D69280795

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER, : **Case No:DR0500131**

Plaintiff, : **Magistrate Theile**
Judge Panioto

v. :

JON ENTINE, : **AFFIDAVIT OF ROBERT J. MEYERS IN SUPPORT OF DEFENDANT'S MOTION FOR CONTEMPT**

Defendant. :

COPY FILED
CLERK OF COURTS
HAMILTON COUNTY
JUL 21 2006
GREGORY HARTMANN
COMMON PLEAS COURTS

STATE OF OHIO)
) **SS:**
COUNTY OF HAMILTON)

FILED
2006 JUL 21 P 3:27
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

I, Robert J. Meyers, being first cautioned and sworn, state that I am over eighteen (18) years of age, and have personal knowledge of the facts as set forth below:

1. I am the trial attorney for Defendant Jon H. Entine.
2. This Affidavit serves to support Defendant's Motion for Contempt against non-party Sara Lee Foods.
3. On June 7, 2006, I served non-party Sara Lee Foods with a Subpoena Duces Tecum seeking the production of certain documents by June 16, 2006.
4. I did not receive any response from Sara Lee Foods, and by letter dated June 30, 2006, I reminded Sara Lee Foods that its response to the June 7, 2006 Subpoena was overdue and demanded its immediate compliance with the Subpoena. A copy of the June 30, 2006 letter is attached as Exhibit 1.
5. To date, Sara Lee Foods has not responded to the Subpoena.
6. I have made a reasonable effort to resolve this matter with Sara Lee Foods through informal means. Having been unsuccessful, I now request that the Court find Sara Lee Foods in contempt for failing to obey the Subpoena.

BUECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

FURTHER AFFIANT SAYETH NAUGHT.

Robert J. Meyers

Robert J. Meyers

Sworn to and subscribed in my presence, a Notary Public, this 21st day of July, 2006.

CYNTHIA SAYLOR
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 02-15-2010

Cynthia Saylor
Notary Public

108267

BUECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO., L.P.A.
ATTORNEYS AT LAW

ROBERT W. BUECHNER [1,2]
GLORIA S. HAFFER [1]
EDWARD M. O'CONNELL, JR. [1]
ROBERT J. MEYERS
PETER E. KOENIG [1]
STEPHEN B. HOFFSIS
DAVID R. VALZ [1]
MICHAEL E. NEINEISEL
LAURIE M. HARMON
ANDREW J. SAMOCKI

1 ALSO ADMITTED IN KENTUCKY
2 ALSO ADMITTED IN FLORIDA

300 FOURTH & WALNUT CENTRE
105 EAST FOURTH STREET
CINCINNATI, OHIO 45202-4057
TELEPHONE (513) 579-1500
FACSIMILE (513) 977-4361

email:
rmeyers@bhomhk.com

June 30, 2006

Legal Compliance Department
Sara Lee Foods
10151 Carver Road
Cincinnati, Ohio 45242

Re: Ellen L. Turner v. Jon H. Entine, Court of Common Pleas, Division of Domestic Relations, Hamilton County, Ohio, Judge Panioto, Case No. DR0500131

Dear Sir or Madam:

On June 7, 2006, we issued a subpoena to Sara Lee concerning the above matter. The subpoena required the production of documents by June 16, 2006. Sara Lee failed to respond to the subpoena.

The purpose of this letter is to request your compliance with the subpoena. If we have not received compliance by Sara Lee by July 10, 2006, we will proceed with a motion for Sara Lee to be held in contempt by the Court. We would prefer not to have to proceed with such an action, and assume that Sara Lee will comply with the subpoena.

Please advise us at your earliest convenience. Thank you for your cooperation.

Very truly yours,

BUECHNER, HAFFER, O'CONNELL
MEYERS, HEALEY & KOENIG CO., L.P.A.

Robert J. Meyers

RJM:cgs
cc: Mr. Jon H. Entine
107545

EXHIBIT 1

( ) Pre-Decree ( ) Post-Decree
( ) Chg. of Cust.
( ) Vis. Enforce/Mod
( ) Spt. Enforce/Mod
( ) Other

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER,	:	**Case No:DR0500131**
Plaintiff,	:	**Magistrate Theile** **Judge Panioto**
v.	:	
JON ENTINE,	:	**DEFENDANT'S MOTION FOR CONTEMPT**
Defendant.	:	

Now comes Defendant Jon Entine ("Husband"), by and through counsel, and moves the Court to find non-party Bruce Humbert in contempt for failing to obey the March 31, 2006 Subpoena Duces Tecum, which requires Mr Humbert to produce certain documents by April 17, 2006 This Motion is supported by the following Memorandum and Affidavit of Attorney Robert J Meyers

FILED
2006 JUL 18 P 3:24
GREGORY L. HEITMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

Respectfully submitted,

Gloria S Haffer (Ohio Reg No 0014333)
Robert J Meyers (Ohio Reg No 0014589)
Trial Attorneys for Defendant, Jon H. Entine
BUECHNER, HAFFER, MEYERS
& KOENIG CO , L PA
105 East Fourth Street
300 Fourth & Walnut Centre
Cincinnati, Ohio 45202
Telephone No . 513-579-1500
Fax No . 513-977-4361

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

MEMORANDUM

This Motion is brought pursuant to Rule 45(E) of the Ohio Rules of Civil Procedure, which states the following

> Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court for which the subpoena issued. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking discovery

In other words, when a non-party witness fails to obey a subpoena, Civil Rule 45(E) provides that a court may find the non-party witness in contempt of court Additionally, Civil Rule 45(E) authorizes the court to order the non-party witness, or his attorney if he frivolously resisted the discovery, to pay the reasonable costs and attorney's fees incurred by the party seeking discovery

On March 31, 2006, Husband served non-party Bruce Humbert with a subpoena Duces Tecum [1] Mr Humbert failed to timely provide his responses to Husband's subpoena By letter dated June 30, 2006, Husband's counsel demanded that Mr Humbert immediately comply with the subpoena and produce the requested documents [2]

To date, Mr Humbert has not responded to Husband's subpoena Husband's subpoena was issued in good faith There is no apparent reason for Mr Humbert's failure to respond Husband is entitled to discover the information sought in the subpoena, and Mr Humbert's unreasonable failure to provide him with this information has delayed the proceedings in this case, hampered Husband's ability to adequately evaluate his case, and unnecessarily increased Husband's legal fees and expenses Husband now requests an order finding Mr Humbert in contempt for failing to obey the subpoena

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

[1] A copy of the Subpoena Duces Tecum is attached hereto as Exhibit A
[2] See Affidavit of Robert J Meyers attached hereto as Exhibit B.

Based upon the foregoing, Husband hereby moves the Court for finding of contempt of court, sanctions, incarceration and any and all other remedies to which the Court finds equitable. Husband further requests the Court order Mr. Humbert to immediately produce the documents requested in the March 31, 2006 subpoena Finally, Husband moves the Court for an order awarding Husband his reasonable expenses, including attorney's fees, in the amount of $2,000 00, which he incurred in prosecuting this Motion for Contempt

Respectfully submitted,

Gloria S Haffer (Ohio Reg No 0014333)
Robert J Meyers (Ohio Reg No 0014589)
Trial Attorneys for Defendant Jon H Entine
BUECHNER, HAFFER, MEYERS
& KOENIG CO., L.PA.
105 East Fourth Street
300 Fourth & Walnut Centre
Cincinnati, Ohio 45202
Telephone No. 513-579-1500
Fax No 513-977-4361

BUECHNER, HAFFER,
O'CONNELL, MEYERS,
HEALEY & KOENIG
CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

NOTICE OF HEARING

Please take notice that a hearing on the foregoing has been scheduled for the 25 day of AUGUST, 2006 at 8:30 a m /~~p m~~ before Magistrate Theile, at the Hamilton County Court of Common Pleas, Division of Domestic Relations, 800 Broadway, Cincinnati, Ohio 45202.

Robert J Meyers (Ohio Reg. No 0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copies of the foregoing Motion for Contempt and the Affidavit of Robert J Meyers have been served upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206, on this 10th day of July, 2006.

Robert J Meyers (Ohio Reg No 0014589)
Attorney for Defendant

107684

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER	:	**CASE NO. DR0500131**
Plaintiff,	:	
		JUDGE PANIOTO
vs.	:	**MAGISTRATE THEILE**
JON H. ENTINE	:	**SUBPOENA *DUCES TECUM* FOR DOCUMENT PRODUCTION**
Defendant.	:	

TO: Bruce Humbert
9130 Lewis Avenue
Blue Ash, Ohio 45242

STATE OF OHIO, COUNTY OF HAMILTON ... . SS·

You are required to appear before a notary public in and for the County and State on Monday, April 17, 2006 at 9 00 A M at the offices of Buechner, Haffer, O'Connell, Meyers, Healey & Koenig Co , L P A , 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, to produce records hereinafter referred to

You are required to bring with you and produce the documents listed on the attached Exhibit "A."

This is a Records Subpoena Only, and in lieu of your personal delivery of these records on the date noted, you may send certified copies of all such records that are in your possession, custody and/or control to Robert J Meyers, Esq., of Buechner, Haffer, O'Connell, Meyers, Healey & Koenig Co , L P A , located at 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, prior to Monday, April 17, 2006 A proposed certificate is attached.

This Subpoena is issued pursuant to Rule 45 of the Ohio Rules of Civil Procedure by Robert J Meyers, attorney of record in the within cause pursuant to division (A)(2) of said rule

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

EXHIBIT A

Fail not under penalty of Law

WITNESS my hand this 31st day of March, 2006 at Cincinnati, Hamilton County, Ohio

Robert J Meyers (0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Subpoena Duces Tecum for Document Production to Bruce Humbert has been served upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206, on this 31st day of March, 2006.

Robert J. Meyers #0014589
Attorney for Defendant

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

CERTIFICATION

STATE OF NEW YORK)
) SS
COUNTY OF _____)

Under penalty of perjury, I hereby verify that I am the authorized Custodian of Records of Bruce Humbert, and am duly authorized to certify that the attached copies are copies of the complete records relating to Bruce Humbert.

I further verify that the originals of these documents were made at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters.

The documents were kept under my control and in the usual manner and course of business of Bruce Humbert.

Each document was made in the usual manner and course of business of Bruce Humbert, according to the customary standards of this office

_____
Records Custodian

Sworn to and subscribed before me this _____ day of _____, 2006

_____
Notary Public

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

Ohio Rules of Civil Procedure
Rule 45. Subpoena

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena

(2)(a) A person commanded to produce under divisions (A)(1)(b) (ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production : If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does nay of the following

(a) fails to allow reasonable time to comply,
(b) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies,
(c) requires disclosure of a fact known or opinion held by an expert not retained or specifically employed by any party in anticipation of litigation or preparation for trial as described by Civ R 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;
(d) subjects a person to undue burden

(4) Before filing a motion pursuant to a division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L.P.A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

(D) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ. R. 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

EXHIBIT "A"

1 All e-mail communications, letters, notes, or other written documents involving any communications with Ellen Turner from the start of your employment at Sara Lee through the present date,

2. Copies of all contracts or other documents evidencing your current employment relationship with Turner & Humbert, LLC,

3. Copies of all business plans, proformas, or other projections associated with the business of Turner & Humbert, LLC;

4. Copies of all financial statements associated with Turner & Humbert, LLC;

5. Copies of any 1099's or W-2's issued to you by Turner & Humbert, LLC;

6. Copies of all contracts or agreements between you and Ellen Turner associated with your consulting business, or any other issues associated with any contract relations between you and Ellen Turner.

7. Documents evidencing any gifts to you by Ellen Turner; and

8. Documents evidencing any asset with a value of $100 or more provided to you by Ellen Turner

BUECHNER, HAFFER,
O'CONNELL, MEYERS,
HEALEY & KOENIG
CO, L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER,	:	**Case No:DR0500131**
Plaintiff,	:	**Magistrate Thelle** **Judge Panioto**
v.	:	
JON ENTINE,	:	**AFFIDAVIT OF ROBERT J. MEYERS IN SUPPORT OF DEFENDANT'S MOTION FOR CONTEMPT**
Defendant.	:	

STATE OF OHIO)
) **SS:**
COUNTY OF HAMILTON)

I, Robert J Meyers, being first cautioned and sworn, state that I am over eighteen (18) years of age, and have personal knowledge of the facts as set forth below

1 I am the trial attorney for Defendant Jon H Entine.

2. This Affidavit serves to support Defendant's Motion for Contempt against non-party Bruce Humbert

3 On March 31, 2006, I served non-party Bruce Humbert with a Subpoena Duces Tecum seeking the production of certain documents by April 17, 2006

4 I did not receive any response from Mr Humbert, and by letter dated June 30, 2006, I reminded Mr. Humbert that his response to the March 31, 2006 Subpoena was overdue and demanded his immediate compliance with the Subpoena A copy of the June 30, 2006 letter is attached as Exhibit 1.

