to us on Monday.

We need the following inserted into the letter:

To induce the Borrower and the Guarantors to enter into this Agreement, FirstMerit represents that the appraisal referred to in Section 3(a) above provides the following values:

170 Summerset Drive - Bank --- appraised value = \$200,000.00

8 Triplex Units including Seven Bay Garage and 4800 Sq Ft Office/Warehouse ---
appraised value = \$640,000.00

200 Summerset Drive --- appraised value = \$160,000.00

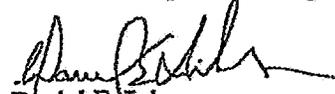
13.26 Acres including Barn --- appraised value = \$65,000.00

59.62 Acres of Farmland --- appraised value = \$245,000.00

730 Eastlake Drive (3-Family Home) and 738 Eastlake Drive (Single Family Home) ---
appraised value = \$266,000.00

Total appraisal --- appraised value = \$1,576,000.00

Please send me the revised agreement so that we can get it signed by the various parties and close this early on Tuesday morning.


Daniel E. Inks
Administrative Manager

2317.43. Medical liability action - defendant's expression of sympathy for victim inadmissible.

Ohio Statutes

Title 23. COURTS - COMMON PLEAS

Chapter 2317. EVIDENCE

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

2317.43. Medical liability action - defendant's expression of sympathy for victim inadmissible

- (A) In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.
- (B) For purposes of this section, unless the context otherwise requires:
- (1) "Health care provider" has the same meaning as in division (B)(5) of section 2317.02 of the Revised Code.
 - (2) "Relative" means a victim's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes said relationships that are created as a result of adoption. In addition, "relative" includes any person who has a family-type relationship with a victim.
 - (3) "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.
 - (4) "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result.

Cite as R.C. 2317.43

History. Enacted eff. 9/13/2004.

733.08. Vacancy in office of mayor of city.

Ohio Statutes

Title 7. MUNICIPAL CORPORATIONS

Chapter 733. OFFICERS

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

733.08. Vacancy in office of mayor of city

- (A) In case of the death, resignation, or removal of the mayor, the vacancy in the office of mayor shall be filled, until a successor is elected and qualified, by a person chosen by the residents of that city who are members of the city central committee if there is one, or if not then of the county central committee, of the political party with which the last occupant of the office was affiliated. If the vacancy occurs because of the death, resignation, or inability to take office of a mayor-elect, an appointment to take the office at the beginning of the term shall be made by the members of the central committee who reside in the city where the vacancy occurs.

Not less than five nor more than forty-five days after the vacancy occurs, the specified members of the city or county committee shall meet to make an appointment to fill the vacancy. Not less than four days before the date of the meeting the committee chairperson or secretary shall send, by mail to every member eligible to vote on filling the vacancy, a written notice stating the date, time, and place of the meeting and its purpose. A majority of the eligible members present at the meeting may make the appointment.

If the last occupant of the office of mayor or the mayor-elect was elected as an independent candidate, the vacancy shall be filled, until a successor is elected and qualified, by election by the legislative authority.

- (B) If a vacancy in the office of mayor occurs more than forty days before the next regular municipal election, a successor shall be elected at that election for the unexpired term unless the unexpired term ends within one year immediately following the date of that election, in which case an election to fill the unexpired term shall not be held and the person appointed or elected under division (A) of this section shall hold the office for the unexpired term. If an election is held under this division, the person appointed or elected by the legislative authority under division (A) of this section shall hold the office until a successor is elected and qualified under this division.

Cite as R.C. 733.08

History. Effective Date: 03-17-1998

3513.19. Challenges at primary elections.

Ohio Statutes

Title 35. ELECTIONS

Chapter 3513. PRIMARIES; NOMINATIONS

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

3513.19. Challenges at primary elections

- (A) It is the duty of any judge of elections , whenever any judge of elections doubts that a person attempting to vote at a primary election is legally entitled to vote at that election, to challenge the right of that person to vote. The right of a person to vote at a primary election may be challenged upon the following grounds:
- (1) That the person whose right to vote is challenged is not a legally qualified elector;
 - (2) That the person has received or has been promised some valuable reward or consideration for the person's vote;
 - (3) That the person is not affiliated with or is not a member of the political party whose ballot the person desires to vote. Such party affiliation shall be determined by examining the elector's voting record for the current year and the immediately preceding two calendar years as shown on the voter's registration card, using the standards of affiliation specified in the seventh paragraph of section 3513.05 of the Revised Code. Division (A)(3) of this section and the seventh paragraph of section 3513.05 of the Revised Code do not prohibit a person who holds an elective office for which candidates are nominated at a party primary election from doing any of the following:
 - (a) If the person voted as a member of a different political party at any primary election within the current year and the immediately preceding two calendar years, being a candidate for nomination at a party primary held during the times specified in division (C)(2) of section 3513.191 of the Revised Code provided that the person complies with the requirements of that section;
 - (b) Circulating the person's own petition of candidacy for party nomination in the primary election.
- (B) When the right of a person to vote is challenged upon the ground set forth in division (A)(3) of this section, membership in or political affiliation with a political party shall be

determined by the person's statement, made under penalty of election falsification, that the person desires to be affiliated with and supports the principles of the political party whose primary ballot the person desires to vote.

