IN THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO

MICHAEL T. MCKIBBEN, Appellant, v. CHRISTENSEN CHRISTENSEN DONCHATZ KETTLEWELL & OWEN LLP, Appellee.	Case No. 18APE-03-177 APPEAL FROM FRANKLIN COUNTY COURT OF COMMON PLEAS Case No. 10CV014590

BRIEF OF APPELLANT MICHAEL T. MCKIBBEN

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ASSIGNMENT OF ERROR #1

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ASSIGNMENT OF ERROR #2

Constitutional Imperative to Set Aside A Settlement Agreement When Subsequent Supreme Court Disciplinary Discoveries Disbar An Attorney For Unconstitutional Acts That Tainted The Proceedings. The lower court's denial of Appellant's Civ.R. 60(B) motion to set aside the settlement agreement misperceived the fact that Appellee's egregious attorney misconduct—for which he was later suspended indefinitely from the practice of law—infected and diminished the integrity of the future proceedings, so that Appellant was induced into the settlement agreement as a direct consequence of Appellee's fraud on the court (adjudicated so by the Supreme Court subsequently) and the court's complete inattention to policing Appellee's conduct during the proceedings subsequent to his fraud, which the Supreme Court found was systemic.

ASSIGNMENT OF ERROR #3

Settlement Agreements Cannot Waive Substantive Constitutional Rights. Waiver of claims against a party in a settlement agreement for past acts does not waive constitutional rights to a fair and honest proceeding that is guided by the Rules of Professional Conduct, especially when subsequent Supreme Court scrutiny determined a party in the settlement had acted unconstitutionally and was disbarred for those acts.

ISSUES PRESENTED FOR REVIEW

It is now well known that the second of three judges in this case, Judge J. Bessey, was in ill health. Judge Bessey did not appear willing or able to challenge Appellee Kenneth R. Donchatz ("Donchatz") when Donchatz pressed the judge in chambers (*ex parte*) to sign ill-advised motions solely on Donchatz's lying word about the agreement of the parties to the motions. Judge Bessey was also presiding over the contentious Christensen, Christensen, Donchatz, Kettlewell & Owen LLP ("CCDKO") partnership dissolution at the same time. His inattention to our case would lead a reasonable person to believe that he became exhausted in dealing with Donchatz's machinations.

***Ex parte* Abuse By Donchatz.** In *ex parte* meetings, Donchatz shoved in front of Judge Bessey a Recovery Funding LLC substitution of the Plaintiff real party in interest. The judge signed it without consulting with the Defendants, including Appellant Michael T. McKibben ("McKibben"). McKibben opposed it immediately, as did Defendants' lawyer Robert Storey ("Storey"). Consistent with his later conduct, Donchatz probably told the judge that the Defendants had agreed to the substitution, which was a lie, just like he lied about the *ex parte* Settlement Entry. Otherwise, the judge would surely have required a hearing or motion practice on this important question of law. Donchatz appears to have used his position of trust as a former Disciplinary Counsel investigator to prey on the Judge's weakened physical condition.

Nonassignabilty was ignored by the court. Assignment of any rights and privileges in a legal engagement letter is improper, most especially when it contains an unambiguous nonassignment clause.

More ex *parte* Abuse By Donchatz (this one got him disbarred). Another document that Donchatz shoved in front of Judge Bessey in an *ex parte* meeting was the Settlement Entry. According to verified Supreme Court evidence, Donchatz told Judge Bessey that Defendants agreed to the entry when we had not. Then, when he was challenged and caught in this lie, he refused to withdraw it. That act got him suspended indefinitely from the practice of law.

Supreme Court's New Facts And 60(B). Settlement Agreements that prohibit future claims on existing facts, clearly do not apply to new facts only determined years later in disciplinary proceedings. 60(B) motions for fraud cannot sweep future facts under the prohibitions of the doctrine of *res judicata* in a settlement agreement. This should be especially true with new facts gathered by the Ohio Supreme Court. All facts they present in their discovery are new facts by nature, even if they may sound similar to old facts, unless the old facts are specifically cited by them.

Doctrine of *Res Judicata* Does Not Apply To New Facts. The new findings of fact in the disciplinary process are obviously new facts in this case. Had McKibben known these facts, he would most certainly have moved to dismiss the case based on this fraud. The notion presented by the court in denying McKibben's motion to set aside the settlement agreement that he knew *all* the facts presented in the Supreme Court disciplinary process defies common sense. All facts gathered by the Supreme Court regarding fraud should be considered new facts, unless the Supreme Court expressly cites a lower court fact, which McKibben agrees would be covered by the Settlement Agreement. It is pure speculation on the Magistrate's part to assume that all the facts surrounding Donchatz's misconduct were previously known to McKibben at the time of the Settlement Agreement.

