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**I. STATEMENT OF APPELLEE GREATER OHIO LEASING'S POSITION REGARDING WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

This is a factually simple summary judgment case that is based on well-settled law. In two separate opinions, the Tenth District Court of Appeals thoughtfully and unanimously affirmed the Trial Court's decision to grant summary judgment in favor of Appellee Greater Ohio Leasing Corporation ("Greater Ohio Leasing") and Appellee CB Richard Ellis, Inc. ("CBRE"). This is not a certified conflict case. This is not a case where Ohio law diverges from that of other jurisdictions. This is not a case in which the applicable law is confusing or unsettled. Instead, it is a garden variety breach of contract and tort action in which Open Container, Ltd. ("Open Container") failed to prevail on three separate occasions in the lower courts.

This is also not a case that presents a substantial constitutional question; indeed, Open Container never raised any constitutional claim in the Trial Court. In its unanimous opinion, the Tenth District Court of Appeals correctly noted that the assignment of error asserted in that Court was the first time in the case that Open Container had claimed that Greater Ohio Leasing and CBRE had violated its constitutional rights. COA Decision I, Jan. 13, 2015 ("COA I"), ¶ 33. The Court of Appeals correctly declined to consider Open Container's tardy constitutional argument. State ex rel. Zollner v. Indus. Comm'n (1993), 66 Ohio St. 3d 276, 278. Therefore, there is no proper substantial constitutional question before this Court.

This is also not a case that presents a question of public or great general interest. This Court has explained that the Ohio Constitution limits its discretionary jurisdiction to "special cases" that present "questions of public or great general interest as distinguished from questions

of interest primarily to the parties.” Williamson v. Rubich (1960), 171 Ohio St. 253, 254. Importantly, this Court does not review cases simply because a lower court made a wrong decision. Ohio law affords “a right to but one appellate review.” Id. at 253-54. The Court’s jurisdiction is limited because its role is not to serve as “an additional court of appeal on review”; instead, the Court must exercise its discretionary jurisdiction only to “clarify rules of law arising in courts of appeals that are matters of public or great general interest.” State v. Bartrum, 121 Ohio St. 3d 148, 153, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31 (O’Donnell, J., dissenting); see also State v. Noling, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 63 (O’Donnell, J., dissenting) (“[W]e are not an error-correcting court; rather, our role as the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest.”). In fact, one of this Court’s objectives is to “provide meaningful guidance to the bench and bar,” so it will often avoid “fact-specific” cases. Blue Ash v. Kavanagh, 113 Ohio St. 3d 67, 2007-Ohio-1103, 862 N.E.2d 810, ¶ 31 (Pfeifer, J., dissenting).

Even a cursory review of Open Container’s proposed propositions of law demonstrates that its arguments in support of this Court accepting jurisdiction of an appeal are fact intensive and fact specific. Open Container already has had three bites at the apple in making these identical arguments in the lower court proceedings: the first time as part of the summary judgment briefing in the Trial Court, and a second and third time in the Court of Appeals as part of the original appeal and then Open Container’s motion for reconsideration. In every instance, the lower courts have rejected Open Container’s fact intensive arguments, and there is no reason for this Court to revisit those decisions.

Finally, without citing any legal authority, Open Container asserts that the “Ohio Supreme Court has not spoken often about contract interpretation, unambiguous and ambiguous” and that “[a] well-reasoned opinion from this Honorable Court would be beneficial for all appellate districts and trial courts in the State of Ohio and thus would be of great public interest to all of its citizens, since almost all adults enter into a contract at some point in their lives.” See Appellant’s Memorandum in Support of Jurisdiction, p. 2. Open Container may be correct on one point: almost all adults will enter into a contract at some point in their lives. However, Open Container is incorrect in its assertion that this Court has not spoken often about contract interpretation issues: a simple legal database search for cases discussing the “construction and operation” of contracts yields almost 400 cases alone from this Court.<sup>1</sup>

If this Court were to accept Open Container’s appeal, then it would open itself up to simply serving as an “error-correcting court” and “an additional court of appeal on review.” Although this case may be a matter of great importance to its litigants, it is not a matter of *public* importance or great general interest. Greater Ohio Leasing requests that the Court not accept Open Container’s appeal.

## **II. GREATER OHIO LEASING’S STATEMENT OF THE CASE.**

After conducting a de novo review of the exhaustive record in this case, including hundreds of pages of evidentiary material filed by Open Container – almost all of which related to immaterial facts – the Tenth District Court of Appeals set forth in its first unanimous written decision the only evidence material to its and the Trial Court’s decision.