5 To date, Mr Humbert has not responded to the Subpoena

6. I have made a reasonable effort to resolve this matter with Mr Humbert through informal means. Having been unsuccessful, I now request that the Court find Mr Humbert in contempt for failing to obey the Subpoena

EXHIBIT B

UECHNER, HAFFER, 'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

FURTHER AFFIANT SAYETH NAUGHT.

Robert J Meyers

Sworn to and subscribed in my presence, a Notary Public, this 10th day of July, 2006

Notary Public

107703

CYNTHIA SAYLOR
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 02-15-2010

UECHNER, HAFFER,
'CONNELL, MEYERS,
HEALEY & KOENIG
CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

email
rmeyers@bhomhk.com

June 30, 2006

Mr Bruce Humbert
9130 Lewis Avenue
Blue Ash, Ohio 45242

Re: Ellen L. Turner v. Jon H. Entine, Court of Common Pleas, Division of Domestic Relations, Hamilton County, Ohio, Judge Panioto, Case No. DR0500131

Dear Mr. Humbert·

On March 31, 2006, we issued a subpoena to you concerning the above matter The subpoena required the production of documents by April 17, 2006 You failed to respond to the subpoena

The purpose of this letter is to request your compliance with the subpoena. If we have not received compliance by you by July 10, 2006, we will proceed with a motion for you to be held in contempt by the Court. We would prefer not to have to proceed with such an action, and assume that you will comply with the subpoena

Please advise us at your earliest convenience. Thank you for your cooperation

Very truly yours,

BUECHNER, HAFFER, O'CONNELL
MEYERS, HEALEY & KOENIG CO , L P A

Robert J Meyers

RJM.cgs
cc Mr Jon H Entine
107548

EXHIBIT 1

(X) PRE-DECREE ( ) POST-DECREE

( ) Chg. of Cust.
( ) Vis. Enforce/Mod.
( ) Sup. Enforce/Mod.
(X) Others

Randal S. Bloch, #0010124
Attorney for Plaintiff

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER	:	**Case No . DR 0500131**
Plaintiff	:	**File No. E233969**
-vs-	:	**Judge Panioto** **Magistrate Theile**
JON ENTINE	:	
		MOTION TO TERMINATE SPOUSAL SUPPORT AND CHILD SUPPORT
Defendant	:	

Now comes Plaintiff, Ellen Turner, by and through her counsel, and moves this Court to terminate spousal support and child support payments made by Plaintiff, Ellen Turner, to Defendant, Jon Entine for the reason of a change in circumstances. Plaintiff will have a reduction in income which necessitates the termination of support. The Plaintiff has been receiving severance pay from the Sara Lee Corporation. This pay will terminate as of September 2006.

WHEREFORE, Plaintiff moves for this Court for an order to terminate the spousal support and child support currently paid to Defendant, for an award of fees and costs associated with this motion, and for such other relief as is equitable and proper.

Randal S Bloch #P.

RANDAL S. BLOCH #0010124
Attorney for Plaintiff
2345 Ashland Avenue
Cincinnati, Ohio 45206
(513) 751-4420
Fax: (513) 751-4555

wagbloch@yahoo.com

NOTICE OF HEARING

A hearing on the within matter has been scheduled for 9-13, 2006 at 9:00 Am. before Magistrate Theile, Room 02-102 of the Hamilton County Domestic Relations Court, 800 Broadway, Cincinnati, Ohio 45202.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has this _____ day of July, 2006 been served by ordinary mail upon Gloria S. Haffer and Robert J. Meyers, Attorney for Defendant, 300 Fourth & Walnut Centre, 105 E. Fourth Street, Cincinnati, Ohio 45202.

RANDAL S. BLOCH

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

Ellen Turner

CASE NO. DR0500131

-vs-

Jon Entine

WRITTEN REQUEST FOR SERVICE
(TYPE OF PAPERS BEING SERVED)

Defendant's Motion for Contempt
Affidavit of Robert J Meyers in Support of Defendant's Motion for Contempt

PLAINTIFF / **DEFENDANT** REQUESTS:

CERTIFIED MAIL SERVICE _____ REGULAR MAIL SERVICE _____

PERSONAL SERVICE _____ RESIDENCE SERVICE _____

PROCESS SERVICE X FOREIGN SHERIFF _____

FILED
2006 JUL 18 P 3:24
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

☐ **IN ACCORDANCE WITH CIVIL RULE 4.6(C) OR (D) AND 4.6(E) AN ORDINARY MAIL WAIVER IS REQUESTED**

LIST NAME AND ADDRESS OF PERSON(S) TO BE SERVED

Mr. Bruce Humbert
9130 Lewis Avenue
Blue Ash, Ohio 45242

Robert J Meyers
ATTORNEY

(513) 579-1500
PHONE NUMBER

105 E Fourth Street, Cincinnati, Ohio
ADDRESS

00014589
ATTORNEY NUMBER

108126

D69219706

( ) PRE-DECREE ( ) POST-DECREE
( ) Chg. of Cust.
( ) Vis. Enforcel/Mod
( ) Sup. Enforcel/Mod

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER,	:	**Case No:DR0500131**
Plaintiff,	:	**Magistrate Theile** **Judge Panioto**
v.	:	
JON ENTINE,	:	**DEFENDANT'S MOTION FOR CONTEMPT**
Defendant.	:	

Now comes Defendant Jon Entine ("Husband"), by and through counsel, and moves the Court to find non-party Sara Lee Foods in contempt for failing to obey the June 7, 2006 Subpoena Duces Tecum, which requires Sara Lee Foods to produce certain documents by June 16, 2006. This Motion is supported by the following Memorandum and Affidavit of Attorney Robert J. Meyers.

FILED
2006 JUL 21 P 3:2
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

Respectfully submitted,

Gloria S. Haffer (Ohio Reg. No. 0014333)
Robert J. Meyers (Ohio Reg. No. 0014589)
Trial Attorneys for Defendant, Jon H. Entine
BUECHNER, HAFFER, MEYERS
& KOENIG CO., L.P.A.
105 East Fourth Street
300 Fourth & Walnut Centre
Cincinnati, Ohio 45202
Telephone No.: 513-579-1500
Fax No.: 513-977-4361

BUECHNER, HAFFER,
MEYERS & KOENIG
CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

D69280805

MEMORANDUM

This Motion is brought pursuant to Rule 45(E) of the Ohio Rules of Civil Procedure, which states the following:

> Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court for which the subpoena issued. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking discovery.

In other words, when a non-party witness fails to obey a subpoena, Civil Rule 45(E) provides that a court may find the non-party witness in contempt of court. Additionally, Civil Rule 45(E) authorizes the court to order the non-party witness, or his attorney if he frivolously resisted the discovery, to pay the reasonable costs and attorney's fees incurred by the party seeking discovery.

On June 7, 2006, Husband served non-party Sara Lee Foods with a subpoena Duces Tecum.[1] Sara Lee Foods failed to timely provide its responses to Husband's subpoena. By letter dated June 30, 2006, Husband's counsel demanded that Sara Lee Foods immediately comply with the subpoena and produce the requested documents.[2]

To date, Sara Lee Foods has not responded to Husband's subpoena. Husband's subpoena was issued in good faith. There is no apparent reason for Sara Lee Food's failure to respond. Husband is entitled to discover the information sought in the subpoena, and Sara Lee Food's unreasonable failure to provide him with this information has delayed the proceedings in this case, hampered Husband's ability to adequately evaluate his case, and unnecessarily increased Husband's legal fees and expenses. Husband now requests an order finding Sara Lee Foods in contempt for failing to obey the subpoena.

BUECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

[1] A copy of the Subpoena Duces Tecum is attached hereto as Exhibit A.
[2] See Affidavit of Robert J. Meyers attached hereto as Exhibit B.

Based upon the foregoing, Husband hereby moves the Court for finding of contempt of court, sanctions, incarceration and any and all other remedies to which the Court finds equitable. Husband further requests the Court order Sara Lee Foods to immediately produce the documents requested in the June 7, 2006 subpoena. Finally, Husband moves the Court for an order awarding Husband his reasonable expenses, including attorney's fees, in the amount of $2,000.00, which he incurred in prosecuting this Motion for Contempt.

Respectfully submitted,

Gloria S. Haffer (Ohio Reg. No. 0014333)
Robert J. Meyers (Ohio Reg. No. 0014589)
Trial Attorneys for Defendant Jon H. Entine
BUECHNER, HAFFER, MEYERS
& KOENIG CO., L.PA.
105 East Fourth Street
300 Fourth & Walnut Centre
Cincinnati, Ohio 45202
Telephone No.: 513-579-1500
Fax No.: 513-977-4361

NOTICE OF HEARING

Please take notice that a hearing on the foregoing has been scheduled for the ____ day of _____, 2006 at _____a.m./p.m. before Magistrate Theile, at the Hamilton County Court of Common Pleas, Division of Domestic Relations, 800 Broadway, Cincinnati, Ohio 45202.

Robert J. Meyers (Ohio Reg. No. 0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copies of the foregoing Motion for Contempt and the Affidavit of Robert J. Meyers have been served upon Sallee M. Fry, Esq., Law Office of Sallee M. Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S. Bloch, Esq., Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206, on this 21st day of July, 2006.

Robert J. Meyers (Ohio Reg. No. 0014589)
Attorney for Defendant

108264

BUECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER	:	**CASE NO. DR0500131**
Plaintiff,	:	
vs.	:	**JUDGE PANIOTO** **MAGISTRATE THEILE**
JON H. ENTINE	:	**SUBPOENA *DUCES TECUM* FOR DOCUMENT PRODUCTION**
Defendant.	:	

TO: Sara Lee Foods
10151 Carver Road
Cincinnati, Ohio 45242

STATE OF OHIO, COUNTY OF HAMILTON.....SS:

You are required to appear before a notary public in and for the County and State on Friday, June 16, 2006 at 9:00 A.M. at the offices of Buechner, Haffer, O'Connell, Meyers, Healey & Koenig Co., L.P.A., 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, to produce records hereinafter referred to.

You are required to bring with you and produce the documents listed on the attached Exhibit "A."

This is a Records Subpoena Only, and in lieu of your personal delivery of these records on the date noted, you may send certified copies of all such records that are in your possession, custody and/or control to Robert J. Meyers, Esq., of Buechner, Haffer, O'Connell, Meyers, Healey & Koenig Co., L.P.A., located at 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, prior to Friday, June 16, 2006. A proposed certificate is attached.

This Subpoena is issued pursuant to Rule 45 of the Ohio Rules of Civil Procedure by Robert J. Meyers, attorney of record in the within cause pursuant to division (A)(2) of said rule.

EXHIBIT A

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

Fail not under penalty of Law.

WITNESS my hand this 7th day of JUNE, 2006 at Cincinnati, Hamilton County, Ohio.

Robert J. Meyers (0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Subpoena Duces Tecum for Document Production to Sara Lee has been served by ordinary U. S. Mail this 7th day of June, 2006 upon:

Sallee M. Fry, Esq.
Law Office of Sallee M. Fry
2345 Ashland Avenue
Cincinnati, Ohio 45206

Randal S. Bloch, Esq.
Wagner & Bloch, LLC
2345 Ashland Avenue
Cincinnati, Ohio 45206

Robert J. Meyers #0014589
Attorney for Defendant

UECHNER, HAFFER,
CONNELL, MEYERS,
HEALEY & KOENIG
CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

CERTIFICATION

STATE OF OHIO)
) SS:
COUNTY OF _____)

Under penalty of perjury, I hereby verify that I am the authorized Custodian of Records of Sara Lee, and am duly authorized to certify that the attached copies are copies of the complete records relating to Sara Lee.

I further verify that the originals of these documents were made at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters.

The documents were kept under my control and in the usual manner and course of business of Sara Lee

Each document was made in the usual manner and course of business of Sara Lee, according to the customary standards of this office.

_____
Records Custodian

Sworn to and subscribed before me this _____ day of _____, 2006.

