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STATEMENT OF INTEREST OF *AMICI CURIAE*

The County Commissioners Association of Ohio (“CCAO”), the Ohio Municipal League (“OML”), the Ohio School Boards Association (“OSBA”), and the Ohio Township Association (“OTA”) are trade associations whose members are comprised of county commissioners, municipalities, school boards, and townships throughout the State of Ohio. The members of these entities (together the “*Amici Curiae*”) are responsible for a large percentage of annual public construction in the State of Ohio.

CCAO is the largest statewide organization representing the concerns of county commissioners who, among other things, contract for the construction of courthouses, jails, administration buildings, water and wastewater facilities, road improvements, and other important public improvements. CCAO is a nonprofit corporation dedicated to assisting its members in effectively serving the needs of the public in all 88 Ohio counties.

OML is the largest statewide organization of Ohio municipalities who, among other things, contract for the construction of police stations, fire stations, water and wastewater projects, city jails, municipal courthouses, roads and streets, city halls and administration buildings, and other important projects. OML is a nonprofit corporation dedicated to assisting its members in effectively serving the needs of the public in Ohio’s cities and villages.

OSBA is the largest statewide organization representing the concerns of public elementary and secondary school leaders in Ohio who, among other things, contract for the construction of Ohio’s K through 12 school buildings, administration buildings and related facilities. OSBA is a nonprofit corporation dedicated to assisting its members to more effectively serve the needs of students, and the larger society they are preparing to enter. Nearly all of the 719 district boards for city, local, exempted village, joint vocational school districts,

and educational service centers throughout the State of Ohio are members of the OSBA. The OSBA engages in extensive informational support, advocacy and consulting activities, such as board development and training, legal information, labor relations representation, and policy service and analysis.

OTA is the largest statewide organization representing the concerns of townships in Ohio who, among other things, contract for the construction of fire stations, administration buildings, roads and streets, monuments, and other important projects. OTA is a nonprofit unincorporated association dedicated to assisting its members in effectively serving the needs of the public in Ohio's townships.

Because the members of these organizations construct a large percentage of Ohio's public improvements, and are charged with the duty of enforcing contract compliance, this appeal is a matter of public and great general interest to the *Amici Curiae*, as well as the taxpayers who are served by their members. Many of the improvements, described in part above, for which the members of the *Amici Curiae* are responsible, must be completed by a specific date in order to meet the needs of the public and the government personnel charged with serving the public. Liquidated damages, which are required for state supported public construction contracts pursuant to R.C. 153.19, are the primary tool for enforcing contract completion dates in light of the difficulty in establishing the amount of actual damage caused by delays in project completion.

The majority of the Fourth District's May 22, 2014 Decision and Judgment Entry (the "Decision"), *Boone Coleman Constr., Inc. v. Village of Piketon*, 4th Dist. Pike No. 13CA836, 2014-Ohio-2377, is sound and conforms to well-established Ohio law. CCAO, OML, OSBA

and OTA recognize, however, that Section C, related to the enforceability of liquidated damages, if allowed to stand, would vitiate the liquidated damages provision mandated by R.C. 153.19.

Until the Fourth District's Decision, the enforceability of a liquidated damages provision in a construction contract was analyzed prospectively, based on the reasonableness of the daily or "per diem" amount when the contract is executed. The Fourth District did not follow that precedent. Instead, the court below analyzed the liquidated damages retrospectively, based on the total cumulative amount of liquidated damages after the contractor, Boone Coleman Construction, Inc. ("Boone"), delayed the project by 397 days. By doing so, the court essentially created a perverse incentive for contractors: the longer the contractor delays a project, the less likely it is that the owner will be able to enforce a liquidated damages provision. This will add risk, cost, delays and disruptions to public projects. The Decision will work to the detriment of the *Amici Curiae's* members, as well as the taxpayers who fund public projects and who expect to benefit from their timely completion.

**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST**

The Fourth District's Decision is inconsistent with the public's significant interest in timely completion of public works, recognized by the legislature when it expressly required in R.C. 153.19 that all public improvement contracts supported by state funds contain a liquidated damages clause.¹ Further, the Decision creates a conflict among Ohio courts and confusion among owners, sureties and contractors on public construction projects that must be addressed by this Court.

¹ R.C. 153.19 states that "[a]ll contracts under sections 153.01 to 153.60, inclusive, of the Revised Code, shall contain provision in regard to the time when the whole or any specified portion of work contemplated therein shall be completed and that for each day it shall be delayed beyond the time so named the contractor shall forfeit to the state a sum to be fixed in the contract, which shall be deducted from any payment due or to become due to the contractor."