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<sup>1</sup> This search was conducted by (1) searching West’s Key Number System (95: Contracts > 95II: Construction and Interpretation); and (2) narrowing the search to show only cases from the Supreme Court of Ohio.

Those undisputed material facts establish that Open Container leased property from Greater Ohio Leasing. The lease began in November 1997, and was for an initial term of six years. The lease also contained two 5-year renewal options. Contrary to Open Container's statement to this Court, the written lease agreement did not contain an option to purchase vested in Open Container's favor. Rather, the lease contained a right of first refusal that would have been triggered only in the event that Greater Ohio Leasing had received a purchase offer from a third-party prior to the termination of the lease; no such triggering event occurred. Open Container operated a restaurant on the property for a short period of time before it closed in 2001. In 2003, Open Container exercised its first option to renew the lease.

In January 2004, Open Container and Greater Ohio Leasing executed a written document that they designated as an "Offer to Purchase Real Estate" ("Offer to Purchase"). This written agreement provided Open Container with 45 days from its date of execution for Open Container to obtain financing and close on the purchase of the property. If Open Container failed to meet this financing contingency, then the Offer to Purchase was to be considered null and void. Open Container failed to obtain the required financing.

Open Container continually asserted in the Trial Court proceedings that after the written Offer to Purchase had expired of its own terms, there were various oral agreements reached between Open Container and Greater Ohio Leasing regarding a potential sale of the property. However, the only written contract between the parties regarding the sale of the property was the Offer to Purchase.

After the Offer to Purchase had expired of its own terms, Open Container entered into a listing agreement with CBRE for the property. Since Open Container did not own the property,

CBRE demanded that Open Container demonstrate that it had the authority to sell the property. Open Container contended that the by-then-expired Offer to Purchase granted to it that authority.

Greater Ohio Leasing provided written notice to Open Container that Greater Ohio Leasing was terminating the lease because of Open Container's failure to pay rent. It also confirmed in that written notice that the Offer to Purchase was null and void because of Open Container's failure to obtain the requisite financing. CBRE later was informed that Open Container lacked the authority to sell the property. As a result, CBRE cancelled its listing contract with Open Container.

### **III. ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW.**

#### **A. Response to Proposition of Law No. 1: Open Container Has Merely Re-Argued an Assignment of Error That Was Properly Rejected on Two Separate Occasions by a Unanimous Court of Appeals.**

Open Container's clumsily worded first proposition of law appears to argue that this Court should accept jurisdiction of an appeal to correct the Trial Court's and Court of Appeals' interpretation of the plain language of the listing agreement between Open Container and CBRE. Open Container made the identical arguments twice in the Court of Appeals proceedings: the first time during the appeal on the merits and the second time during its motion for reconsideration. The Court of Appeals properly decided this issue, which is a straightforward issue of contract interpretation of an unambiguous contract.

Open Container's proposition of law continues to argue that the Trial Court improperly interpreted the listing agreement between Open Container and CBRE. As the Court of Appeals concluded in its first decision, that assertion "is simply incorrect." COA I, ¶ 14. The Court of Appeals decision explains how the listing agreement language is not ambiguous and that the

evidence properly supported the conclusion that the contract “included everything on the property.” Id.

Open Container’s proposition of law appears to argue that this Court should accept jurisdiction of an appeal because the listing agreement at issue was ambiguous and ambiguous contract questions are not appropriate for summary judgment. That argument misconstrues the Court of Appeals’ decision. The Court of Appeals determined that the listing agreement was not ambiguous on the issue of what was being offered to be sold, and that, therefore, summary judgment was appropriate in favor of CBRE. Open Container’s cursory discussion of the well-settled parol evidence rule not only is irrelevant, but it fails to create an issue for which this Court should exercise its discretionary jurisdiction.

**B. Response to Proposition of Law No. 2: Open Container’s Second Proposition of Law Does Not Create a Jurisdictional Appeal On the Issue of Whether Certain Claims Were Properly Dismissed for Lack of Proof of Damages.**

Open Container devotes a mere five sentences to its second proposition of law. It appears to be arguing that the Court of Appeals improperly affirmed the Trial Court’s decision to dismiss certain claims because Greater Ohio Leasing and CBRE demonstrated that Open Container had not produced any evidence of damages to support those claims. The proposition of law as framed by Open Container invites this Court to sit as an additional court of appeals on review, an invitation this Court repeatedly declines.