_____
Notary Public

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
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Ohio Rules of Civil Procedure
Rule 45. Subpoena

(C) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2)(a) A person commanded to produce under divisions (A)(1)(b) (ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does nay of the following:

(a) fails to allow reasonable time to comply;
(b) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;
(c) requires disclosure of a fact known or opinion held by an expert not retained or specifically employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;
(d) subjects a person to undue burden

(4) Before filing a motion pursuant to a division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

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HEALEY & KOENIG
CO., L.P.A.
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(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ. R. 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

SUECHNER, HAFFER,
O'CONNELL, MEYERS,
HEALEY & KOENIG
CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

EXHIBIT "A"

1. Copies of Ellen L. Turner's daily, weekly, monthly, schedules, logs, journals, calendars, work schedules and or planners, from the commencement of her employment at Sara Lee (June 2002) until the date of termination of her employment.

2. Copies of all documents submitted to Sara Lee by Ellen L. Turner documenting her travel expenses (not the printouts previously produced by Sara Lee) commencing from the beginning of her employment at Sara Lee to the date of her termination.

3. Copies of all emails between Ellen L. Turner and/or Bruce Humbert, Ellen L. Turner's parents, Ada Lou Turner and Kenneth Turner, Ellen L. Turner's brother, Keith Turner, Ellen L. Turner's sister and brother-in-law, Christine Turner-Bertoud and Charles Bertoud, Donna Lyons, Dorothy Crenshaw, Susan Flanagan, James Mead, Neil Lenarsky, Susan Marocco, Joel Goren, Brian Williams, Mark Mitten, Chris Nadherny, Suzy Stewart and any communications mentioning Hyde Park Gymnastics.

4. All communications between Ellen L. Turner and Sara Lee concerning Ellen's attempts to relocate to Chicago.

5. All documents related to Ellen's employment and termination including reports filed with Human Resources.

6. All documents related to the "coach" hired at Sara Lee's insistence in connection with Ellen's managerial issues.

7. Any and all documents, including e-mails containing the following words: Entine, Maddie, Madeleine, divorce, abuse, abusive, move, and moving.

8. All communications regarding transformation retention grant, which Ellen Turner received.

9. All communications regarding contributions to her retirement and bonus accounts including, but not limited to, her non-qualified supplemental 401(k) plan.

10. All documents and contracts pertaining to the company car including payments on the car, discussions and/or agreements relating to the car after Ellen Turner's termination.

106164

BUECHNER, HAFFER,
O'CONNELL, MEYERS,
HEALEY & KOENIG
CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER,	:	**Case No:DR0500131**
Plaintiff,	:	**Magistrate Theile** **Judge Panioto**
v.	:	
JON ENTINE,	:	**AFFIDAVIT OF ROBERT J. MEYERS IN SUPPORT OF DEFENDANT'S MOTION FOR CONTEMPT**
Defendant.	:	

STATE OF OHIO)
) **SS:**
COUNTY OF HAMILTON)

I, Robert J. Meyers, being first cautioned and sworn, state that I am over eighteen (18) years of age, and have personal knowledge of the facts as set forth below:

1. I am the trial attorney for Defendant Jon H. Entine.
2. This Affidavit serves to support Defendant's Motion for Contempt against non-party Sara Lee Foods.
3. On June 7, 2006, I served non-party Sara Lee Foods with a Subpoena Duces Tecum seeking the production of certain documents by June 16, 2006.
4. I did not receive any response from Sara Lee Foods, and by letter dated June 30, 2006, I reminded Sara Lee Foods that its response to the June 7, 2006 Subpoena was overdue and demanded its immediate compliance with the Subpoena. A copy of the June 30, 2006 letter is attached as Exhibit 1.
5. To date, Sara Lee Foods has not responded to the Subpoena.
6. I have made a reasonable effort to resolve this matter with Sara Lee Foods through informal means. Having been unsuccessful, I now request that the Court find Sara Lee Foods in contempt for failing to obey the Subpoena.

EXHIBIT A

UECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

FURTHER AFFIANT SAYETH NAUGHT.

Robert J. Meyers

Sworn to and subscribed in my presence, a Notary Public, this 21st day of July, 2006.

CYNTHIA SAYLOR
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 02-15-2010

Notary Public

108267

UECHNER, HAFFER,
MEYERS & KOENIG
CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

email
rmeyers@bhomhk.com

June 30, 2006

Mr Bruce Humbert
9130 Lewis Avenue
Blue Ash, Ohio 45242

Re: Ellen L. Turner v. Jon H. Entine, Court of Common Pleas, Division of Domestic Relations, Hamilton County, Ohio, Judge Panioto, Case No. DR0500131

Dear Mr. Humbert

On March 31, 2006, we issued a subpoena to you concerning the above matter. The subpoena required the production of documents by April 17, 2006 You failed to respond to the subpoena.

The purpose of this letter is to request your compliance with the subpoena If we have not received compliance by you by July 10, 2006, we will proceed with a motion for you to be held in contempt by the Court We would prefer not to have to proceed with such an action, and assume that you will comply with the subpoena

Please advise us at your earliest convenience Thank you for your cooperation

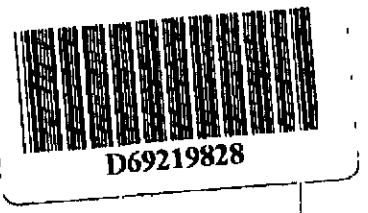
Very truly yours,

BUECHNER, HAFFER, O'CONNELL
MEYERS, HEALEY & KOENIG CO , L P A

Robert J Meyers

RJM cgs
cc Mr Jon H Entine
107548

EXHIBIT 1



COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN TURNER,	:	**Case No:DR0500131**
Plaintiff,	:	**Magistrate Theile** **Judge Panioto**
v.	:	
JON ENTINE,	:	**AFFIDAVIT OF ROBERT J. MEYERS IN SUPPORT OF DEFENDANT'S MOTION FOR CONTEMPT**
Defendant.	:	

STATE OF OHIO)
) **SS:**
COUNTY OF HAMILTON)

I, Robert J Meyers, being first cautioned and sworn, state that I am over eighteen (18) years of age, and have personal knowledge of the facts as set forth below.

1 I am the trial attorney for Defendant Jon H Entine

2 This Affidavit serves to support Defendant's Motion for Contempt against non-party Bruce Humbert

3 On March 31, 2006, I served non-party Bruce Humbert with a Subpoena Duces Tecum seeking the production of certain documents by April 17, 2006.

4 I did not receive any response from Mr Humbert, and by letter dated June 30, 2006, I reminded Mr. Humbert that his response to the March 31, 2006 Subpoena was overdue and demanded his immediate compliance with the Subpoena A copy of the June 30, 2006 letter is attached as Exhibit 1.

5 To date, Mr Humbert has not responded to the Subpoena

6. I have made a reasonable effort to resolve this matter with Mr Humbert through informal means Having been unsuccessful, I now request that the Court find Mr Humbert in contempt for failing to obey the Subpoena

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO, LPA
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

FURTHER AFFIANT SAYETH NAUGHT.

Robert J Meyers

Sworn to and subscribed in my presence, a Notary Public, this 10th day of July, 2006

Notary Public

107703

CYNTHIA SAYLOR
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 02-15-2010

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO, L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

email
rmeyers@bhomhk.com

June 30, 2006

Mr Bruce Humbert
9130 Lewis Avenue
Blue Ash, Ohio 45242

Re: Ellen L. Turner v. Jon H. Entine, Court of Common Pleas, Division of Domestic Relations, Hamilton County, Ohio, Judge Panioto, Case No. DR0500131

Dear Mr. Humbert

On March 31, 2006, we issued a subpoena to you concerning the above matter. The subpoena required the production of documents by April 17, 2006 You failed to respond to the subpoena.

The purpose of this letter is to request your compliance with the subpoena If we have not received compliance by you by July 10, 2006, we will proceed with a motion for you to be held in contempt by the Court We would prefer not to have to proceed with such an action, and assume that you will comply with the subpoena

Please advise us at your earliest convenience Thank you for your cooperation

Very truly yours,

BUECHNER, HAFFER, O'CONNELL
MEYERS, HEALEY & KOENIG CO , L P A

Robert J Meyers

RJM cgs
cc Mr Jon H Entine
107548

EXHIBIT 1

OBJECTIONS TO MAG DECISION
MOTION TO SET ASIDE
REQUEST FOR FINDINGS OF FACTS
7-7-06
DATE

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER	:	**CASE NO. DR0500131**
Plaintiff,	:	**JUDGE PANIOTO** **MAGISTRATE THEILE**
v.	:	
JON H. ENTINE	:	**DEFENDANT'S OBJECTIONS TO MAGISTRATE'S DECISION OF JUNE 20, 2006**
Defendant.	:	

Pursuant to Rule 53 of the Ohio Rules of Civil Procedure, Defendant Jon H Entine ("Husband"), by and through counsel, objects to the Magistrate's Decision dated June 20, 2006, which concludes that the parties' Premarital Agreement should be governed by California law Husband respectfully requests that the Court reject the Magistrate's Decision dated June 20, 2006 as more fully explained in the following memorandum

Gloria S Haffer #0014333
Robert J Meyers #0014589
Trial Attorneys for Defendant Jon H Entine
Buechner, Haffer, Meyers, & Koenig, Co , L P A
300 Fourth & Walnut Centre
105 East Fourth Street
Cincinnati, Ohio 45202
Telephone 513-579-1500
Facsimile 513-977-4361
E-mail ghaffer@bhmklaw com
E-mail rmeyers@bhmklaw com

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

2006 JUL -7 P 3:00

FILED

BUECHNER, HAFFER, O'CONNELL, MEYERS, HEALEY & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

D69076951

MEMORANDUM

Husband objects to the Magistrate's Decision dated June 20, 2006 that concludes that California law should govern the parties' Premarital Agreement for the following reasons

1. THE MAGISTRATE FAILED TO APPLY OHIO'S CHOICE-OF-LAW TEST.

The Magistrate did not apply the choice-of-law test set forth in the landmark Ohio Supreme Court case of *Schulke Radio Productions, Ltd v Midwestern Broadcasting Co* [1] Husband devoted his entire choice-of-law brief to analyzing the *Schulke* test in connection with the particular facts of this case Plaintiff Ellen Turner ("Wife") quoted the *Schulke* test in her brief and conceded that it applies Nonetheless, the Magistrate completely ignored the *Schulke* test and did not even mention the case

According to *Schulke*, the Court has discretion to decide not to apply the state law chosen by the parties at the time they entered into the Premarital Agreement Because Husband has challenged the choice-of-law provision in the Premarital Agreement, the Magistrate should have applied *Schulke* to determine whether the parties made an effective choice of law When a choice-of-law conflict arises in an action, Ohio courts apply *Schulke*, which is based upon Section 187(2) of the Restatement of the Law 2d, Conflict of Laws (1971) [2] California courts have also adopted Section 187(2) to resolve choice-of-law conflicts that arise in California cases [3]

Schulke provides as follows

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[1] *Schulke Radio Productions, Ltd v Midwestern Broadcasting Co* (1983), 6 Ohio St 3d 436, 453 N E 2d 683 (copy attached as Exhibit A)

[2] See, i e, *Jarvis v Ashland Oil, Inc* (1985), 17 Ohio St 3d 189, 478 N E 2d 786, paragraph two of the syllabus, *Sekeres v Arbaugh* (1987), 31 Ohio St 3d 24, 508 N E 2d 941, *Brunner v Quantum Chemical Corp* ,(Mar 17, 1993), Hamilton App No C-920037, 1993 Ohio App LEXIS 1477, unreported (copy attached as Exhibit B)

[3] *Nedlloyd Lines B V v Super Ct (Seawinds Ltd)*, 834 P 2d 1148 (Cal 1992)

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied **unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties** [4]

Schulke sets forth two separate, independent tests for applying the chosen state law The first test requires that the chosen state have a substantial relationship to the parties or the transaction, or that there is some reasonable basis for the parties' choice The facts of this case indicate that California, the chosen state, does not have a substantial relationship to the parties or the transaction and that there was no reasonable basis for the parties' choice

Currently, the parties do not have a substantial (or any) relationship with California They moved to Cincinnati, Ohio in the summer of 2002 and have continuously lived in Ohio since 2002 They purchased a home in Cincinnati that served as the marital residence Husband continues to reside in the home as his primary and only residence Wife leased a home in Cincinnati that serves as her primary and only residence The parties vote in Ohio They have Ohio driver's licenses They pay taxes in Ohio All of their tangible assets are located in Ohio