Cite as R.C. 3513.19

History. Amended by 129th General Assembly File No.105, SB 295, 1, eff. 8/15/2012.

Amended by 129th General Assembly File No.40, HB 194, 1 Made subject to referendum in the Nov. 6, 2012 election. The version of this section thus amended was repealed by 129th General Assembly File No.105, SB 295, 1, eff. 8/15/2012.

Effective Date: 08-22-1995; 05-02-2006

3513.05. Deadline for filing declaration of candidacy.

Ohio Statutes

Title 35. ELECTIONS

Chapter 3513. PRIMARIES; NOMINATIONS

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

3513.05. Deadline for filing declaration of candidacy

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election, except persons desiring to become joint candidates for the offices of governor and lieutenant governor and except as otherwise provided in section 3513.051 of the Revised Code, shall, not later than four p.m. of the ninetieth day before the day of the primary election, file a declaration of candidacy and petition and pay the fees required under divisions (A) and (B) of section 3513.10 of the Revised Code. The declaration of candidacy and all separate petition papers shall be filed at the same time as one instrument. When the offices are to be voted for at a primary election, persons desiring to become joint candidates for the offices of governor and lieutenant governor shall, not later than four p.m. of the ninetieth day before the day of the primary election, comply with section 3513.04 of the Revised Code. The prospective joint candidates' declaration of candidacy and all separate petition papers of candidacies shall be filed at the same time as one instrument. The secretary of state or a board of elections shall not accept for filing a declaration of candidacy and petition of a person seeking to become a candidate if that person, for the same election, has already filed a declaration of candidacy or a declaration of intent to be a write-in candidate, or has become a candidate by the filling of a vacancy under section 3513.30 of the Revised Code for any federal, state, or county office, if the declaration of candidacy is for a state or county office, or for any municipal or township office, if the declaration of candidacy is for a municipal or township office.

If the declaration of candidacy declares a candidacy which is to be submitted to electors throughout the entire state, the petition, including a petition for joint candidates for the offices of governor and lieutenant governor, shall be signed by at least one thousand qualified electors who are members of the same political party as the candidate or joint candidates, and the declaration of candidacy and petition shall be filed with the secretary of state; provided that the secretary of state shall not accept or file any such petition appearing on its face to contain signatures of more than three thousand electors.

Except as otherwise provided in this paragraph, if the declaration of candidacy is of one that is to be submitted only to electors within a district, political subdivision, or portion thereof, the petition

shall be signed by not less than fifty qualified electors who are members of the same political party as the political party of which the candidate is a member. If the declaration of candidacy is for party nomination as a candidate for member of the legislative authority of a municipal corporation elected by ward, the petition shall be signed by not less than twenty-five qualified electors who are members of the political party of which the candidate is a member.

No such petition, except the petition for a candidacy that is to be submitted to electors throughout the entire state, shall be accepted for filing if it appears to contain on its face signatures of more than three times the minimum number of signatures. When a petition of a candidate has been accepted for filing by a board of elections, the petition shall not be deemed invalid if, upon verification of signatures contained in the petition, the board of elections finds the number of signatures accepted exceeds three times the minimum number of signatures required. A board of elections may discontinue verifying signatures on petitions when the number of verified signatures equals the minimum required number of qualified signatures.

If the declaration of candidacy declares a candidacy for party nomination or for election as a candidate of an intermediate or minor party, the minimum number of signatures on such petition is one-half the minimum number provided in this section, except that, when the candidacy is one for election as a member of the state central committee or the county central committee of a political party, the minimum number shall be the same for an intermediate or minor party as for a major party.

If a declaration of candidacy is one for election as a member of the state central committee or the county central committee of a political party, the petition shall be signed by five qualified electors of the district, county, ward, township, or precinct within which electors may vote for such candidate. The electors signing such petition shall be members of the same political party as the political party of which the candidate is a member.

For purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if the elector voted in that party's primary election within the preceding two calendar years, or if the elector did not vote in any other party's primary election within the preceding two calendar years.

