

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

WILTON S. SOGG, as executor for the Estate of Julia Sogg, individually and on behalf of a class of all others similarly situated; and)

THE STATE OF OHIO ex rel. WILTON S. SOGG, as executor of the Estate of Julia Sogg, individually and on behalf of a class of all others similarly situated,)

Plaintiffs,)

v.)

DOUG WHITE, Director of Commerce of the State of Ohio,)

Defendant.)

No. 04 CVH08 08028

Judge Frye

AMENDED CLASS ACTION COMPLAINT

Plaintiffs WILTON S. SOGG, as executor for the Estate of Julia Sogg, individually and on behalf of a class of all others similarly situated, and Plaintiff THE STATE OF OHIO ex rel. WILTON S. SOGG, as executor for the Estate of Julia Sogg, individually and on behalf of a class of all others similarly situated. for their AMENDED CLASS ACTION COMPLAINT against Defendant DOUG WHITE, Director of Commerce of the State of Ohio, state the following:

INTRODUCTION

1. As described more fully below, private property subject to the Ohio Unclaimed Funds Chapter, Ohio Rev. Code §§ 169.01–169.99 (the “Ohio Chapter” or “Chapter”), is placed in the custody or control of the Defendant for safekeeping pending its return to its rightful owner. While in the Defendant’s custody or control, the property is used (I) either to accrue actual earnings (e.g., the interest earned on a bank account into which the funds are deposited, or dividends paid on stock), which are then used by the state for purposes having no relation to the unclaimed property or other

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accruals, or (ii) to avoid having to borrow like amounts for state purposes, in which case it earns “constructive interest.”

2. Under long-settled and widely-accepted principles of both the federal and Ohio Constitutions, the earnings on unclaimed property “follow the principal,” and are themselves private property. Nevertheless, the Chapter, specifically, § 169.08(D), directs that when the true owner files a claim, Defendant is prohibited from returning to the owner the earnings, or constructive interest, that have accrued on his or her private property while under the Defendant’s custody or control. Thus, pursuant to §169.08(D), Defendant wrongfully withheld, and failed to pay compensation for, Mr. Sogg’s and the Class’s private property when Defendant returned their principal.

3. In Count I, Mr. Sogg seeks an order compelling Defendant to return his and the Class’s private property. Alternatively, in Count II, Mr. Sogg, as relator, seeks a writ of mandamus to Defendant to compel the institution of an appropriation action so that compensation for the previously uncompensated taking of Mr. Sogg’s and the Class’s private property may be determined and paid. In Counts III, IV, and V, Mr. Sogg alleges, respectively, that Defendant’s retention of the earnings and constructive interest on unclaimed funds constitutes a facial taking of private property for public use without just compensation in violation of Article I, §19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and a deprivation of Plaintiff’s constitutional rights in violation of 42 U.S.C. § 1983.

FACTUAL ALLEGATIONS

The Parties

4. Plaintiff Wilton S. Sogg is executor of the estate of his mother, Julia Sogg. At all relevant times, Mr. Sogg, as was Julia Sogg, is and was a citizen and resident of the State of Ohio. Mr. Sogg brings Counts I and III through V as an individual and executor, and Count II as relator.

5. Defendant Doug White is the Director of Commerce of the State of Ohio. In that position, Defendant supervises and administers the Chapter, as did her predecessors.

The Chapter and its Operation

6. Ohio adopted the Unclaimed Funds Chapter in 1967.

7. The Chapter places all unclaimed funds under the control of the Defendant, the Director of Commerce.

8. Section 169.02 of the Chapter defines “unclaimed funds” as various types of money, rights to money, or intangible property that has remained inactive and under the control of certain “holders” (e.g., banks, investment brokers, insurance companies, or utilities) for a prescribed period - between one and fifteen years, depending on the type of funds.

9. Section 169.05(A) of the Chapter requires a holder of unclaimed funds to report the funds to the Defendant. If the holder reports less than \$50, the holder must remit the entire amount to the Defendant at the time of reporting. The Defendant may deposit the funds in the state treasury to the credit of the Unclaimed Funds Trust Fund or invest them with a “financial organization” (a bank, for example). In either case, the funds accrue earnings, and those earnings are eventually paid into the state treasury to the credit of various state funds.