Husband is affiliated with the Ohio office of Northlich Public Relations, a full-service public relations agency, as an independent contractor He is also a writer, among other things, and operates out of his Cincinnati home

Wife no longer works for a large company that requires her to relocate Wife has started her own business in Cincinnati known as Turner & Humbert, LLC, an Ohio limited liability company, and she plans to remain in Cincinnati

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[4] *Schulke*, at the syllabus (emphasis added)

The parties' minor daughter resides with the parties in Ohio, attends school in Ohio, and enjoys a number of extracurricular activities in Ohio All of her medical providers are located in Ohio This Court has approved a Shared Parenting Plan governing the parties' rights and responsibilities regarding the minor child They have both expressed a commitment to live in Ohio indefinitely and are so tied by their Shared Parenting agreement The parties currently do not have any relationship with California

At the time they entered into the Premarital Agreement, the parties did not have a substantial relationship with California The parties were married in New York where they had been residing and working until shortly before their marriage when they moved to California for Wife's career opportunity After they decided to get married (and even before they were formally engaged), the parties agreed that after they married they would jointly focus on Wife's career as a business executive and Husband would discontinue his career in network television news and start a new career in writing to allow maximum flexibility for Wife Their plan was for Wife to climb the corporate ladder by seeking the best opportunities at the best companies regardless of location

Even before the parties married in 1994, Wife had committed herself to a career track that involved frequent relocations She had worked at Frito Lay in Texas from 1984 to 1988 and at Cadbury Schweppes in Connecticut from 1988 to 1993 before her position was terminated

Over the course of the next six years, from the fall of 1994 to the spring of 2000, Wife held six jobs in six different cities Approximately nine months before the parties were married, Wife accepted a position at Taco Bell Corporation located in California, and the parties relocated to California After less than two years, in 1995, Wife left her employment at Taco Bell to join The Weather Channel in Atlanta, Georgia, and the parties moved to Atlanta After about a year in Atlanta, Wife left The Weather Channel Wife's next job was at Limited Brands, Inc in Columbus, Ohio, and the parties' moved to Columbus in the summer of 1996 Approximately a

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year and half later, in 1998, Wife left the Limited for a position at Kinko's Inc , and the parties returned to California

Wife's employment at Kinko's Inc ended in 1999, and she was hired by Nike, Inc in December 1999 The parties purchased a house in Portland, Oregon but Wife was abruptly fired after only four months at Nike and before they moved into the Oregon home In the summer of 2002, Wife was hired by Sara Lee Corporation, and the parties left the west coast for Cincinnati Sara Lee was Wife's' seventh job in seven different cities since 1993 Wife was terminated from her job in April 2004, three months before the executive jobs at Sara Lee were relocated to Chicago

Based upon the foregoing, it is apparent that the parties never intended to remain in California or in any one particular state for any substantial period of time The parties agreed prior to their marriage, while they were courting, that they would live virtually as nomads, relocating whenever and wherever a better employment opportunity came along for Wife As they had planned, the parties did relocate for Wife's jobs They, in fact, relocated seven times for Wife's jobs California happened to be the location of Wife's next job at the time the parties were to be married Wife's position in California at Taco Bell was merely a stepping stone for Wife to achieve the next rung of the corporate ladder

Under these circumstances, it was unreasonable for the parties to select California law, or any one particular state law, to govern the Premantal Agreement

The facts of this case as applied to the first test of *Schulke* demonstrate that the "substantial relationship" prong of the first test has not been met Nor has the "reasonable basis" prong of the first *Schulke* test been met According to the plain language of *Schulke*, if neither of these prongs is met, then that is the end of the inquiry, and the Court need not enforce the parties' choice of law

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Under the circumstances, it is unnecessary to proceed to the second test set forth in *Schulke* But if the Court disagrees and decides to analyze this case under *Schulke's* second test, then the Court should also find that California law is not an effective choice of law

The second test is that the application of the law of the chosen state must not violate the fundamental policy of the state that (1) has a greater material interest in the determination of the issue, and (2) is the state whose law would be applied in the absence of a choice by the parties This means that if Ohio has a materially greater interest than California in this matter, and Ohio law would have governed the agreement if the parties had not specified otherwise, then California law cannot be applied if it violates Ohio public policy

Ohio law clearly would have applied in this case had the parties not specified California law in the Premarital Agreement Ohio is the place that will determine the applicability of the Premarital Agreement as part of the divorce proceedings And Ohio has a materially greater interest than California in the outcome of this action As stated above, the parties have lived continuously in Ohio since 2002 Wife no longer works for Sara Lee and has started her own Ohio business located in Cincinnati They own real property in Ohio Their tangible assets are located in Ohio The parties' minor daughter resides with the parties and attends school in Ohio California has no interest in the outcome of this divorce action between two Ohio citizens

California law must not be applied here because it is repugnant to Ohio's fundamental policy of equitable distribution of property In particular, Section 6 D of the parties' Premarital Agreement is offensive to the basic principles underlying the equitable distribution policy

Section 6 D of the Premarital Agreement states as follows

> In the event the parties desire to acquire property jointly as community property, they shall do so by a separate written agreement so stating their intent to acquire community property, and identify the same with specificity There shall be no community property acquired by the parties other than as expressly stated **In the event either party contributes any money to improve or maintain an asset of the other party, the**

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contributing party shall have no community property interest or separate property interest in the maintained or improved asset and shall not be entitled to any reimbursement from the other except as otherwise expressly agreed to in writing signed by both parties [5]

The highlighted portion of Section 6 D is significant in that a literal application of this language to the facts of this case, ignoring Wife's trickery and deception, could cause Husband to forfeit his share of all the family assets accumulated during the marriage and the substantial inheritance (in excess of $550,000 00) he received from his father during the marriage

Husband used almost all of his inheritance to improve the parties' marital residence in Cincinnati Husband has produced documentation tracing virtually every penny of his inheritance that he put into the marital residence At all times during the marriage, Husband reasonably believed and never doubted that the marital residence was jointly titled in both parties' names During this divorce proceeding, Husband discovered to his surprise that Wife had defrauded him by causing the residence to be titled solely in her name Wife never told Husband that the marital residence was not jointly titled Husband believes Wife has committed fraud and breached her fiduciary duty to him A literal interpretation of the Premarital Agreement (if found to be valid and enforceable) could transform the marital residence into Wife's separate property and Husband's inheritance into Wife's separate property This result is untenable in Ohio

Ohio statutory law defines separate property in R C §3105 171(B)(6) Specifically, R C §3105 171(B)(6)(a)(i) provides that an inheritance by one spouse by bequest, devise or descent during the marriage constitutes separate property of the recipient R C § 3105 171(D) states that the court shall disburse a spouse's separate property to that spouse Only in very

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[5] See page 8 of the parties' Premarital Agreement (emphasis added), a copy is attached as Exhibit A to Defendant's Brief on Applicable State Law

limited circumstances where equity dictates will a court make a distributive award consisting of one spouse's separate property to another

Additionally, according to R C §3105 171(H), "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property" Under the plain language of Ohio statutory law, Wife's misconduct in secretly causing the marital residence to be titled solely in her name would not diminish or eliminate Husband's marital interest in the property The language of the California premarital agreement, if interpreted literally, could provide otherwise

By seeking the enforcement of the Premarital Agreement, Wife has improperly attempted to circumvent Ohio law in an effort to have the marital residence designated as her separate property and to have Husband's inheritance deemed her separate property In so doing, Wife has also attempted to defy the basic concept that no one should be permitted to profit from her wrongful conduct [6]

Section 9 of the Premarital Agreement also offends Ohio public policy That section provides

> The parties agree that any earnings, profits, perquisites, residuals, income or benefits, no matter their nature, kind, or source, from and after the marriage, including but not limited to, salary, residuals, bonuses, stock options, deferred compensation, and retirement benefits, shall be the separate property of the party earning or acquiring such earnings, income or benefits as though the contemplated marriage had never occurred There shall be no allocation made of any such earnings, income or benefits between community property and separate property, and such earnings, income or benefits shall be entirely the separate property of the party earning or acquiring the same The parties acknowledge their understanding that in the absence of this Agreement any earnings, residuals, income or benefits resulting from the personal services, skills, celebrity goodwill, industry, and efforts of either party during the contemplated marriage would be community property

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[6] *Schrader v Equitable Life Assurance Soc* (1985), 20 Ohio St 3d 41, 485 N E 2d 1031

Under this section, all of the income of any kind earned by Wife during the marriage, as well as all money earned by Husband that was used to pay family expenses, including home improvements, could possibly be characterized as Wife's separate property despite the fact that the parties never separated their lives financially and had agreed to sacrifice Husband's career in television to allow Wife to pursue her career This result is also contrary to R C § 3105 171(A)(3)(iii), which expressly states that all income due to the labor, monetary, or in-kind contribution of either or both spouses that occurred during the marriage is marital property Husband loyally supported Wife and moved from state to state every other year or so to permit Wife to improve her resume and earning power Husband assumed the basic household responsibilities so that Wife could focus on her career It is inconceivable under Ohio law that Husband would be denied all interest in the assets they accumulated jointly during the marriage

Likewise, Section 8 of the Premarital Agreement, entitled Community Efforts in Managing the Other Party's Separate Property Interests, contravenes Ohio's policy of compensating a party for his or her non-monetary contributions to the marriage During the marriage, while Wife was vigorously pursuing her career, Husband devoted his time and effort to managing the parties' investments as well as the mundane details of the parties' daily lives He later served as the primary caretaker of the parties' minor child Husband's non-monetary contributions are highly valued in Ohio law but are not give much, if any, credit in California

Section 13 of the Premarital Agreement, entitled Debt Obligations on Separate Property Interests, and Section 14 of the Premarital Agreement, entitled Unsecured Debt Responsibility, are repugnant in that they deny the right of reimbursement to a party who uses separate property to pay the debts of the other party Husband poured all of his assets into the parties' daily living He paid for improvements to the parties' various houses and routine living expenses The Premarital Agreement denies Husband the ability to obtain reimbursement

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Under the facts and circumstances of this case, Sections 6, 8, 9, 13, and 14 of the Premarital Agreement are particularly onerous and unconscionable Ohio domestic relations courts as courts of equity have the unique ability to remedy onerous and unconscionable premarital agreements It does not appear that California courts have statutory authority to correct repugnant and unconscionable property division

Considering the facts and circumstances of this action in connection with the second prong of the *Schulke* test, this Court should not apply California law to the Premarital Agreement While the Magistrate summarily concluded that the parties' agreement to be bound by California law does not violate a fundamental policy of this state, the Magistrate failed to provide any analysis demonstrating how he reached this conclusion In the absence of any sound reasoning, this Court should reject the Magistrate's arbitrary decision and instead apply Ohio law to the Premarital Agreement

There is a dearth of case law in Ohio exactly on point It appears that only the Eleventh District Court of Appeals has faced a choice of law issue in connection with a premarital agreement in *In re Estate of Davis* [7] There, the parties signed a prenuptial agreement that contained a choice of law provision stating that Texas law would control the agreement The parties were married in Ohio During their twelve-year marriage, the parties spent part of each year living in Ohio and Texas The wife had an interest in 3,460 acres of land in Texas

The wife died in Ohio, and the husband sought to set aside the prenuptial agreement He argued that Ohio law should govern the agreement because (1) Ohio was the place of performance, (2) the parties were married in Ohio, (3) the parties resided for part of the year in Ohio, and (4) the wife's will was executed and probated in Ohio The husband further claimed that Texas had no significant relationship to the agreement

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[7] *In re Estate of Davis* (Dec 3, 1999), Ashtabula App No 98-A-0085, 1999 Ohio App LEXIS 5751, unreported (copy attached as Exhibit C)

The Eleventh District applying *Schulke* disagreed with the husband It found that the facts demonstrated that Texas had a substantial relationship to the agreement Specifically, the Davis court pointed to the wife's large land interest in Texas, the wife's bank account located in Texas, the agreement was signed in Texas, and the parties resided in Texas for part of each year for eleven years of their marriage The *Davis* court concluded that the standards of *Schulke* had been met, and the trial court properly held that Texas law controlled

Davis turned on the specific facts of that case The operative facts in *Davis* indicated that the parties had a substantial connection with the chosen state and that the parties made an effective choice of law

On the contrary, the parties in this case do not have a substantial (or any) connection with the chosen state Neither party has retained any interest in land located in California The home they once owned in California was sold years ago after they decided to move to Cincinnati for the Sara Lee position The parties do not have any bank or financial accounts in California All of their tangible property is located in Ohio Since relocating to Ohio in 2002, the parties have resided in Ohio all year round They do not reside in California or any other state for part of the year Wife filed her Complaint for Divorce in Ohio