If the declaration of candidacy is of one that is to be submitted only to electors within a county, or within a district or subdivision or part thereof smaller than a county, the petition shall be filed with the board of elections of the county. If the declaration of candidacy is of one that is to be submitted only to electors of a district or subdivision or part thereof that is situated in more than one county, the petition shall be filed with the board of elections of the county within which the major portion of the population thereof, as ascertained by the next preceding federal census, is located.

A petition shall consist of separate petition papers, each of which shall contain signatures of electors of only one county. Petitions or separate petition papers containing signatures of electors

of more than one county shall not thereby be declared invalid. In case petitions or separate petition papers containing signatures of electors of more than one county are filed, the board shall determine the county from which the majority of signatures came, and only signatures from such county shall be counted. Signatures from any other county shall be invalid.

Each separate petition paper shall be circulated by one person only, who shall be the candidate or a joint candidate or a member of the same political party as the candidate or joint candidates, and each separate petition paper shall be governed by the rules set forth in section 3501.38 of the Revised Code.

The secretary of state shall promptly transmit to each board such separate petition papers of each petition accompanying a declaration of candidacy filed with the secretary of state as purport to contain signatures of electors of the county of such board. The board of the most populous county of a district shall promptly transmit to each board within such district such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the county of each such board. The board of a county within which the major portion of the population of a subdivision, situated in more than one county, is located, shall promptly transmit to the board of each other county within which a portion of such subdivision is located such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the portion of such subdivision in the county of each such board.

All petition papers so transmitted to a board and all petitions accompanying declarations of candidacy filed with a board shall, under proper regulations, be open to public inspection until four p.m. of the eightieth day before the day of the next primary election. Each board shall, not later than the seventy-eighth day before the day of that primary election, examine and determine the validity or invalidity of the signatures on the petition papers so transmitted to or filed with it and shall return to the secretary of state all petition papers transmitted to it by the secretary of state, together with its certification of its determination as to the validity or invalidity of signatures thereon, and shall return to each other board all petition papers transmitted to it by such board, together with its certification of its determination as to the validity or invalidity of the signatures thereon. All other matters affecting the validity or invalidity of such petition papers shall be determined by the secretary of state or the board with whom such petition papers were filed.

Protests against the candidacy of any person filing a declaration of candidacy for party nomination or for election to an office or position, as provided in this section, may be filed by any qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy the elector objects to, or by the controlling committee of that political party. The protest shall be in writing, and shall be filed not later than four p.m. of the seventy-fourth day before the day of the primary election. The protest shall be filed with the election officials with whom the declaration of candidacy and petition was filed. Upon the filing of the protest, the election officials with whom it is filed shall promptly fix the

time for hearing it, and shall forthwith mail notice of the filing of the protest and the time fixed for hearing to the person whose candidacy is so protested. They shall also forthwith mail notice of the time fixed for such hearing to the person who filed the protest. At the time fixed, such election officials shall hear the protest and determine the validity or invalidity of the declaration of candidacy and petition. If they find that such candidate is not an elector of the state, district, county, or political subdivision in which the candidate seeks a party nomination or election to an office or position, or has not fully complied with this chapter, the candidate's declaration of candidacy and petition shall be determined to be invalid and shall be rejected; otherwise, it shall be determined to be valid. That determination shall be final.

A protest against the candidacy of any persons filing a declaration of candidacy for joint party nomination to the offices of governor and lieutenant governor shall be filed, heard, and determined in the same manner as a protest against the candidacy of any person filing a declaration of candidacy singly.

The secretary of state shall, on the seventieth day before the day of a primary election, certify to each board in the state the forms of the official ballots to be used at the primary election, together with the names of the candidates to be printed on the ballots whose nomination or election is to be determined by electors throughout the entire state and who filed valid declarations of candidacy and petitions.

The board of the most populous county in a district comprised of more than one county but less than all of the counties of the state shall, on the seventieth day before the day of a primary election, certify to the board of each county in the district the names of the candidates to be printed on the official ballots to be used at the primary election, whose nomination or election is to be determined only by electors within the district and who filed valid declarations of candidacy and petitions.

The board of a county within which the major portion of the population of a subdivision smaller than the county and situated in more than one county is located shall, on the seventieth day before the day of a primary election, certify to the board of each county in which a portion of that subdivision is located the names of the candidates to be printed on the official ballots to be used at the primary election, whose nomination or election is to be determined only by electors within that subdivision and who filed valid declarations of candidacy and petitions.

Cite as R.C. 3513.05

History. Amended by 129th General Assembly File No.105, SB 295, 1, eff. 8/15/2012.

Amended by 129th General Assembly File No.40, HB 194, 1 Made subject to referendum in the Nov. 6, 2012 election. The version of this section thus amended was repealed by 129th General Assembly File No.105, SB 295, 1, eff. 8/15/2012.

Amended by 128th General Assembly File No.29, HB 48, 1, eff. 7/2/2010.