Under Ohio law, parties are free to enter into contracts that contain liquidated damages provisions that apportion damages in the event of a breach. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993). A liquidated damages clause is enforceable so long as (1) actual damages would be uncertain as to amount and difficult to prove; (2) the contract as a whole is not so unreasonable and disproportionate as to conclude that the liquidated damages clause does not express the intent of the parties; and (3) the contract is consistent with the conclusion that the parties' intended that damages in the amount stated should follow if there is a breach. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 28, 465 N.E.2d 392 (1984). Until the Fourth District's Decision, the enforceability of a liquidated damages clause under the *Samson* test was assessed prospectively, meaning courts assessed its reasonableness as of the time the contract was executed. *See Lake Ridge Academy* at 382 (court must examine liquidated damages "in light of what the parties knew at the time the contract was formed" and assess whether the provision "was reasonable at the time of formation"); *see also Mt. Olivet Baptist Church, Inc. v. Mid-State Builders, Inc.*, 10th Dist. No. 84AP-363, 1985 Ohio App. LEXIS 9120, *24 (Oct. 31, 1985).

In this case, the Fourth District held that damages were uncertain as to amount and difficult to prove, satisfying the first prong of the *Samson* test. The Court also held that the third prong of the *Samson* test was met in that the \$700 per diem amount of those liquidated damages set forth in the contract was the amount intended by the parties in the event of a breach. However, in applying the second prong of the *Samson* test, the Fourth District erred by analyzing the cumulative amount of liquidated damages retrospectively, holding that "in its application... the amount of damages is so unreasonably high and so disproportionate to the

consideration paid that the clause amounts to a penalty.” *Boone Coleman Constr., Inc.*, 2014-Ohio-2377 at ¶ 40.

Importantly, the court did not find the \$700 per diem amount in the contract unreasonable at the time the contract was executed, which should have been the extent of its analysis. *Id.* at ¶¶ 40-43. Rather, the court concluded that the \$700 per diem amount, *as applied to* the 397 day delay, resulted in a penalty when retrospectively compared to the contract amount. *Id.* This is simply inconsistent with Ohio law and public policy. *See Lake Ridge Academy* at 382; *see also Mt. Olivet Baptist Church, Inc.* at *24 (liquidated damages are assessed at the time the contract is executed.) Under the lower court’s logic, the more a party delays a project, the more likely it is to avoid liquidated damages mandated by R.C. 153.19. *See Boone Coleman Constr., Inc.* at ¶¶ 40-43.

The Fourth District also inexplicably concluded that because there was no history of traffic accidents at the intersection in question and the traffic signal under construction at the intersection had not previously existed, there was no loss to the public from a delay, and, therefore, the liquidated damages constituted an impermissible penalty. *Boone Coleman Constr., Inc.* at ¶ 42. The court’s analysis would presumably bar liquidated damages on all projects for new construction, and essentially render R.C. 153.19 meaningless. *Boone Coleman Constr., Inc.* at ¶¶ 40-43.

The Fourth District’s Decision conflicts with the settled legal principles, adopted by Ohio courts, that (1) the enforceability of a liquidated damages per diem is assessed at the time of execution, and (2) a party seeking to recover liquidated damages is not obligated to prove actual damages flowing from the breach. *See Lake Ridge Academy* at 382; *see also USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist.

1993) (where a liquidated damages clause is otherwise valid the owner is “not required to prove that actual damages resulted from the breach. In adopting this view, we ascribe to what has been called the majority view.”) If allowed to stand, the Decision will reward a contractor that delayed a public project for 397 days, and strip public owners of their right to enforce a substantial completion date when a contractor causes significant delays. The Decision will also prejudice a public owner’s right to liquidated damages for delays to new construction. These consequences undercut the important public policy of promoting timely completion of public works, recognized in the express requirements of R.C. 153.19. Further, the Fourth District has created a conflict among Ohio courts with respect to the enforceability of liquidated damages, and the manner in which per diem liquidated damages will be evaluated under the *Samson* test.

It is critically important to the timely completion of all current and future public projects in Ohio that this Court accept jurisdiction of the Appellant’s discretionary appeal and reverse the Fourth District’s holding with regard to liquidated damages. The *Amici Curiae* join Appellants in seeking the Court’s guidance with respect to Propositions of Law 1 and 2 included herein.