10. If the holder reports more than \$50, the holder must deliver to Defendant 10% of the unclaimed property at the time of reporting. The 10% is then deposited into either the Unclaimed Funds Trust Fund or a financial institution. The Defendant may then allow the holder to continue holding the remaining 90% or require the holder to submit it to the state. In either case, § 169.05 mandates that the funds be invested in "income-bearing accounts" subject to Defendant's approval, and the earnings on those accounts are eventually paid into the state treasury to the credit of various state funds.

11. Alternatively, the state has profited, and will profit, from the use of the Plaintiff's and the Class's property during the period the property is held in Defendant's custody and control under the Chapter, even if deposited in a non-interest bearing account. Because they allow the state to avoid borrowing a like amount, when so used these funds must be considered as earning constructive interest at the state's usual borrowing rate. That constructive interest is as much part of the *res* held or controlled by Defendant as is the principal.

12. Unlike an escheat statute, which transfers title to property to the state after certain court procedures are followed, the Chapter is purely custodial in nature, and title to the unclaimed funds never transfers from the owner to the State of Ohio. Instead, title and ownership at all times remain with the original owner of the property, and Defendant acts merely as the custodian of such property, holding it in trust until its rightful owners come forward to claim it.

13. The fact that unclaimed funds remain forever the private property of the owner is reflected in the Chapter itself. Section 169.08(A) of the Chapter provides that "[a]ny person claiming a property interest in unclaimed funds delivered or reported to the state under Chapter 169 . . . may

file a claim thereto," and § 169.08(B) mandates that "[n]o statute of limitations shall bar the allowance of a claim."

14. Despite its custodial nature, however, the Chapter denies claimants the earnings or constructive interest that accrue while the Defendant holds custody or control of the unclaimed property. Instead, § 169.08(D), as amended effective July 26, 1991, provides that "[i]nterest is not payable to claimants of unclaimed funds held by the state."

15. Accordingly, Defendant has retained, and will continue to retain, all earnings and constructive interest that have accrued or will accrue on unclaimed funds since July 26, 1991, regardless of whether the funds were reported or delivered to Defendant before July 26, 1991, or after July 26, 1991.

16. Pursuant to § 169.08(D), Defendant also withholds 5% of the principal amount from each claim paid to cover the cost of administering the Chapter.

17. In fiscal year 2003, Defendant paid out more than 36,000 unclaimed property claims totaling more than \$40 million but withheld the service charge, as well as all earnings and constructive interest, pursuant to § 169.08(D).

18. The net result is that Defendant retains the earnings and constructive interest on presumptively unclaimed property held under or subject to the Chapter, pursuant to the Chapter, for the state's use without just (or any) compensation, in violation of the Constitutions of Ohio and the United States, even though the return of such earnings to the owner will not substantially harm the unclaimed property program, because the vast majority of unclaimed property remains permanently unclaimed.

19. Any request to Defendant for return of the earnings properly belonging to the Plaintiff would be futile because the Chapter specifically prohibits Defendant from returning such earnings. Moreover, Defendant disputes that the owners of the unclaimed principal also own its earnings.

Plaintiff's Property

20. On or about January 7, 2004, Plaintiff, as executor of his mother's estate, filed a claim with Defendant for two amounts: (1) an insurance policy claim payment of \$40.52 reported by Blue Cross & Blue Shield Mutual, Property ID: 1701258 and (2) dividends of \$292.86 reported by Bank of New York, Property ID: 1018597. The two claims totaled \$333.38.

21. Defendant took custody of the \$40.52 insurance payment on or about November 1, 1989, and the \$292.86 in dividends on or about September 2, 1998.

22. On or about April 1, 2004, Defendant sent Plaintiff a check for \$320.72.

23. On information and belief, the \$320.72 reflects the principal amount of the two claims (\$333.38), plus interest on the \$40.52 insurance payment earned prior to July 26, 1991 (but none thereafter), pursuant to the former version of § 169.08, less the 5% withholding mandated by the current version of § 169.08(D) to cover Defendant's administrative costs.