Furthermore, the Court of Appeals correctly considered the necessity of Open Container demonstrating some form of damages in order to withstand summary judgment on its claims. The Court of Appeals’ decision carefully outlined the necessity of proving damages for each of the claims asserted by Open Container. COA I, ¶¶ 26-27. Then, in undertaking its de novo review, it concluded that “[v]iewing the evidence most favorably to Open Container, we find that

Open Container did not suffer any damages.” *Id.* at ¶ 28. Open Container has offered no compelling explanation of how this proposition of law creates an issue of public or great general interest.

C. **Response to Proposition of Law No. 3: Greater Ohio Leasing and CBRE Both Addressed All of the Claims of Open Container in Their Respective Motions for Summary Judgment and the Trial Court Properly Dismissed Those Claims.**

Open Container recycles yet another of its arguments from the Court of Appeals proceedings in setting forth its third proposition of law. It argues that this Court must accept jurisdiction of an appeal to correct the Trial Court having allegedly sua sponte granted summary judgment against Open Container on its tort claims against Greater Ohio Leasing and CBRE. That argument failed in the Court of Appeals and has no persuasive value in establishing why this Court should accept a jurisdictional appeal.

The Court of Appeals already has considered and rejected this argument of Open Container. In its original decision, the Court of Appeals addressed this identical argument that had been posited as an assignment of error. It properly concluded that the breach of contract claims had been specifically addressed by the Trial Court, and that the disposition of those claims necessarily disposed of Open Container’s declaratory judgment claim. COA I, ¶ 24. The Court also noted that the disposition of the trespass claim had not been challenged on appeal. *Id.*

The Court of Appeals then turned its attention to the remaining tort claims. It noted that both Greater Ohio Leasing and CBRE had addressed those claims in their motions for summary judgment, which was an accurate summary of the record. It also noted the well-settled proposition of law that a court of appeals must affirm the trial court’s judgment if any of the grounds raised by the moving party, at the trial court level, are found to support it, even if the

trial court failed to consider those grounds. *Id.* at ¶ 25, citing Coventry Twp. v. Ecker, 101 Ohio App. 3d 38, 41-42 (9<sup>th</sup> Dist. 1995).

There is nothing improper or remarkable about how the Trial Court or the Court of Appeals decided the motions for summary judgment as to the tort claims. Open Container relies only on the case of Ford Motor Credit Co. v. Ryan, 189 Ohio App. 3d 560, 2010-Ohio-4601 (10<sup>th</sup> Dist.), claiming that the Court of Appeals “defied its own precedent” in failing to follow a case “on all fours factually with the case at bar.” But Open Container fails to explain how the case is similar, or how this opinion was relevant to the issues in this case. In fact, the case appears to be irrelevant to any of the specific issues that were before the Trial Court or the Court of Appeals.

Presumably, Open Container is relying upon this case for the simple proposition that a court of appeals can affirm summary judgment on certain claims, but remand other claims for trial. That principle of law is beyond dispute. Here, however, the Court of Appeals correctly determined that summary judgment was properly granted on all claims in favor of Greater Ohio Leasing and CBRE, including Open Container’s alleged tort claims, which were all addressed fully by the appellees in the briefing on summary judgment in the Trial Court.

**D. Response to Proposition of Law No. 4: Open Container’s Contention That the Court of Appeals Improperly Denied Its Motion to Certify a Conflict is Without Merit.**

Open Container’s last effort to convince this Court to accept its appeal is to contend that the Court of Appeals incorrectly denied Open Container’s Motion to Certify. That argument does not have merit; the Court of Appeals properly rejected Open Container’s Motion.

In its decision denying the Motion to Certify, the Court of Appeals correctly set forth the standard governing such a motion, and emphasized that factual distinctions between cases are not a basis upon which to certify a conflict. Semenchuk v. Ohio Dep’t of Rehab. & Corr., 10<sup>th</sup> Dist.

No. 10AP-19, 2010-Ohio-6394, ¶ 4, citing Whitelock v. Gilbane Bldg. Co., 66 Ohio St. 3d 594, 599 (1993). The Court of Appeals also correctly concluded that Open Container's Motion to Certify set forth issues that were never properly before the Trial Court or that had been fully resolved by that Court's prior decisions. Court of Appeals Decision II, dated Mar. 12, 2015, ¶ 13. The Court of Appeals properly denied the Motion to Certify based upon well-settled Ohio law, and nothing in the decision suggests an issue worthy of this Court accepting a jurisdictional appeal.

Open Container makes one final, passing reference to an additional argument at the close of its Memorandum in Support of Jurisdiction, setting forth the proposition that both the Trial Court and the Court of Appeals decided the case improperly because they "strictly applied" the Statute of Frauds and ignored the defenses of waiver and estoppel.