These Proceedings Were Infected By Lawyer Inattention To The Rules. These circumstances put the Defendants, including Appellee, in a vise. The judge was in ill-health. It is an understatement that he was not doing a good job of watching over the proceedings.

Appellant will refrain here out of respect for Judge Bessey from describing the nature of his ill-health, except suffice it to say it appears his failing health was common knowledge among his colleagues and did affect his cognitive functioning. Donchatz was evidently exploiting the judge's weakness to force his Recovery Funding LLC agenda. So, the Appellant concluded that the justice system was failing him, and he would have to seize any opportunity possible to stop this runaway train of coercion, judicial inattention and abuse of due process. As an organizational development expert, Appellant could see the dysfunction, but could do nothing to fix it since the people with the attorney licenses were all letting down the process for different reasons, one bad heath, and the other bad character.

We pray this court will use common sense and do what any reasonable person would, namely set aside the Settlement Agreement, and affirm the Aug. 24, 2010 settlement agreement with CCDKO. Exh. A. Do not allow the victims of this evident legal misconduct to be further victimized by having to make any further payments and other

benefits to Appellee Donchatz / Recovery Funding LLC for their bad acts.

STATEMENT OF THE CASE

As a layman, this Court must know that this matter has consumed hundreds, if not thousands, of hours of time, and great expense, as Appellant McKibben and Defendants Leader Technologies, Inc. et al worked to protect themselves from a legal predator. We have learned that when the legal system wants to punish you, it does so by cronyistic procedural abuse and bottomless layers of case law sophistry. Common sense appears to be dead. We have come to call it "Death by the Rules of Civil Procedure." In this environment, a corrupt system can indict a ham sandwich. Appellant believes that the legal system let us down, and he can only hope this Court will do its part, as the Supreme Court did, to help restore confidence in our legal system whose reputation has been badly damaged by Attorney Kenneth R. Donchatz.

This matter is actually quite simple. On the eve of a fee dispute mediation by the Columbus Bar Association that was requested by

Defendants Leader Technologies, Inc. ("Leader") and Appellant Michael T. McKibben ("McKibben"), Appellee Kenneth R. Donchatz ("Donchatz") agreed to settle the dispute. He notified the Bar mediator of the settlement, and the mediation was cancelled.

The parties exchanged numerous drafts of a settlement agreement over many months. All the material terms were eventually agreed, save one. The sole remaining deal point was whose name would be on the contingent settlement checks. That's it. This case was initiated over this final remaining term. Is this not a dictionary definition of a frivolous lawsuit?

Donchatz wanted only *his name* on the check, not also his partners in Donchatz, Kettlewell & Owen LLP ("CCDKO"). McKibben felt that it would be unwise to agree to this without a consensus among all of the CCDKO partners—since the engagement letter was with the firm and not Donchatz individually. Hindsight shows McKibben was painfully right. *See* Memo in Support (containing CCDKO engagement letters), Aug. 19, 2011.

Donchatz was intransigent when Defendants hesitated at agreeing to his assignment demand. In emails and discussions he started making references to having to resort to “men in black robes” in evident threats to file a lawsuit if he did not get his way. So, McKibben contacted the CCDKO managing partners Jon and Mary Christensen (the “CC” in CCDKO). He shared the draft prepared with Donchatz. The Christensens and third partner Timothy Owen (the “O” in CCDKO) agreed and signed the agreement with a fair payment note stating “"CCDKO Address to be specified at time of payment."

Having a Settlement Agreement with three of the five partners, Defendants believed we were done. But, Donchatz did not agree to the note identifying CCDKO on the checks. So he filed this lawsuit.

Unbeknownst to Defendants, Donchatz had started a new financial collections firm with Rick Brunner called “Recovery Funding LLC.” Apparently they were eager for new targets for their collections activities. It appears that extorting former legal clients was part of Donchatz’s plan.

Very quickly after filing the case, Donchatz asked the original Judge Cocroft to substitute Recovery Funding for CCDKO as the real party in interest telling her that Judge J. Bessey in the CCDKO partnership dissolution had approved it. McKibben did not know about this action until after Donchatz had gotten the judge to agree without hearing objections. McKibben filed an objection to this substitution since the underlying legal engagement letter was with CCDKO, not Recovery Funding. McKibben did not even believe it was legal to substitute a non-attorney third party into a dispute involving a legal engagement where law licenses are prerequisite requirement.

Donchatz said the CCDKO partnership dissolution had assigned McKibben's and Leader's engagement obligations, if any, to him. Judge Bessey replaced Judge Cocroft. The fundamental flaw in Donchatz's Recovery Funding plan was that the CCDKO engagement letter was nonassignable without Defendants' approval.

Since Recovery Funding was not a law firm, even if Defendants were on the best of terms, they still could not be assigned the

engagement letter since they would then be practicing law without a license, we believed. McKibben appealed this ruling. We pointed out the nonassignability clause. We pointed out the impropriety of allowing a financial collections firm to be the beneficiary of a legal engagement letter without also assuming the liabilities—which they could not since that would be practicing law without a license.