24. Pursuant to § 169.08(D), Defendant retained the earnings or constructive interest that had accrued on Plaintiff's unclaimed funds since July 26, 1991, and paid not compensation for those earnings.

CLASS ACTION ALLEGATIONS

25. Pursuant to Rule 23 of the Ohio Rules of Civil Procedure, Plaintiff brings this action on behalf of himself and the following Class:

All persons or entities, excluding members of the federal or State of Ohio judiciary, who filed, or will file, claims for funds that had been reported to the Director of Commerce of the State of Ohio pursuant to the Ohio Unclaimed Funds Chapter (or its predecessor or successor acts), but who, upon payment of their claims, were not paid the actual earnings or constructive interest earned on those funds since July 26, 1991, or just compensation for such earnings.

26. The Class is sufficiently large that joinder of all members would be impracticable. The Defendant paid more than 36,000 claims in 2003 alone. Furthermore, according to Defendant's website, the state holds "more than 2.1 million accounts worth over \$216 million in its custody" <http://www.com.state.oh.us/ODOC/unfd/unfdabout.htm>. The earnings on these claims, which is the private property at issue in this lawsuit, would be too small to warrant individual actions. Thus, joinder of the many thousands of Class members in this case would be impracticable, even impossible.

27. Common questions of law or fact exist, including the following:

(a) Whether the actual or constructive earnings on property held in custody by the Defendant are private property;

(b) Whether § 169.08 of the Chapter, which directs the Defendant to withhold interest earned on unclaimed funds, violates Article I, §19, of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution;

(c) What are the proper remedies for Defendant's retention of such private property. Conversely, the only individual question affecting Class members is the calculation of the exact amount of earnings to which each member is entitled. The common questions clearly predominate over any questions affecting only individual members.

28. Plaintiff's claim is typical of the other Class members because, like all other Class members, he filed a claim for unclaimed funds that had been reported to Defendant pursuant to the

Chapter, but he was not given any of the actual earnings or constructive interest earned on that property after July 26, 1991. Thus, each Class member is affected in the same manner by the Defendant's retention of their private property - the earnings or constructive interest on their private property.

29. Plaintiff and his counsel will fairly and adequately protect the interests of the Class. Plaintiff's interests are consistent with those of the Class, and he has no interests antagonistic to the Class. Plaintiff is represented by experienced and able counsel. Plaintiff's lead counsel have successfully represented plaintiff classes in complex matters throughout the United States in both federal and state courts. Plaintiff's local counsel have vast experience in complex matters in both the federal and Ohio courts.

30. This class action is an appropriate method for the fair and efficient adjudication of the claims asserted herein. Repetitive individual litigation of the claims in this case would pose an unnecessary burden on Class members and the court system. This class action is not expected to present any significant management difficulties and focuses, by definition, on the uniform and consistent actions of the Defendant in enforcing an allegedly unconstitutional law. The prosecution of separate actions would also create a risk of inconsistent adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for the Defendant.

CONTROLLING CASE LAW

31. The United States Supreme Court has recognized that, since at least the mid-1700s, the common law has accepted the general rule that "interest follows principal." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165, 118 S.Ct. 1925, 1930 (1998). As the Court held: "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund

itself is property.” *Id.* at 167, 118 S.Ct. at 1931 (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452 (1980)). Ohio has long followed the same rule. *See, e.g., City of Ohio v. Cleveland and Toledo R.R. Co.*, 6 Ohio St. 489, 494–95 (1856).

32. For example, in *Webb’s*, the Court held that the retention of interest earned on private funds while in the custody of a state agency was a taking in violation of the Fifth Amendment to the United States Constitution. *Webb’s*, 449 U.S. at 164, 101 S.Ct. at 452. The *Webb’s* Court struck down a Florida statute that allowed a county clerk to retain interest earned on interpleader funds:

[A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. Thus, the Court held, the interest earned on the interpleader funds belonged not to the government but to the owners of the funds, and must be returned to them. *Id.* A copy of the *Webb’s* opinion is attached as Exhibit A.