STATEMENT OF THE CASE AND FACTS

The *Amici Curiae* defer to the Statement of the Case and Facts as set forth by the Appellants.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: When evaluating the enforceability of a liquidated damages provision in a construction contract, a court must conduct its analysis prospectively, based on the per diem amount of the liquidated damages as of the date of contract execution, and not retrospectively, based on the total liquidated damages that ultimately accrue.

It is well-settled in Ohio that “parties are free to enter into contracts that contain provisions which apportion damages in the event of default.” *Lake Ridge Academy*, 66 Ohio

St.3d at 381, 613 N.E.2d 183. In fact, this Court has held that a liquidated damages clause is enforceable if it satisfies following three-prong test:

- (1) Actual damages would be uncertain as to amount and difficult to prove;
- (2) The contract *as a whole* is not so manifestly unconscionable, unreasonable, and disproportionate as to justify the conclusion that the liquidated damages clause does not express the true intention of the parties; and
- (3) The contract is consistent with the conclusion that the parties' intended that damages in the amount stated should follow if there was a breach.

Samson Sales, Inc., 12 Ohio St.3d at 28, 465 N.E.2d 392; *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶¶ 67-68 (4th Dist.). Prior to the Fourth District's Decision, Ohio law was equally clear that the enforceability of a liquidated damages per diem is assessed at the time of execution. *See Lake Ridge Academy* at 382 (court must assess whether the liquidated damages provision "was reasonable at the time of formation"); *see also Mt. Olivet Baptist Church, Inc.*, 1985 Ohio App. LEXIS 9120, *24. Now, the Decision of the Fourth District has called these well-reasoned principles into question by examining the *total* amount of liquidated damages *retrospectively* and comparing that total to the contract sum. *Boone Coleman Constr., Inc.* at ¶¶ 40-43

The Fourth District based its ruling almost entirely on *Harmon v. Haehn*, 7th Dist. Mahoning No. 10 MA 177, 2011-Ohio-6449. *See Boone Coleman Constr., Inc.* at ¶¶ 40-43. It was in its application of the *Harmon* decision that the Fourth District lost its way, holding

[L]ike the clause that the court in *Harmon* found to be unenforceable, the clause in this matter produced an award nearly 1/3 of the value of the contract, i.e., \$277,900 in liquidated damages on a \$683,300 total contract price.

See Id. at ¶ 42. However, while the *Harmon* court correctly applied the *Samson* test's second prong using a prospective assessment of the stipulated liquidated damages as of the date the contract was executed, the Fourth District looked at the liquidated damages "produced" upon

application of the clause to the duration of the contractor's delay. Compare *Harmon*, 2011-Ohio-6449 at ¶¶ 52-54 with *Boone Coleman Constr., Inc.* at ¶¶ 40-43. In *Harmon* the court of appeals properly considered the “the contract as a whole,” by weighing the liquidated damages identified in the contract to the contract sum. *Harmon*, 2011-Ohio-6449 at ¶¶ 52-54. In that case, both amounts were known at the time of contracting. *Id.* In contrast, the Fourth District analyzed the total *accrued* liquidated damages, thereby disregarding the per diem actually identified in the contract. *Boone Coleman Constr., Inc.* at ¶¶ 40-43. This retrospective analysis of accrued liquidated damages is not permitted under Ohio law, and is not supported by the holding in *Harmon*. See *Mt. Olivet Baptist Church, Inc.*, 1985 Ohio App. LEXIS 9120, *24.

Further, the liquidated damages in *Harmon*, was a stipulated lump sum that equaled 1/3 of the purchase price of real property, paid by the breaching party in the event the sale did not close. *Harmon*, 2011-Ohio-6449, ¶¶ 52-54. The clause was not contained in a construction contract pursuant to R.C. 153.19, nor did it comply with R.C. 153.19 by basing liquidated damages on a per diem amount, multiplied by each day of delay. *Id.* That is, while the contract in *Harmon* was tied to a breach, in contrast with this case, the amount of liquidated damages was not adjusted based on the magnitude and duration of an ongoing breach. *Id.*

The Fourth District's analysis and ruling is simply inconsistent with Ohio law and public policy. In this case, the Fourth District rewarded a contractor who delayed an important public project for 397 days by invalidating, as a penalty, the liquidated damages provision to which the contractor agreed when, presumably, the court would have upheld the liquidated damages provision if the contractor had only delayed the project by two weeks. See *Boone Coleman Constr., Inc.* at ¶¶ 40-43. It is poor public policy indeed to allow a breaching party the unilateral ability to avoid paying damages for its breach by compounding that very breach.

Proposition of Law No. 2: Liquidated Damages are not a penalty simply because a project consists of new construction; proof of actual damages to the non-breaching party is not required as a condition to the enforcement of liquidated damages.