The facts do not supply a reasonable basis to find that California has a substantial relationship to the agreement or the parties The parties have a substantial relationship to Ohio and only to Ohio

Based upon the rationale of *Davis*, California law should not govern the parties' agreement Ohio has a greater interest in this case Ohio is the place of performance California law is repugnant to Ohio public policy regarding the equitable distribution of property Under the circumstances, Ohio law should apply

Beyond the context of divorce proceedings, Ohio courts routinely deny the application of the state law designated by the parties to a contract based upon the factors of *Schulke* For

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example, in *J&L Specialty Steel v Hammond Constr*,[8] the Fifth District affirmed the trial court's decision not to apply the choice of law provision in a purchase order agreement designating Pennsylvania law as the controlling state law even though Pennsylvania had a substantial relationship to the parties and transaction because Pennsylvania law was contrary to Ohio's fundamental policy concerning indemnification

Likewise, in *Telmark, Inc, v P J T, Inc*,[9] the Fourth District affirmed the trial court's refusal to apply the New York choice of law clause in the parties' lease contract, which would allow the lessor to receive attorney fees The *Telmark* court found that Ohio had a substantially greater relationship with the parties and transaction than New York and that the lessor included the New York choice of law provision to circumvent Ohio's rule against awards of attorney's fees [10]

Here, the Court should follow the line of Ohio cases refusing to apply the choice of law provision The particular facts of this case as applied to the requirements of *Schulke* militate against the application of California law to govern the parties' Premarital Agreement

Ohio has a materially greater interest in the parties and the distribution of their property than California For example, the parties lived in Cincinnati longer than they lived in any other city since they were married The total time that the parties lived in Ohio (Columbus and Cincinnati combined) is greater than the time they lived in any other state, including California They are committed to the Shared Parenting Plan approved by the Court and to making Cincinnati their permanent home indefinitely, or at least until their minor child goes to college ten years from now Now that Wife is no longer working for a large corporation and has started her own Ohio business located in Cincinnati, she would not need to relocate The parties were

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[8] *J&L Specialty Steel v Hammond Constr* (Aug 11, 1997), Stark App No 1996CA00370, 1997 Ohio App LEXIS 3900, unreported, a copy is attached as Exhibit B to Defendant's Brief on Applicable State Law

[9] *Telmark, Inc, v P J T, Inc* (Mar 2, 1993), Gallia App No 92 CA 17, 1993 Ohio App LEXIS 1344, unreported, , a copy is attached as Exhibit C to Defendant's Brief on Applicable State Law

[10] *Id*

merely passing through California when they signed the Premarital Agreement The Premarital Agreement is at odds with Ohio's equitable distribution policy

The Court should reject the Magistrate's Decision because it did not apply or even consider *Schulke* in connection with the choice-of-law issue Both parties agree that *Schulke* applies to this case The Court should hear the matter and apply *Schulke* to the facts or, in the alternative, recommit the matter to the Magistrate with instructions to apply *Schulke* The application of *Schulke* will reveal that the parties' choice-of-law was ineffective and that Ohio law should govern the Premarital Agreement

2. **THE MAGISTRATE MISSTATED HUSBAND'S POSITION.**

The Magistrate's Decision states that "Husband is requesting that the pre-nuptial agreement not be enforced and to have Ohio law apply to the issues in this case "[11] This statement is inaccurate Husband is not currently seeking a ruling on the enforcement of the Premarital Agreement Husband seeks to have Ohio law instead of California law applied to the Premarital Agreement

The Magistrate appears to have misunderstood Husband's position as evidenced by the language used in the Decision as well as the fact that the Magistrate ignored Husband's choice-of-law argument and the applicable Ohio case law on resolving choice-of-law conflicts The Magistrate did not properly analyze the choice-of-law issue by failing to consider landmark Ohio case law on the subject, and the Court should reject the Magistrate's Decision

3. **THE MAGISTRATE'S DECISION FAILED TO RECOGNIZE THAT PREMARITAL AGREEMENTS ARE SPECIAL TYPES OF CONTRACTS.**

The Ohio Supreme Court in *Fletcher v Fletcher* [12] stated that a premarital agreement is a special type of contract to which special rules apply The Magistrate failed to recognize the

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[11] See Findings of Fact on page 2 of the Magistrate's Decision of June 20, 2006
[12] *Fletcher v Fletcher* (1994), 68 Ohio St 3d 464, 467, 628, N E 2d 1343

special status conferred upon premarital agreements and strictly analyzed the parties' Premarital Agreement under basic contract law The Magistrate's Decision implies that the parties knowingly chose California law, were counseled on its consequences, and that to apply Ohio law would somehow be inequitable

To the contrary, applying Ohio law to the Premarital Agreement would not be inequitable First, the parties did not abide by terms of the Premarital Agreement and California law during the marriage The parties abandoned the Premarital Agreement soon after it was executed when the threat of the lawsuits had ceased They jointly acquired assets during the marriage (including, inter alia, real estate, bank accounts, and investments assets) and treated the assets as marital property/community property They did not treat the jointly acquired assets as either party's separate property They used their incomes to jointly purchase assets and to pay their joint expenses They both had access and free use of the jointly acquired assets

Second, as residents of Ohio, the parties benefited from Ohio law by executing personal (non-business related) contracts in connection with their purchase and financing of the Cincinnati marital residence, and the construction, repair and improvements of the marital residence, among other contracts

The Magistrate's approach to deciding whether to apply the chosen state law to the parties' Premarital Agreement begs the question of at what point does the Court exercise its discretion to apply Ohio law instead of the law of a foreign jurisdiction chosen long ago in a premarital agreement For example, would the Court blindly apply the chosen state law to a 50-year marriage with marital assets located in Ohio valued in excess of $50 million? The parties Premarital Agreement is not a commercial contract and should not be treated as such The Magistrate's Decision cannot stand

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4. THE MAGISTRATE'S DECISION IS OVERBROAD

The Magistrate's Decision states that California law will be applied in determining application, enforcement, and interpretation of the Premarital Agreement [13] The Decision does not specifically address whether California law or Ohio law will apply to Wife's tortuous conduct during the marriage, which will have a significant impact on the division of property as set forth in the Premarital Agreement

During the marriage, after relocating to Cincinnati, Wife sought to defraud Husband by secretly causing the Cincinnati marital residence to be titled solely in her name Husband reasonably believed that the marital residence was jointly titled Indeed, on the mortgage loan application for the marital residence, Wife represented that the residence was titled in both of their names Husband subsequently invested almost all of his inheritance to improve the marital residence Wife's misconduct has placed Husband's interest in the marital residence and his inheritance in jeopardy It is unclear from the Magistrate's Decision whether the tort claims (fraud and breach of fiduciary duty, among others) will be governed by California law or Ohio law

The Premarital Agreement does not speak to the application of any particular state law as to independent acts of misconduct by either party that will impact the interpretation of the Premarital Agreement The Magistrate's Decision has exceeded the scope of the Premarital Agreement The Court should remedy this defect and find that Ohio law controls all issues, or at a minimum, limit California law's application to the express terms of the Premarital Agreement The Court should further state that Ohio law will govern Husband's tort claims against Wife for her independent acts of fraudulent misconduct

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[13] See Decision on page 2 of the Magistrate's Decision of June 20, 2006

For all of the foregoing reasons, this Court should reject the Magistrate's Decision and find that Ohio law should govern the Premarital Agreement In the alternative, the Court should recommit this matter to the Magistrate with instructions to apply the choice-of-law test adopted by the Ohio Supreme Court in *Schulke*

Respectfully submitted,

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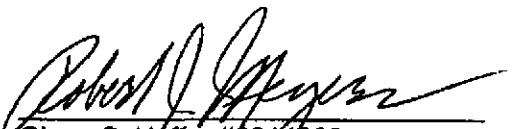
NOTICE OF HEARING

Please take notice that a hearing has been scheduled on Defendant's Objections to Magistrate's Decision of June 20, 2006 on the 5th day of September, 2006 before Judge Panioto, Hamilton County Domestic Relations Court, 800 Broadway, Cincinnati, Ohio 45202 at 10.00 am

Robert J Meyers #0014589
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Defendant's Objections to Magistrate's Decision of June 20, 2006 has been served upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206, on this 7th day of July, 2006



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6 Ohio St.3d 436; Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.; 453 N.E.2d 683

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SCHULKE RADIO PRODUCTIONS, LTD., APPELLEE, v MIDWESTERN BROADCASTING COMPANY, APPELLANT

[Cite as Schulke Radio Productions, Ltd v Midwestern Broadcasting Co (1983), 6 Ohio St 3d 436]

Conflict of laws - Contracts - Parties specifically designate forum other than place of performance - Forum bears substantial relationship to parties, when

O Jur 3d Conflict of Laws § 11

The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties

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(No. 82-916 - Decided September 7, 1983)

APPEAL from the Court of Appeals for Lucas County

Appellee, Schulke Radio Productions, Ltd. (hereafter referred to as "Schulke"), is the successor in interest to Stereo Radio Productions, Ltd (hereafter referred to as "Stereo"), and is in the business of producing tapes with a "beautiful music" format for radio programming. Appellant, Midwestern Broadcasting Company (hereafter referred to as "Midwestern"), is engaged in broadcasting, with interests in radio and television stations One of its wholly owned subsidiaries is WXEZ, an FM radio station based in Toledo, Ohio

In January 1972, Stereo and Midwestern entered into a written contract in which Stereo agreed to supply its beautiful music tapes and attendant services to WXEZ for a period of three years beginning with May 1972 These services included consultation regarding the station's equipment, engineering, promotional activities and other procedures In return, Midwestern was to pay Stereo the sum of $1,200 per month

At the end of the contract period, the parties entered into a second agreement operating for a four-year period beginning May 1, 1975 Under this contract, Stereo was to be paid $1,200 per month for the first through third year and $1,500 per month for the final year One of the contract terms provided that all matters between the parties were to be settled in accordance with New York law

In the summer of 1977, Lewis W Dickie, president of Midwestern, became dissatisfied with the beautiful music format as WXEZ had not captured a very sizeable share of the market's listening audience He notified James A. Schulke, Stereo's president, that he was considering changing to a different format Schulke suggested that Midwestern purchase an optimod, a device for improving the intensity of sound produced by the station Schulke suggested that he would consider letting Midwestern

EXHIBIT A

out of the contract if the optimod did not improve WXEZ's fall ratings

WXEZ utilized the optimod device for about seven weeks and then switched to a "top forty" rock and roll format At this point, Stereo stopped sending new tapes to WXEZ but continued billing under the contract Midwestern continued to make its monthly payments until November 1977 and then ceased to do so

On September 7, 1979, appellee filed an action in the Court of Common Pleas of Lucas County for breach of contract, demanding that all payments not made by Midwestern be made At trial, Schulke testified concerning the assessment of damages He stated that his company produced master tapes in London, England with a special thirty-five piece orchestra Duplicates of the tapes were then prepared and sent to the various subscribing radio stations Each station was supplied with a library of one hundred thirty tapes The library was continuously updated so that every two years it would be entirely replaced According to Schulke, the only amount that his company actually saved by not having to complete its contract with Midwestern was one

hundred dollars per month attributable to the cost of servicing WXEZ and of supplying it with new tapes and schedules

The trial court found that the contract had in fact been breached by Midwestern The court further found that the state of New York did not bear any relationship to the parties and it therefore applied Ohio law on the issue of damages Finally, the court found that appellee had failed to prove its damages under Ohio law and was therefore entitled to only nominal damages in the sum of five dollars plus court costs.