33. Even when the state does not invest the funds in an interest-bearing account (if it spends them, for example), the state benefits from the use of those funds and must pay constructive interest. For example:

[I]f . . . seized currency is not put into an interest-bearing account, the funds will nevertheless ‘be considered as constructively earning interest at the government’s alternative borrowing rate’ because the government benefits by the amount of interest it doesn’t have to pay while the Treasury has use of the money. Such amounts, we concluded, become just as much a part of the *res* as earned interest because they are its equivalent.

United States v. \$133,735.30 Seized From U.S. Bancorp Brokerage Account No. 32130630, 139 F.3d 729, 732 (9th Cir. 1998) (quoting *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491,

1495–96 (9th Cir. 1995)); *see also United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 505 (6th Cir. 1998) (“Financial assets in the hands of the Government are a means by which the Government avoids having to borrow equivalent funds.”) (citing *\$277,000 U.S. Currency*, 69 F.3d at 1494); *United States v. 1461 West 42 St., Hialeah, Fl.*, 251 F.3d 1329, 1338 (11th Cir. 2001) (suggesting that it would follow *\$515,060.42*).

COUNT I

RETURN OF PLAINTIFF’S AND THE CLASS’S PROPERTY

(Wilton S. Sogg and the Class)

34. Plaintiff realleges preceding paragraphs 1 through 33 as if fully set forth herein.

35. At all times, the earnings on Plaintiff’s and the Class’s property held in custody and control by Defendant as unclaimed property have been and remain the private property of the owner of the principal on which such earnings accrued.

36. Neither Defendant nor the State of Ohio has ever had title or any other ownership interest in such earnings.

37. Although § 169.08(D) of the Chapter purports to allow Defendant to retain the earnings on the private property Defendant holds in custody or control under the Chapter, that provision is unconstitutional and void because it denies the protection of the property owner’s private property rights afforded by Art. I, § 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

38. Defendant had and has no right, therefore, to retain that private property after the return of the principal upon which such earnings accrued, and should be required to return that property to its rightful owners.

COUNT II

MANDAMUS

(State ex rel. Wilton S. Sogg)

39. Plaintiff realleges preceding paragraphs 1 through 33 as if fully set forth herein.

40. Defendant's retention of the earnings on the private property held in custody or control pursuant to the Ohio Chapter is a taking of private property without compensation in violation of Art. I, §19 of the Ohio Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

41. Pursuant to these constitutional protections, Plaintiff, as relator, for himself and the Class, has a clear legal right to be compensated for the involuntary taking of Plaintiff and the Class's private property by Defendant.

42. By reason of these constitutional provisions, Defendant has a clear legal duty to pay compensation for the involuntary taking of Plaintiff's and the Class's private property.

43. Plaintiff and the Class have no adequate legal remedy to obtain compensation for Defendant's taking of their private property — their actual or constructive earnings — pursuant to the Act.

COUNT III

FACIAL TAKING UNDER THE OHIO CONSTITUTION

(Wilton S. Sogg and the Class)

44. Plaintiff realleges preceding paragraphs 1 through 33 as if fully set forth herein.

45. Article I, §19, of the Constitution of the State of Ohio provides that "where private property shall be taken for public use, a compensation therefor shall first be made in money"

46. The actual earnings or constructive interest earned on private property owned by Plaintiff and the Class while in the Defendant's custody pursuant to the Chapter is private property.

47. By allowing Defendant to retain such private property, the Chapter provides a windfall to the State and places upon the owners of unclaimed funds an unfair burden that should be borne by all citizens of the state.

48. Defendant's unlawful use and retention of the earnings and constructive interest on Plaintiff's and the Class's private property, and the failure to return that private property along with the principal upon which such earnings accrued, is a facial taking of Plaintiff's and the Class's private property without compensation, and as such a deprivation of the Plaintiff's and the Class's rights secured under Article I, §19, of the Ohio Constitution.

49. Plaintiff seeks, on his behalf and on behalf of the Class, only prospective relief in this Court.

COUNT IV

FACIAL TAKING UNDER THE UNITED STATES CONSTITUTION

(Wilton S. Sogg and the Class)

50. Plaintiff realleges preceding paragraphs 1 through 33 as if fully set forth herein.

51. The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part, "nor shall private property be taken for public use, without just compensation."