Effective Date: 2002 HB445 12-23-2002; 09-29-2005; 05-02-2006

4123.93. Subrogation definitions.

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4123. WORKERS' COMPENSATION

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

4123.93. Subrogation definitions

As used in sections 4123.93 and 4123.931 of the Revised Code:

- (A) "Claimant" means a person who is eligible to receive compensation, medical benefits, or death benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.
- (B) "Statutory subrogee" means the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code.
- (C) "Third party" means an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.
- (D) "Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.
- (E) "Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury.
- (F) "Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest.

Cite as R.C. 4123.93

History. Effective Date: 04-09-2003

305.14. Employment of legal counsel.

Ohio Statutes

Title 3. COUNTIES

Chapter 305. BOARD OF COUNTY COMMISSIONERS - GENERALLY

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

305.14. Employment of legal counsel

- (A) The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.
- (B) The board of county commissioners may also employ legal counsel, as provided in section 309.09 of the Revised Code, to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.
- (C) Notwithstanding division (A) of this section and except as provided in division (D) of this section, a county board of developmental disabilities or a public children services agency may, without the authorization of the court of common pleas, employ legal counsel to advise it or to represent it or any of its members or employees in any matter of public business coming before the board or agency or in the prosecution or defense of any action or proceeding in which the board or agency in its official capacity, or a board or agency member or employee in the member's or employee's official capacity, is a party or has an interest.
- (D)
 - (1) In any legal proceeding in which the prosecuting attorney is fully able to perform the prosecuting attorney's statutory duty to represent the county board of developmental disabilities or public children services agency without conflict of interest, the board or agency shall employ other counsel only with the written consent of the prosecuting attorney. In any legal proceeding in which the prosecuting attorney is unable, for any reason, to represent the board or agency, the prosecuting attorney shall so notify the board or agency, and, except as provided in division (D)(2) of this section, the board or agency may then employ counsel for the proceeding without further permission from any authority.

- (2) A public children services agency that receives money from the county general revenue fund must obtain the permission of the board of county commissioners of the county served by the agency before employing counsel under division (C) of this section.

Cite as R.C. 305.14

History. Amended by 128th General Assembly ch.29, SB 79, 1, eff. 10/6/2009.

Effective Date: 10-05-2000

1703.03. License required.

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

Chapter 1703. FOREIGN CORPORATIONS

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

1703.03. License required

No foreign corporation not excepted from sections 1703.01 to 1703.31 of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the secretary of state. To procure such a license, a foreign corporation shall file an application, pay a filing fee, and comply with all other requirements of law respecting the maintenance of the license as provided in those sections.

Cite as R.C. 1703.03

History. Effective Date: 09-29-1997

1703.29. Unlicensed foreign corporation contracts not affected - corporation cannot maintain an action.

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

Chapter 1703. FOREIGN CORPORATIONS

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

1703.29. Unlicensed foreign corporation contracts not affected - corporation cannot maintain an action

- (A) The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license. Before any such corporation shall maintain such action on any cause of action arising at the time when it was not licensed to transact business in this state, it shall pay to the secretary of state a forfeiture of two hundred fifty dollars and file in this office the papers required by divisions (B) or (C) of this section, whichever is applicable.
- (B) If such corporation has not been previously licensed to do business in this state or if its license has been surrendered it shall file as required by division (A) of this section:
 - (1) Its application for a license certificate, together with the filing fee, with such information as the secretary of state requires as to the time it began to transact business in this state and as to the number of its issued shares represented in this state, and with the license fees on its shares represented in this state plus a forfeiture of fifteen per cent thereon.
 - (2) A certificate from the tax commissioner that the corporation has paid all franchise taxes which it should have paid had it qualified to do business in this state at the time it began to do so, plus any penalties assessable on said taxes on account of failure to pay them within the time prescribed by law, or a certificate of the commissioner that the corporation has furnished security satisfactory to the commissioner for the payment of all such franchise taxes and penalties.
- (C) If such corporation has been previously licensed to transact business in this state and its license has expired or has been canceled by the secretary of state upon order of the commissioner, or for failure to designate an agent for service of process, it shall file with the secretary of state its application for reinstatement, as provided by law, together with

the proper reinstatement fee plus a forfeiture of fifteen per cent thereon.
Upon the filing of such application and payment of such fees and penalties or
forfeitures, the secretary of state shall issue to such corporation a license certificate.

Cite as R.C. 1703.29

History. Effective Date: 10-01-1953

1.42. Common, technical or particular terms.

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION

Includes all legislation filed with the Secretary of State's Office through 6/28/2013

1.42. Common, technical or particular terms

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Cite as R.C. 1.42

History. Effective Date: 01-03-1972