The court of appeals reversed and remanded, finding that the trial court had erred in refusing to apply New York law as stipulated in the parties' contract The court further held that appellee was entitled to damages in the sum of $25,792 representing the contract price for each unpaid month, minus one hundred dollars per month representing appellee's savings, plus interest

The cause is now before this court pursuant to the allowance of a motion to certify the record

Messrs Cooper, Straub, Walinski & Cramer and Mr H Buswell Roberts, Jr , for appellee

Messrs Spengler, Nathanson, Heyman, McCarthy & Durfee, Mr James R Jeffery and Mr Byron S Choka, for appellant

J P CELEBREZZE, J

The initial issue in this case is whether the court of appeals was correct in applying New York law, rather than Ohio law, in assessing the damages in this case

Generally, Ohio follows the rule that where a conflict of law issue arises in a case involving a contract, the law of the state where the contract is to be performed governs Montana Coal & Coke Co v Cincinnati Coal & Coke Co (1904), 69 Ohio St. 351 , paragraph one of the syllabus, Pittsburgh, Cin , C St L Ry Co v Sheppard (1897), 56 Ohio St. 68, paragraph two of the syllabus Some courts have noted that the rationale for this rule is that the place of performance bears the most significant relationship to the contract S&S Chopper Service v Scripter (1977), 59 Ohio App 2d 311 [13 O O 3d 326], Osborn v Osborn (1966), 10 Ohio Misc. 171 [39 O O 2d 275]

In the instant matter, however, we are confronted with a question which we have not heretofore addressed, i e , where the parties have specifically designated a forum other than the place of performance, should that decision be respected? The court below held, and we agree, that under these circumstances the correct rule to apply is the one set forth in the Restatement of Law 2d (1971) 561, Conflict of Laws, Section 187, which provides in part, as follows

"(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

"(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

"(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties "

The trial court did not disagree with the applicability of this rule but held that the forum chosen by the parties had no relationship whatsoever to the parties or their contract We do not agree with this finding The record below indicates that at the time the 1975 contract was entered into, Stereo was located in the state of New York It apparently moved its operations to New Jersey in 1976 In addition, the contract was executed by Schulke on behalf of Stereo in New York Finally, until Stereo moved to New Jersey, part of its performance of the contract, including the preparation of the duplicate tapes, took place in New York Under these circumstances, it is our conclusion that New York did bear a substantial relationship to the parties and the contract Accordingly, there being no issue that the application of New York law would be contrary to the policies of this state, the court of appeals did not err in respecting the agreement of the parties

The only remaining issue is whether the court of appeals properly assessed the appellee's damages under New York law. Money damages awarded in a breach of contract action are designed to place the aggrieved party in the same position it would have been in had the contract not been violated West, Weir & Bartel, Inc v Mary Carter Paint Co (1966), 25 A D. 2d 81, 87, 267 N Y Supp 2d 29, 35 The nonbreaching party must establish the fact of damage and then sustain its burden of proof as to the amount of damage by proof on any reasonable basis Id at 86 The proper measure of damages is the difference between the price the nonbreaching party would have received under the contract less the necessary expense of performance on its part R & I Electronics, Inc v Neuman (1978), 66 A D 2d 836, 838 411 N Y Supp 2d 4011 404 Under this rule, the breaching party is entitled to a credit for the amount saved by the aggrieved party in not having to perform under the contract However, this amount does not necessarily include overhead, or fixed expenses The wrongdoer is entitled to a credit for only those business costs as were reasonably saved by its breach. Id at 838

In applying these rules, the court of appeals approved of a case having facts strikingly similar to those presented herein Schubert v. Midwest Broadcasting Co (1957), 1 Wis 2d 497, 85 N W 2d 449, was an action to recover damages for the defendant's breach of a contract to telecast a television quiz program produced by the plaintiff's assignor The defendant, which operated a television station had contracted to televise the show for two years but suspended its operations prior to the expiration of that period At the time of the breach, the defendant owed $4,040 under the contract

The show's producer testified that he had an investment of approximately $400,000 in films and materials At the time his contract with the defendant was signed, approximately fifty stations subscribed to his television quiz

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shows The bulk of his expenses was spread over these fifty clients In addition, the plaintiff employed a company to transmit the films and materials to the different stations at a cost of three dollars per week per station Applying the same rules set forth above, the court held that the plaintiff's overhead was fixed and that the three dollar per week figure was the only amount actually saved by him owing to the defendant's breach Accordingly, the defendant's deduction was limited to that amount Id at 505.

In the case at hand, the appellee's major investment was in the production of its master tapes As of 1975, duplicate tapes were being sent to approximately seventy different stations The tapes were not customized to the various subscribers and the appellee's costs in producing the tapes and maintaining its basic operations were fixed The only savings actually experienced due to Midwestern's breach was the one hundred dollars per month attributable to the direct cost of service to WXEZ.

Applying New York law to these facts, we find that the court of appeals correctly measured appellee's damages, granting the contract price minus a credit for only those sums actually saved by appellee, plus interest Appellant is not entitled to any further reduction for a proportional share of appellee's fixed expenses

Accordingly, the judgment of the court of appeals is affirmed

Judgment affirmed

CELEBREZZE, C J , SWEENEY, LOCHER, HOLMES and C BROWN, JJ., concur

W BROWN, J , concurs separately

WILLIAM B BROWN, J , concurring I agree with the majority that the judgment of the court of appeals awarding plaintiff-appellee $25,792 in damages must be affirmed However, because I see no conflict between New York and Ohio law in this case, I find it unnecessary to adopt a conflict of laws rule.(fn1)

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Both Ohio and New York have adopted the general rule that a plaintiff is entitled to recover damages for a defendant's breach of contract in the amount of the further compensation plaintiff would have received under the contract, less the value to plaintiff being relieved of the obligation of completing performance Allen, Heaton & McDonald, Inc v Castle Farm Amusement Co (1949), 151 Ohio St. 522 [39 O O 330], R & I Electronics, Inc v Neuman (1978), 66 A D 2d 836, 411 N Y Supp 2d 401 Additionally, both states require plaintiff to allege and prove what he would have received under the contract and what the continuing performance would have cost Id Neither state's law specifically deals with the issue of allocation of overhead expenses.(fn2) Thus, since the law of both jurisdictions is identical on the question, there is no conflict of laws (fn3) Where no conflict exists courts should naturally apply forum law and the fact that the parties have chosen the law of a particular state to govern their contract is irrelevant (fn4)

Therefore, the sole issue before this court is whether the court of appeals properly awarded damages to appellee Appellant contends that appellee presented no proof as to costs saved in regard to making

master tapes, devising programming schedules, consulting, advising and servicing its customers Appellant argues that these were services for which Midwestern had contracted and that these costs, including Schulke's business trips to Europe, must be allocated among appellee's customers as costs saved Lastly, appellant believes that these constitute essential costs of the contract and have nothing to do with overhead

This argument is unpersuasive Webster's New Collegiate Dictionary (1975 Ed) defines "overhead" as "business expenses * * * not chargeable to a particular part of the work or product " That is precisely what the costs involved in this case are The contract provided that appellee would furnish appellant with music cue sheets and schedules for recommended tape rotations in addition to the tapes themselves There is no mention of advice, consultation or additional servicing As for Schulke's trips to Europe, appellee was already under contract to the BBC for the production of music selections

Even after the breach, appellee entered into a new contract with the BBC. Midwestern's breach presented no opportunity to affect the BBC contracts or reduce Schulke's travel expenses In fact, as the majority opinion has clearly noted, appellee had to continue to produce master tapes for its remaining sixty-nine customers This cost and similar costs for the production of the master tapes are clearly not chargeable to a particular part of the product and are thus overhead expenses Schubert v Midwest Broadcasting Co (1957), 1 Wis 2d 497, 85 N W 2d 449, is precisely on point in this regard and is properly approved and followed

Furthermore, I agree with the majority that appellee appropriately satisfied its burden of proof in regard to savings actually experienced Allen, Heaton & McDonald, Inc , supra. That standard does not require an absolute mathematical precision in the proof of damages or expenses saved Indeed, such a requirement would be manifestly unjust, for it would allow the wrongdoer to profit from his breach and would supply an incentive for the breaching party to obfuscate the facts regarding the issue.

For the foregoing reasons I concur in the judgment that the decision of the court of appeals be affirmed

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Footnotes

1 It is unfortunate that the majority adopts the rule of Restatement of Law 2d (1971) 561, Conflict of Laws, Section 187, without any discussion of the rationale or policy behind such adoption. The majority opinion also ignores some very fundamental and potentially troublesome issues in the application of the test For example, neither the Restatement nor this majority opinion discusses when the chosen state must have a substantial relationship to the parties or the transaction. This issue is particularly important in situations such as the present case where one party has moved and neither party retains any contact with the chosen state. This question and many others left unaddressed by the majority need to be considered before the Restatement test can truly become viable

Furthermore, this court is well advised not to adopt the Restatement rule hastily inasmuch as it has received significant criticism See Note, Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law. Party Autonomy or objective Determination? (1982), 82 Colum L Rev 1659

2 The lack of case law on this question is implicitly recognized by the majority While stating that New York law governs the case, the majority relies on a Wisconsin case to resolve the question

3 Appellant asserts that Ohio law places a stricter burden of proof upon a plaintiff in order to recover compensatory damages than does New York law I do not read the pertinent cases to establish such a difference.

4 In this situation the expectations of the parties are not defeated because their contract is governed by the very rules which they desired Moreover, there is no need for the courts of the forum state to undergo the perils of applying the law of another state beyond the initial inquiry as to whether the rules are identical. In the present case, this application is even less significant because the law of neither state addresses the determinative issue Interestingly enough, there is authority in New York for just such an application Levey v Saphier (1975), 83 Misc 2d 146, 149, 370 N Y Supp 2d 808, 813 (where the court concluded that New York law applies even though it admitted that the application of Delaware law would have made no difference)

93-LW-0615 (1st)

RONALD BRUNNER and DENISE BRUNNER, Plaintiffs
v
QUANTUM CHEMICAL CORPORATION, THE FRED B DEBRA COMPANY, REFRIGERATION SYSTEMS COMPANY, H B ZACHRY COMPANY, W W CLARK CORPORATION, CONCOURSE CONSTRUCTORS, INC , JOHNSON CONTROLS, INC , RIZZO BROTHERS, INC ; ENERFAB, INC , Defendants and PROCESS CONSTRUCTION, INC , Third-Party Plaintiff-Appellee,
v
I&F CORPORATION, Third-Party Defendant-Appellant

APPEAL NO C-920037
1st District Court of Appeals of Ohio, Hamilton County
Decided on March 17, 1993

TRIAL NO A-9100461

Civil Appeal From Hamilton County Court of Common Pleas

G Gregory Lewis, Esq , No 0015395, P O Box 145496, Cincinnati, Ohio 45250-5496, for Third-Party Plaintiff-Appellee

Lindhorst & Dreidame and J. Roger Blust, Esq., No. 0009457, 312 Walnut Street, Suite 2300, P O Box 3339, Cincinnati, Ohio 45202, for Third-Party Defendant-Appellant

DECISION

PER CURIAM

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, the assignments of error, and the briefs and arguments of counsel

Third-party defendant-appellant I&F Corporation ("I&F") has taken the instant appeal from the judgment of the trial court entered on January 3, 1992, which overruled its motion for summary judgment and granted the motion for summary judgment filed by third-party plaintiff-appellee Process Construction, Inc ("Process") In support of its two assignments of error, I&F alleges that the trial court erred by holding that the law of Kentucky should govern the agreement it entered into with Process For the reasons that follow, the judgment of the trial court is affirmed

The factual and procedural history of the instant case is relatively simple On June 14, 1988, the parties agreed, in a document entitled "SUBCONTRACT PURCHASE ORDER," that Process, as the general contractor for a construction project at the Quantum Chemical Corporation, located in Cincinnati, Ohio, would subcontract a portion of the work to I&F Paragraph four of the agreement provided that

> These General Conditions and the foregoing Purchase Order are executed by Purchaser [Process] and Seller [I&F] with reference to the laws of the State of Kentucky and the rights of Purchaser and Seller and the validity, construction and effect of every provision hereof and of the foregoing Purchase Order shall be subject to and construed according to the laws of Kentucky

EXHIBIT B

On January 16, 1989, Ronald Brunner ("Brunner"), an employee of I&F, was injured while working at the Quantum Chemical site Brunner filed suit in the Hamilton County Court of Common Pleas against numerous entities, including Process, which, in turn, filed a third-party complaint against I&F Process, in relying upon the choice-of-law clause above, maintained that its indemnification claim against I&F should be governed by the law of Kentucky I&F, on the other hand, argued that Ohio had a greater material interest in the controversy, that the indemnification clause(fn1) in the subcontract purchase order violated the public policy of Ohio, and that Ohio law should be applied in the instant case Both parties subsequently moved for summary judgment The trial court granted the motion filed by Process and overruled the motion filed by I&F

I&F now appeals, asserting the following assignments of error

> The trial court erred to the prejudice of [I&F] by denying [its] motion for summary judgment,
>
> The trial court erred to the prejudice of (I&F) in granting [Process's] motion for summary judgment