52. The actual earnings or constructive interest earned on private property owned by Plaintiff and the Class while in the Defendant's custody pursuant to the Chapter is private property.

53. By allowing Defendant to retain such private property, the Chapter provides a windfall to the state and places upon the owners of unclaimed funds an unfair burden that should be borne by all citizens of the state.

54. Defendant's unlawful use and retention of the earnings and constructive interest on Plaintiff's and the Class's private property, and the failure to return that private property along with the principal upon which such earnings accrued, is a facial taking of Plaintiff's and the Class's private property without just compensation, and as such a deprivation of the Plaintiff's and the Class's rights secured under the Fifth and Fourteenth Amendments to the United States Constitution.

55. Plaintiff, on his own behalf and on behalf of the Class, seeks only prospective relief in this Court.

COUNT V

VIOLATION OF 42 U.S.C. § 1983

(Wilton S. Sogg and the Class)

56. Plaintiff realleges preceding paragraphs 1 through 33 as if fully set forth herein.

57. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

58. By following the dictates of the Chapter, which prohibits and fails to authorize the return of the actual earnings or constructive interest on the private property held pursuant to the Chapter, thereby taking Plaintiff's and the Class's private property without compensation, Defendant,

acting under color of Ohio law, has unlawfully deprived Plaintiff and the Class of their constitutional rights secured by the Fifth and Fourteenth Amendments to the United States Constitution.

59. Defendant has taken Plaintiff's and the Class's private property for public use without just compensation under color of the statutes, regulations, and customs of the State of Ohio.

60. Defendant is therefore liable for prospective relief under Section 1983 in the form of a declaration that § 169.08(D) is facially unconstitutional and an order enjoining Defendant from enforcing § 169.08(D) of the Chapter.

PRAYER FOR RELIEF

As to Count I:

(a) Determine that this action may be maintained as a class action pursuant to Rule 23 of the Ohio Rules of Civil Procedure on behalf of the Class defined herein and declare the Plaintiff to be a proper Class representative and his counsel to be Class counsel;

(b) Order Defendant to return to Plaintiff and each member of the Class the actual or constructive earnings that accumulated on their private property while it was held in Defendant's custody and control pursuant to the Ohio Unclaimed Property Chapter;

(c) Award Class counsel reasonable fees, including attorneys' fees, together with reimbursement of expenses and costs of suit as allowed by law; and

(d) Grant such other relief the Court deems just and proper.

As to Count II:

(a) Determine that this action may be maintained as a class action pursuant to Rule 23 of the Ohio Rules of Civil Procedure on behalf of the Class defined herein and declare Plaintiff to be a proper Class representative and his counsel to be Class counsel;

(b) Issue a writ of mandamus to the Defendant compelling Defendant to institute an appropriation action with respect to the earnings on Plaintiff's and the Class's private property while it was held as unclaimed property pursuant to the Act;

(c) Award Class counsel reasonable fees, including attorneys' fees, together with reimbursement of expenses and costs of suit as allowed by law; and

(d) Grant such other relief the Court deems just and proper.

As to Count III:

(a) Determine that this action may be maintained as a class action pursuant to Rule 23 of the Ohio Rules of Civil Procedure on behalf of the Class defined herein and declare the Plaintiff to be a proper Class representative and his counsel to be Class counsel;

(b) Declare the retention of the actual or constructive earnings on the private property reported to or held by Defendant pursuant to the Ohio Unclaimed Funds Chapter, Ohio Rev. Code §§ 169.01–169.99, in particular § 169.08(D), to be a facially unconstitutional taking of private property for public use without payment of compensation as required by Article I, §19, of the Ohio Constitution;

(c) Enjoin Defendant's further enforcement of the provision of the Act found to be a facial taking, to the extent it prohibits return of private property or payment of just compensation for the taking of private property so that Defendant will henceforth return the earnings on private property to their rightful owners or pay compensation therefore;

(d) Grant counsel for Plaintiff and the Class reasonable attorneys' fees, together with reimbursement of expenses and costs of suit as allowed by law; and

(e) Grant such other and further relief as the Court deems just and proper.