That argument is directly contrary to the principles of contract law established by this Court. The Statute of Frauds, Ohio Revised Code § 1335.05, requires that any agreement related to a contract or sale of land, or an interest in such land, must be in writing. Its purpose is to prevent "frauds and perjuries." Wilber v. Paine, 1 Ohio 251, 255 (1824). "The statute does so by informing the public and judges of what is needed to form a contract and by encouraging parties to follow these requirements by nullifying those agreements that do not comply." Olympic Holding Co., L.L.C. v. ACE Ltd., 122 Ohio St. 3d 89, 2009-Ohio-2057, 909 N.E.2d 93, at ¶ 33. As succinctly held by this Court, agreements subject to the Statute of Frauds that do not comply with the requirements of the statute are unenforceable. Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923 (1938), syllabus, ¶ 1. This Court recently reaffirmed these bedrock legal principles regarding the effect of the Statute of Frauds upon alleged oral agreements within the statute's purview in a unanimous decision in First Merit Bank, N.A. v. Inks, 138 Ohio St. 3d 384,

2014-Ohio-789. In holding that an alleged oral modification to a loan agreement relating to real property was unenforceable, whether asserted either as a claim or as an affirmative defense, the Court reaffirmed that “oral agreements that pertain to matters covered by the statute of frauds cannot be enforced as either a claim or defense.” Id. at ¶ 20.

The Court of Appeals correctly concluded that the Trial Court properly applied the Statute of Frauds to the undisputed material facts before it. COA I, ¶ 19. Indeed, contrary to Open Container’s assertion, there is no such thing as a legal principle that permits a court not to “strictly” apply the Statute of Frauds. This Court repeatedly has reiterated that the Statute of Frauds is alive and well in the courts of the State of Ohio.

The principles of waiver and estoppel likewise do not create a question of law in this case that would mandate the Court accepting jurisdiction of an appeal. The Court of Appeals duly considered the waiver argument of Open Container and properly denied it: “Open Container argues that the financing requirement of the option to purchase was orally waived by Greater Ohio and thus Greater Ohio was barred from voiding the purchase agreement. Viewing this in the light most favorable to the non-moving party, even if Greater Ohio did in fact waive the financing requirement, such a waiver would still be required to be reduced to writing. ‘The statute of frauds bars a party from enforcing an oral agreement falling within the statute.’ FirstMerit Bank, N.A. v. Inks, 138 Ohio St. 3d 384, 2014-Ohio-789, ¶ 22.” COA I, ¶ 20.

The Statute of Frauds is intended to prevent the very argument that Open Container contends justifies this Court accepting jurisdiction of an appeal. Wilber, 1 Ohio 251 at 255 (the purpose of the Statute of Frauds is to prevent “frauds and perjuries.”). If waiver and estoppel could be used, as Open Container contends, as a bar to the writing requirements imposed by Ohio law, then the predictability that the Statute of Frauds brings to contract formation would be

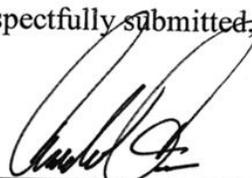
eroded. Parties negotiating a contract for property would no longer know what signifies a final agreement, thus opening these agreements to fraud, the very evil that the statute seeks to prevent. As this Court has stated, “to allow [a] plaintiff to recover on a theory of [estoppel] where the oral contract is precluded by the Statute of Frauds, ‘would abrogate the purpose and intent of the legislature in enacting the statute of frauds and would nullify its fundamental requirements.’” Olympic Holding, at ¶ 35 (internal citations omitted).

Furthermore, as the Trial Court properly concluded, even if Greater Ohio Leasing had waived the financing provision in the Option to Purchase, this “does not mean that Greater Ohio did not have the right to terminate the contract based on the failure of Open Container to ever obtain the financing. Greater Ohio did have this right, and properly exercised it.” Trial Court Decision, p. 6. The Trial Court properly concluded that Greater Ohio Leasing’s termination merely amounted to the valid exercise of its contractual rights. Ohio courts recognize the sanctity of such contractual rights, especially where, as here, the contract is between two sophisticated business entities. See Aultman Hospital Ass’n v. Community Mutual Ins. Co., 46 Ohio St. 3d 51, 53-55 (1989).

#### IV. CONCLUSION.

For all of the reasons stated here, Appellee Greater Ohio Leasing Corporation respectfully submits that this Court should decline to accept discretionary jurisdiction of an appeal of this case.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Memorandum in Response of Appellee Greater Ohio Leasing Corporation To Appellant Open Container Ltd.'s Memorandum in Support of Jurisdiction was served on the following counsel of record by regular U.S. mail on May 18, 2015:

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