Clearly, the task before us is to determine whether the trial court correctly resolved the choice-of-law dispute between the parties Pursuant to Civ R 44 1(A) (3), the court's determination shall be treated as a ruling on a question of law Vaughn v Vernon Sales Promotions (1990), 68 Ohio App 3d 806, 589 N E 2d 1363 In general, Ohio adheres to the rule that where a conflict-of-law issue arises in a case involving a contract, the law of the state where the contract is to be performed governs Schulke Radio Productions, LTD v Midwestern Broadcasting Co (1983), 6 Ohio St 3d 436, 453 N E 2d 683 The court in Schulke, however, held in its syllabus that

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless [1] either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or [2] application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties See also Sekeres v Arbaugh (1987), 31 Ohio St 3d 24, 508 N E 2d 941

Under the first prong of this test, we are persuaded that the parties' decision to resolve their disputes by applying the law of Kentucky was reasonable considering Process was incorporated in Kentucky and conducted most of its business in that state See Jarvis v Ashland Oil, Inc (1985), 17 Ohio St 3d 189, 478 N E.2d 786

As to the second prong, the first step is to determine whether Ohio has a "greater material interest" in deciding the dispute at issue than does Kentucky Sekeres, supra Our analysis of this question is hindered somewhat because of the lack of guidance in Ohio as to what factors or criteria, when demonstrated, constitute a "greater material interest " while the supreme court in Sekeres, supra, placed some emphasis on the place of performance of the contract and where it was given final approval, it failed, in Jarvis, supra, and in Schulke, supra, to provide a basis for determining whether one state has a greater material interest in an issue than another state We do note, however, that in Jarvis the court was particularly impressed with the fact that the parties had voluntarily entered into a valid con,tract that expressly provided that the laws of Kentucky would govern their legal relationship

In the instant case, the record reveals, inter alia, that the parties agreed, in paragraph four of the subcontract purchase order, to allow the law of Kentucky to govern their legal disputes, that Process is a Kentucky corporation, that Process's principal area of business is Kentucky, that Process has an office in Cincinnati, Ohio, and that the place of performance of the contract was Ohio

Based on our review of the record in its entirety, we are not convinced that Ohio had a greater material interest in the dispute at issue than Kentucky Having made this determination, we deem it unnecessary under the test outlined in Schulke, supra, to ascertain whether the application of Kentucky law here would violate Ohio's public policy Sekeres, supra

Accordingly, we hold that the trial court properly upheld the parties' contractual agreement that the law of Kentucky would govern their dispute

The judgment of the trial court is affirmed

KLUSMEIER, P J , SHANNON and DOAN, JJ

Footnotes

1 Paragraph nine of the subcontract purchase order, entitled "INDEMNIFICATION," provided that

> In the event that Seller [I&F] is required to enter the premises owned, leased, occupied by or under the control of the Purchaser [Process] or others during the performance of the foregoing Purchase Order, Seller agrees to indemnify and hold harmless Purchaser, its officers, employees, and agents from all costs, losses, expenses, damages, claims, suits, judgments, including court costs and reasonable attorneys' fees, or liability resulting from injury, including death, to persons or property arising out of, based upon, or connected with the actions of the Seller or its subcontractors or their respective employees, and Seller agrees to maintain and require its subcontractors to maintain
>
> (1) public liability and property damage insurance * * * in amounts satisfactory to Purchaser to cover the obligations set forth above * * *

99-LW-6100 (11th)

IN RE ESTATE OF REVA DAVIS, a k a REVA LEVIN, a k a REVA KARPEL

CASE NO 98-A-0085
11th District Court of Appeals of Ohio, Ashtabula County
Decided December 3, 1999

Civil Appeal from the Court of Common Pleas, Probate Division Case No 95 ES 276

HON DONALD R FORD, P J , HON ROBERT A NADER, J., HON WILLIAM M O'NEILL, J

ATTY JOHN S SEICH, 1801 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Appellant, Sanford Davis)

ATTY CARL F MULLER, WARREN & YOUNG, PLL, 134 West 46t h Street, P O Box 2300, Ashtabula, OH 44005 (For Appellee, Zelda Altman)

ATTY SAMUEL L ALTIER, 3503 Carpenter Road Ashtabula, OH 44004 (For Appellee, Lynn Alexander)

OPINION

FORD, P J

Appellant, the Estate of Sanford Davis, appeals the judgment entry of the Ashtabula County Court of Common Pleas, Probate Division, in which it ruled in favor of appellee, the Estate of Reva Davis, with respect to the claims asserted by appellant in his complaint for declaratory judgment regarding the disposition of the assets in his former wife's estate, and his request to set aside the antenuptial contract executed by the parties

On March 27, 1983, Sanford Davis ("Sanford") and Reva Davis ("Reva") were married in Euclid, Ohio Prior to that marriage, on March 7, 1983, both parties entered into an "Agreement in Contemplation of Marriage " The antenuptial agreement expressly stated that it was a "marital property agreement under the provisions of Article No 5 41 of the Texas Family Code, Subchapter C, Property Agreements "

In that agreement, Reva's property was described as including (1) ownership in fee simple of an undivided one-third interest in 3,460 acres of land situated in Jasper and Newton Counties, Texas, together with rights to all timber and all underground oil, gas, and other mineral rights, (2) ownership of corporate stock in American Telephone and Telegraph Corp , Cleveland Electric Co , General Motors Corp , Gulf Oil Corp , Fulg States Utilities Co , National Steel Corp , Uniroyal Corp , Marine Midland Bank, and Society Corp , and (3) ownership of bank accounts, certificates of deposit, interest, household furniture, and an automobile The agreement further stated that Sandford owns a building in Ohio and possesses cash

Regarding the Texas property owned by Reva, the record shows that she inherited her one-third interest in June 1978 from her former husband, Eugene Karpel The record also indicates that the remaining two-third's interest was inherited by Mark Karpel ("Mark") in 1986 from Eugene Karpel's brother, Jerome From 1978 to 1993, the income and expenses associated with the land were allocated between the owners on an equal basis, regardless of who actually managed the productive land

EXHIBIT C

Moreover, Reva managed the land from 1978 to 1985, and acted as the bookkeeper from 1978 to 1993 In 1993, Mark assumed full control of the financial management of the land, marking the beginning of income allocation according to their one-third and two-third's ownership rights Finally, checks for oil and gas lease payments were made to Reva and Mark separately after September 1993 For the same time period, proceeds from timber sales were divided by Mark, and one-third of the profits was paid to Reva by checks drawn on his "Magnolia Creek Farms" account

Also, Reva and Mark reported their income from the property separately on their own federal income tax returns by filling out a Schedule "C " No partnership federal tax returns were ever prepared or filed by Reva or Mark for the Texas real estate At the time of Reva's death, the Texas property had a fair market value of $2,365,000

In addition to the Magnolia Creek Farms account, there existed a "Forestry Account" at the State Bank of Jasper until Reva's death, at which time the account was closed and a check for one-third of the balance was issued to appellee, Reva's estate, with the remaining two-thirds going to Mark The Forestry Account was used for emergency purposes relating to the Texas property and for paying property taxes on it All income was placed into the Forestry Account until the Magnolia Creek Farms account was opened. No proceeds were withdrawn from the Forestry Account after 1993

After their date of marriage, Sanford and Reva resided as husband and wife for the next eleven years, spending part of each year residing in Beaumont, Texas and Ashtabula, Ohio In February 1994, Reva purchased a home in Ashtabula, Ohio, and remained there with Sanford until her death on April 25, 1995 During the entire time that she remained in Ohio, Reva maintained assets both in Texas and Ohio

Importantly, Reva died testate, and her will was admitted into probate by the Probate Court of Ashtabula County on May 9, 1995. As part of her will, Reva left to Sanford a bequest of $25,000 and the right to live in her residence for two years provided that he pay all maintenance costs of that residence, including real estate taxes and fire insurance. Zelda Altman and Lynn Alexander were duly appointed co-executors of Reva's estate On August 18, 1995, Sanford filed an election in the probate court to take against Reva's will

On August 30, 1995, Sanford filed a complaint in the Ashtabula County Probate Court for declaratory judgment, requesting that the court set aside the antenuptial agreement On December 13, 1996, Sanford died, and his estate was substituted as a party for him in this action on March 27, 1997 Importantly, the foregoing facts were undisputed and derived from the stipulation of facts filed before the probate court, as well as, the court's judgment entries

In an August 18, 1998 judgment entry, the probate court ruled on appellant's (now Sanford's estate) complaint in favor of appellee Appellant now asserts the following assignments of error on appeal

> "[1] The trial court erred to the prejudice of Plaintiff-Appellant [sic] in ruling that Texas law, not Ohio law, is the appropriate choice of law in this case
>
> "[2] The trial court erred in ruling that the Antenuptial Agreement [sic] is valid
>
> "[3] The trial court erred in ruling that Reva Davis' ownership of the Texas property was not held by a partnership interest, and therefore not includable as an asset in Reva Davis' Ohio probate [sic] estate "

In the first assignment of error, appellant avers that the antenuptial agreement is a contract and, hence, should be governed by the law of the place of performance rather than the place of execution Therefore, appellant argues that Ohio law should govern the agreement since both Sanford and Reva were married in Ohio, resided in Ohio for part of each year of their marriage, and Reva's will was executed and probated in Ohio Thus, appellant claims that Texas law has no significant relationship to the agreement

In Schulke Radio Productions, Ltd v Midwestern Broadcasting Co (1983), 6 Ohio St 3d 436, syllabus, the Supreme Court of Ohio held

> "The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties "

Although appellant correctly contends that Ohio was the state in which Sanford and Reva were married and resided for part of each year, as well as, the fact that Reva's will was executed and probated in Ohio, the antenuptial agreement expressly provides that Texas law is to govern the agreement Indeed, the agreement contains the following language

> "WHEREAS, each has property, both real and personal, acquired by each prior to said date of March 27, 1983, and it is the desire of both parties that each should retain all ownership of the properties owned by either prior to their marriage, therefore, each desires to enter into a marital property agreement under the provisions of Article No. 5 41 of the Texas Family Code, Subchapter C, Property Agreements: ***"

Importantly, the antenuptial agreement was executed in Texas prior to the Ohio marriage Additionally, the facts reveal that except for the last year of Reva's life, both she and Sanford lived in Texas for part of each year of their marriage. Moreover, Reva maintained at least one bank account in Texas and the large land interest she had was in land also situated in Texas

In reviewing the antenuptial agreements, it clearly demonstrates that Sanford and Reva both intended that it would be governed by Texas law The factual record further shows that Texas has substantial contacts with the antenuptial agreement by virtue of the fact that Reva's large land interest is located there, she maintained at least one bank account in Texas, and the antenuptial agreement was signed in that state Also relevant to the substantial contacts evaluation is the fact that Sanford and Reva resided in Texas for part of each year of the first eleven years of their twelve year marriage Thus, we conclude that the standards articulated in Schulke have been met and the trial court properly determined that the antenuptial agreement should be governed by the laws of Texas Therefore, appellant's first assignment of error is without merit

In his second assignment of error, appellant argues that the antenuptial agreement is invalid because he received a disproportionate share under it, and the agreement failed to provide a fair and reasonable disclosure of Reva's property interests at the time of signing because the value of each asset was not provided

As this court has already indicated that the antenuptial agreement is governed by Texas law, the resolution of this issue lies in a consideration of Texas law as it relates to the antenuptial agreement

Under the law of Texas, antenuptial agreements are presumed valid and the burden to prove that such agreement is invalid rests with the challenging party Grossman v Grossman (Tex App 1990), 799 S W 2d 511, 513 To prove that an antenuptial agreement is invalid, the challenging party must show that he or she did not execute the agreement voluntarily or that it was unconscionable at the time of execution and the challenging party· (1) was not provided a fair and reasonable disclosure of the other party's property or financial obligations, (2) did not, in writing, voluntarily waive any right to disclosure of the other party's property or financial obligations beyond the disclosure provided, and (3) did not have, or could not reasonably have had, adequate knowledge of the other party's property or financial obligations Texas Family Code § 5 46

Texas courts will consider the maturity, business backgrounds, educational levels, prior marriage experiences, ages, and motivations of the parties, as additional considerations in determining the validity of an antenuptial agreement Marsh v Marsh (Tex App 1997), 949 S W 2d 734, 741, Williams v Williams (Tex App 1986), 720 S W 2d 246, 249 Furthermore, Texas courts interpret antenuptial agreements to the effect that, "almost without limitation, what the parties agree upon is valid, the parties are bound by the agreement they have made, and the fact that a bargain is a hard one does not entitle a party to be relieved therefrom if he assumed it fairly and voluntarily " Marsh, 949 S W 2d at 740 The validity of an antenuptial agreement will be considered "on a case-by-case basis, looking to the entire atmosphere in which the agreement was made " Id at 739