As to Count IV:

(a) Determine that this action may be maintained as a class action pursuant to Rule 23 of the Ohio Rules of Civil Procedure on behalf of the Class defined herein and declare Plaintiff to be a proper Class representative and his counsel to be Class counsel;

(b) Declare the retention of the actual earnings or constructive interest on private property reported to or held by the State of Ohio pursuant to the Ohio Unclaimed Funds Chapter, Ohio Rev. Code §§ 169.01–169.99, in particular § 169.08(D), to be a facially unconstitutional taking of private property for public use without payment of compensation as required by and without payment of just compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution;

(c) Enjoin Defendant's further enforcement of the provision of the Act found to be a facial taking, to the extent it prohibits return of private property or payment of just compensation for the taking of private property so that Defendant will henceforth return the earnings on private property to their rightful owners or pay compensation therefore;;

(d) Grant Class counsel reasonable fees, including attorneys' fees, together with reimbursement of expenses and costs of suit as allowed by law; and

(e) Grant such other and further relief the Court deems just and proper.

As to Count V:

(a) Determine that this action may be maintained as a class action pursuant to Rule 23 of the Ohio Rules of Civil Procedure on behalf of the Class defined herein and declare Plaintiff to be a proper Class representative and his counsel to be Class counsel;

(b) Declare the retention of the actual earnings or constructive interest on private property reported to or held by the State of Ohio pursuant to the Ohio Unclaimed Funds Chapter, Ohio Rev.

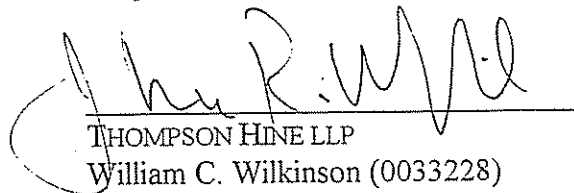
Code §§ 169.01–169.99, in particular § 169.08(D), to be a facially unconstitutional taking of private property for public use without payment of compensation as required by and without payment of just compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution, and therefore a violation of 42 U.S.C. § 1983;

(c) Enjoin Defendant's further enforcement of § 169.08 (D) of the Ohio Unclaimed Property Chapter, to the extent it prohibits the return of the actual or constructive earnings on the private property held in custody pursuant to the Ohio Unclaimed Property Chapter, or payment of just compensation for the taking of that private property;

(c) Award Class counsel reasonable fees, including attorneys' fees under 42 U.S.C. § 1988, together with reimbursement of expenses and costs of suit as allowed by law; and

(d) Grant such other relief the Court deems just and proper.

Respectfully submitted,



THOMPSON HINE LLP

William C. Wilkinson (0033228)

Paul Giorgianni (0064806)

10 West Broad Street, 7th Floor

Columbus, Ohio 43215-3435

Phone: (614) 469-3200; Fax: (614) 469-3361

www.ThompsonHine.com

Paul.Giorgianno@ThompsonHine.com

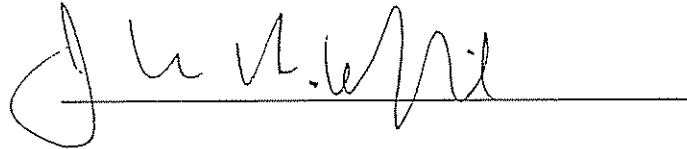
Of counsel:

SUSMAN, WATKINS & WYLIE, LLP
Arthur T. Susman
Charles R. Watkins
John R. Wylie
Two First National Plaza, Suite 600
Chicago, Illinois 60603
Phone: (312) 346-3466; Fax: (312) 346-2829

*Attorneys for Wilton S. Sogg, as executor of the estate
of Julia Sogg*

Certificate of Service

A copy of this document was served this 20th day of May 2005 by regular U. S. mail, postage prepaid, upon William J. Cole, Office of the Ohio Attorney General's, Executive Agencies Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215.

A handwritten signature in black ink, appearing to read "John R. Wylie", is written over a horizontal line.