In addition to improperly analyzing the enforceability of the liquidated damages provision retrospectively based on the cumulative total of the liquidated damages, the Fourth District adopted a new requirement that the non-breaching party prove actual damages that, heretofore, has been specifically rejected by Ohio courts. In its analysis of the *Samson* test's second element, the Fourth District held in pertinent part:

[T]he party seeking to enforce the liquidated damages—the village here—did not present testimony or evidence to credibly support the relationship between the damages specified and the actual damages that would be incurred. There is no cited evidence in the record, for example, of a history of accidents at the intersection where the traffic signal was placed...there is no evidence of the loss of a preexisting use of the highway resulting from the construction delay; there was no loss of any existing traffic signal during the construction.

Boone Coleman Constr., Inc. at ¶ 42. The foregoing holding is of grave concern to the *Amici Curiae*.

Under the Fourth District's Decision, the only damage resulting from delays to new construction is physical harm to the public that must be evidenced by a history of accidents. Public owners, however, often act in anticipation of the needs of the citizens they serve. Must a public owner wait for a traffic accident before contracting for a road improvement or enforcing a completion date? Public policy dictates that a public owner that anticipates a potential need, or possible risk to the public, should be free to act to address the need or risk without being required to wait until the harm occurs. Such an owner should not be punished by being unable to enforce the contractual completion date for such an improvement. Even though roadway and traffic safety improvements, courthouses, jails, water and wastewater projects, and schools may be constructed in anticipation of changing or increased needs of the public, completion dates for

those projects are critical to the health, safety, and education of the public. In fact, the size and capacity of some public facilities are typically based on a projection of future need, rather than historic need, but that does not make their completion date any less important.

These realities have not been overlooked by the majority of Ohio courts that have evaluated this issue. The majority of Ohio courts have recognized, for all the foregoing reasons, that proof of actual damages is not required when the parties have agreed upon liquidated damages. *Physicians Anesthesia Serv. Inc. v. Burt*, 1st Dist. No. C-060761, 2007-Ohio-6871, ¶20 (if a liquidated damages provision is otherwise valid, “the party seeking such damages need not prove that actual damages resulted from a breach”); *USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist. 1993) (where a liquidated damages clause is otherwise valid the owner is “**not required to prove that actual damages resulted** from the breach. In adopting this view, we ascribe to what has been called the majority view.”) (Emphasis added.); *B&G Props. Ltd. P’ship v. OfficeMax, Inc.*, 8th Dist. Cuyahoga No. 99741, 2013-Ohio-5255, ¶ 31 (“actual damages... have little relevance to the validity of a liquidated damages clause.”)

Through R.C. 153.19, the legislature recognized that time is of the essence on all public projects, and that a completion date must be enforced through a liquidated damages provision. Actual delay damages to a public owner can be even more difficult to prove than in the private sector, as is the self-evident loss in value to the public when a project is not delivered on time. Indeed, the fact that actual damages are difficult to quantify and prove is a primary justification for the use of liquidated damages. *See Samson Sales, Inc.*, 12 Ohio St.3d at 28, 465 N.E.2d 392 (liquidated damages enforced when actual damages would be uncertain as to amount and difficult to prove.) R.C. 153.19 addresses that difficulty, while at the same time ensuring that

liquidated damages are not punitive. To that end, R.C. 153.19 mandates a per diem instead of lump sum, which ties the total liquidated damages to the severity (i.e., duration) of the breach. It is also common for a public owner to base the per diem amount on the contract value, keeping liquidated damages reasonable in comparison to the size, complexity, and cost of the project.

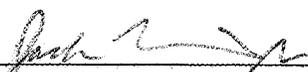
The Fourth District's departure from this sound analysis, an analysis anchored in important public policy considerations, results in a situation where a public owner will be unable to enforce liquidated damages for any new construction project unless it has waited until some historic harm has occurred to the public before commencing that project. The Decision also introduces costly uncertainty into the case law interpreting the *Samson* test and the enforceability of common contract terms.

For these reasons, this case raises an issue of public or great general interest that is worthy of this Court's attention. The *Amici Curiae* join Appellants in asking the Court to allow the Appellants' discretionary appeal and accept this cause for briefing and argument on the merits.

CONCLUSION

For the foregoing reasons, this case presents questions that are of public or great general interest. This Court should therefore accept the Appellant's appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of the *Amici Curiae* in Support of Jurisdiction was served by regular U.S. mail, postage prepaid, this 3rd day of July, 2014, upon the following:

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