Moreover, contrary to appellant's assertions, there is no mandate in Texas law that the value of the assets contained in the antenuptial agreement also must be provided in the agreement For example, in Williams, supra, unreported, at 249, 251, the validity of an antenuptial agreement was upheld even though there was no value itemization of the property listed in that agreement In Williams, the appellant argued that certain property should not have been awarded to the appellee because it had not been specifically identified or described in the antenuptial agreement However, the appellate court affirmed the trial court's award of the property in controversy to the appellee because its ownership was later attributed to the sole proprietorship, Louis E Williams Jewels, and the antenuptial stated, "'all inventory, assets, accounts receivable and each and every item, material and immaterial, of that sole proprietorship known as Louis E Williams Jewels (***)' [is] the separate property of appellee " Id at 249 Additionally, under Texas law, an antenuptial agreement will not be invalidated due to a lack of disclosure of the assets of the parties to that agreement unless the court has first found that the agreement was unconscionable, when the challenging party executed the agreement voluntarily Marsh, 949 S W 2d at 738, 743 In that case, the appellate court did not address the appellant's contention that the antenuptial agreement was invalid for lack of full and fair disclosure, because it had determined the agreement was not unconscionable Id

In the instant matter, appellant does not contend, and the facts do not show, that Sanford involuntarily or unfairly entered into the agreement Indeed, the stipulation of facts states that Sanford entered into the antenuptial agreement "freely " Thus, the only issue which must be resolved in this assignment of error is whether the agreement provided a fair and reasonable disclosure of the property In answering that question, we need only look to the language of the agreement itself, which expressly stated that Reva had an interest in 3,460 acres of land in Texas and rights to proceeds from any timber, oil, gas, or mineral production. The agreement further lists all of Reva's ownership of corporate stocks, and indicates that she has bank accounts, certificates of deposit, other interest proceeds, household furniture and an automobile Finally, the agreement states that appellant owns a building in Ohio and has cash invested in his name

As set forth in Williams, there is no requirement that an antenuptial agreement must include an itemization of the values of each party's properties in order to make such agreement valid Instead, the issue of whether the property has been fairly and reasonably disclosed will be reviewed on a case-by-

case basis and by looking at the entire atmosphere in which the agreement was made

In reviewing the facts of this matter, both parties were mature adults and possessed business experience at the time of executing the agreement Also, there was a stipulation that Sanford freely entered into the antenuptial agreement Moreover, appellant's assignment of error focuses merely on the fact that Reva's assets listed in the agreement were not accompanied by a monetary valuation In our review, we conclude that there is otherwise a complete description of the extent of Reva's assets Indeed, the antenutpial agreement notified Sanford that she owned a one-third interest in 3,460 acres of land in Texas, along with the rights to proceeds from any timber, oil, gas, or mineral production, retained corporate stock in nine corporations, and possessed certain bank accounts, certificates of deposit, household furniture, an automobile, and interest Consequently, we hold that based on the facts and circumstances of this case, there was a fair and full disclosure of each party's assets because Sanford was on notice of the extent of her property and, thus, had ample opportunity to inquiry as to the actual value of those assets

In addressing this assignment of error, we have indulged the appellant's contentions with great latitude in light of the fact that, as articulated in Marsh, issues concerning a lack of disclosure of the assets in an antenuptial agreement will not be addressed until after such agreement has been determined to be unconscionable (fn1) Importantly, appellant failed to argue the issue of unconscionability and, hence, waived his assigned issue concerning asset disclosure Therefore, appellant's second assignment of error is not well-taken

In appellant's third assignment of error, it is claimed that the trial court erred in its determination that the Texas property was not held by a partnership Appellant further contends that if the property was held by a partnership, it would constitute personal intangible property and would then be includable as an asset of Reva's estate

Pursuant to the laws of Texas, a "'partnership is an association of two or more persons to carry on as co-owners of a business for profit.' ***" Grimmett v Higginbotham (Tex App 1994), 907 S.W 2d 1, 2 The burden of proving the existence of a partnership is imposed upon the party seeking to establish the relationship. Id. Finally, the "party asserting the formation of a partnership relationship must establish each of the following essential elements (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise " Id., citing Ayco Dev Corp v G E T Serv Co (Tex 1981), 616 S W 2d 184, 186 If any one of the four elements is not satisfied, then no partnership exists, as a matter of law Id

In its brief, appellant attempts to demonstrate that the Texas property was a partnership, but neglected to address the existence of the four factors set forth in Grimmett Instead, appellant argued the existence of a partnership under Ohio law In addition, the stipulated facts state that Reva was a one-third owner of the Texas property, while Mark was a two-third's owner The facts also indicate that the property had been in the family for generations and had vested in Reva and Mark through their inheritances Consequently, the record evidences that Reva and Mark possessed the land as tenants in common

Under both Texas and Ohio law, the holding of land as tenants in common, coupled with the right to share in the profits of such land does not constitute a partnership Furthermore, appellant has failed to demonstrate that the sharing in the profits indicated the establishment of a partnership rather than a tenant in common relationship Thus, appellant's third assignment of error is meritless.

For the foregoing reasons, appellant's assignments of error are without merit, and the judgment of

the Ashtabula County Court of Common Pleas, Probate Division, is affirmed

NADER, J , O'NEILL, J , concur

Footnotes

1. "In determining whether a contract is unconscionable or not, the court must look to the entire atmosphere in which the agreement was made, the alternatives, if any, which were available to the parties at the time of the making of the contract, the non-bargaining ability of one party, whether the contract is illegal or against public policy, and, whether the contract is oppressive or unreasonable " Marsh, 949 S W 2d at 740.

ISSUED to Attorney

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER	:	**CASE NO. DR0500131**
Plaintiff,	:	
		JUDGE PANIOTO
vs.	:	**MAGISTRATE THEILE**
JON H ENTINE	:	**SUBPOENA *DUCES TECUM* FOR DOCUMENT PRODUCTION**
Defendant.	:	

TO: Yahoo
Attn: Custodian of Records
701 First Ave.
Sunnyvale, CA 94089

STATE OF OHIO, COUNTY OF HAMILTON SS

You are required to appear before a notary public in and for the County and State on Thursday, July 20, 2006 at 9 00 A M at the offices of Buechner, Haffer, O'Connell, Meyers & Koenig Co , L P A , 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, to produce records hereinafter referred to

You are required to bring with you and produce the documents listed on the attached Exhibit "A "

This is a Records Subpoena Only, and in lieu of your personal delivery of these records on the date noted, you may send certified copies of all such records that are in your possession, custody and/or control to Robert J Meyers, Esq , of Buechner, Haffer, O'Connell, Meyers & Koenig Co , L P A , located at 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, prior to Thursday, July 20, 2006 A proposed certificate is attached

This Subpoena is issued pursuant to Rule 45 of the Ohio Rules of Civil Procedure by Robert J Meyers, attorney of record in the within cause pursuant to division (A)(2) of said rule

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH
2006 JUN -6 A 5b
FILED

BUECHNER, HAFFER, MEYERS & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

D69049341

Fail not under penalty of Law

WITNESS my hand this 5th day of July, 2006 at Cincinnati, Hamilton County, Ohio

Robert J Meyers (0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Subpoena Duces Tecum for Document Production to Google, Inc has been served by ordinary U S Mail this 5th day of July, 2006 upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206

Robert J Meyers #0014589
Attorney for Defendant

BUECHNER, HAFFER, MEYERS & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

CERTIFICATION

STATE OF CALIFORNIA)
) SS
COUNTY OF _____)

Under penalty of perjury, I hereby verify that I am the authorized Custodian of Records of Yahoo and am duly authorized to certify that the attached copies are copies of the complete records relating to Yahoo

I further verify that the originals of these documents were made at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters

The documents were kept under my control and in the usual manner and course of business of Yahoo

Each document was made in the usual manner and course of business of Yahoo according to the customary standards of this office

_____
Records Custodian

Sworn to and subscribed before me this _____ day of _____, 2006

_____
Notary Public

BUECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

Ohio Rules of Civil Procedure
Rule 45. Subpoena

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena

(2)(a) A person commanded to produce under divisions (A)(1)(b) (ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does nay of the following

(a) fails to allow reasonable time to comply,
(b) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies,
(c) requires disclosure of a fact known or opinion held by an expert not retained or specifically employed by any party in anticipation of litigation or preparation for trial as described by Civ R 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party,
(d) subjects a person to undue burden

(4) Before filing a motion pursuant to a division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden

BUECHNER, HAFFER, MEYERS & KOENIG CO, L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated

(D) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ R 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim

BUECHNER, HAFFER, MEYERS & KOENIG CO, L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

EXHIBIT "A"

1 Copies of all incoming and outgoing emails associated with the email addresses of , both held in the name of Ellen Turner, for the period of June 1, 2002 through the date of receipt of this Subpoena

107535

BUECHNER, HAFFER, MEYERS & KOENIG CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

ISSUED to Attorney

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER	:	**CASE NO. DR0500131**
Plaintiff,	:	
		JUDGE PANIOTO
vs.		**MAGISTRATE THEILE**
JON H. ENTINE	:	**SUBPOENA *DUCES TECUM* FOR DOCUMENT PRODUCTION**
Defendant.		

TO: Google, Inc.
Attn: Custodian of Records
1600 Ampitheatre Parkway
Mountain View, CA 94043

STATE OF OHIO, COUNTY OF HAMILTON SS

You are required to appear before a notary public in and for the County and State on Thursday, July 20, 2006 at 9 00 A M at the offices of Buechner, Haffer, O'Connell, Meyers & Koenig Co , L P A , 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, to produce records hereinafter referred to

You are required to bring with you and produce the documents listed on the attached Exhibit "A "

This is a Records Subpoena Only, and in lieu of your personal delivery of these records on the date noted, you may send certified copies of all such records that are in your possession, custody and/or control to Robert J Meyers, Esq , of Buechner, Haffer, O'Connell, Meyers & Koenig Co , L P A , located at 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, prior to Thursday, July 20, 2006 A proposed certificate is attached

This Subpoena is issued pursuant to Rule 45 of the Ohio Rules of Civil Procedure by Robert J Meyers, attorney of record in the within cause pursuant to division (A)(2) of said rule

BUECHNER, HAFFER, MEYERS & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

D69049311

Fail not under penalty of Law

WITNESS my hand this 5th day of July, 2006 at Cincinnati, Hamilton County, Ohio

Robert J Meyers (0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Subpoena Duces Tecum for Document Production to Google, Inc has been served by ordinary U S Mail this 5th day of July, 2006 upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206

Robert J Meyers #0014589
Attorney for Defendant

BUECHNER, HAFFER, MEYERS & KOENIG CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

CERTIFICATION

STATE OF CALIFORNIA)
) SS
COUNTY OF _____)

Under penalty of perjury, I hereby verify that I am the authorized Custodian of Records of Google, Inc and am duly authorized to certify that the attached copies are copies of the complete records relating to Google, Inc

I further verify that the originals of these documents were made at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters

The documents were kept under my control and in the usual manner and course of business of Google, Inc

Each document was made in the usual manner and course of business of Google, Inc according to the customary standards of this office

_____
Records Custodian

Sworn to and subscribed before me this _____ day of _____, 2006

_____
Notary Public

BUECHNER, HAFFER, MEYERS & KOENIG CO, L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

Ohio Rules of Civil Procedure
Rule 45. Subpoena

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena

(2)(a) A person commanded to produce under divisions (A)(1)(b) (ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does nay of the following

(a) fails to allow reasonable time to comply,
(b) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies,
(c) requires disclosure of a fact known or opinion held by an expert not retained or specifically employed by any party in anticipation of litigation or preparation for trial as described by Civ R 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party,
(d) subjects a person to undue burden

(4) Before filing a motion pursuant to a division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden

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(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated

(D) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ R 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim

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EXHIBIT "A"

1 Copies of all incoming and outgoing emails associated with the email addresses of Ellen turner@gmail com and runerun@gmail com, both held in the name of Ellen Turner, for the period of June 1, 2002 through the date of receipt of this Subpoena

2 Copies of all incoming and outgoing emails associated with the email address of Bruce humbert@gmail com, held in the name of Bruce Humbert, for the period of June 1, 2002 through the date of receipt of this Subpoena

107538

BUECHNER, HAFFER, MEYERS & KOENIG CO , L P A
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