However, Judge Bessey never addressed the subject again. It has hung in limbo throughout the case. It is now well known that Judge Bessey's health problems were worsening at that time. To this day everyone, including the Clerk, is confused.

Convoluted Situation Never Resolved By The Court. The case is listed on the Clerk's website as "Recovery Funding," but the court captions always use the original "CCDKO." McKibben always uses "CCDKO" in his captions and copies all the CCDKO partners. Donchatz and his Recovery Funding Partner, Rick L. Brunner, always use "Recovery Funding" and never copy CCDKO partners—even though Donchatz claims he represents the CCDKO partners, and even though

McKibben already settled with CCDKO. Exh. A. When Judge Bessey's health continued to deteriorate, the case was eventually reassigned to Judge Michael Holbrook. If ever a proceeding was irreparably tainted by attorney misconduct and judicial inattention, this is it. When Judge Holbrook came on the scene, we saw this as a godsend opening to stop the madness.

We realized that Judge Bessey was distracted. He seemed to have no appetite to challenge Donchatz's lies and insider pressure to approve the Recovery Funding shift. (Ironically, Donchatz was a former Disciplinary Counsel investigator.) Donchatz was simultaneously pressing a whole different set of claims with Judge Bessey in the contentious CCDKO partnership dissolution, we were told by CCDKO partner Jon Christensen. Those negotiations included disposition of partnership assets, which is where this confusion appears to have occurred. The Leader / McKibben Settlement Agreement appears to have been bundled into the CCDKO partnership dissolution mediated by

Judge Bessey without anyone addressing the nonassignment clause in Leader's and McKibben's engagement letters.

We realized that we were stuck in a situation that could have generated interminable attacks, especially since these were all greedy lawyers, at least in the Recovery Funding crowd. Even if we had gone along with Donchatz's wish to be the only name on the settlement agreement, his unilateral assignment to Recovery Funding would have opened us up to even more attacks. We could become the targets of the other CCDKO partners. We would almost certainly have become the predatory targets of Recovery Funding, who could attack us in the future without any obligation to honor the CCDKO engagement letter, leaving us defenseless.

While Judge Bessey was on the case, we marked time, hoping for a break in these maddening circumstances. Donchatz filed motions to appoint a receiver and compel discovery. We opposed each of his moves to assign the claims to Recovery Funding. McKibben filed a motion to dismiss. Donchatz opposed it.

The break came when Judge Michael Holbrook took Judge Bessey's case load. The case by this stage had become so tainted that we felt we had no choice but to *seize* on Judge Holbrook's proposal to mediate before he too would grow tired of Donchatz. We achieved a settlement on Mar. 13, 2017 and have meticulously fulfilled the terms.

McKibben was later contacted by the Cleveland Metropolitan Bar Association and asked about the record in this case. He answered their questions and provided requested information. Subsequently, McKibben was told that three other former Donchatz clients had filed complaints about Donchatz's conduct in their matters. McKibben was asked to file a complaint so that the Cleveland Bar Association could add Donchatz's misconduct in this case to their pending disciplinary action against Donchatz. McKibben complied.

Donchatz eventually received an indefinite suspension from the practice of law.

The Supreme Court opinion presented many new facts regarding Donchatz's fraud in the inducement of the Settlement Agreement that

Appellant believed constituted new fraud. He then filed a 60(B) motion which was denied by the Magistrate. After the Magistrate's complicated denial, McKibben understood that she did not yet grasp the case and objecting to her decision would cause the whole case to be relitigated.

Recognizing the interminable due process muddle in the lower court, McKibben filed this appeal.

STATEMENT OF THE FACTS

The lower court record prepared in preparation for this case is incorporated by reference as if fully incorporated herein.

On Mar. 08, 2007, Leader Technologies, Inc. ("Leader") entered into a letter of engagement with Christensen, Christensen, Donchatz, Kettlewell & Owen LLP ("CCDKO").

On Jun. 13, 2007, Appellant Michael T. McKibben ("McKibben") entered a legal letter of engagement with CCDKO.

Between May 2007 and Dec 2008 Defendants (Leader and McKibben) paid CCDKO a total of $79,000 on a retainer fee basis of $4,000 per month. Appellee Kenneth R. Donchatz ("Donchatz") billed more than this amount, but said "don't worry about it." These charges

were contested and to be the subject of a Jun. 25, 2009 fee dispute mediation by the Columbus Bar Association.

On Jun. 25, 2009, Defendants including McKibben were scheduled, at their request, for a Columbus Bar Association fee dispute mediation with Donchatz. On the eve of the meeting, Donchatz agreed to settle, so the mediation the next day was cancelled.

Between Jun. 25, 2009 and Aug. 04, 2010, many settlement drafts were exchanged.

On Aug. 24, 2010, with Donchatz stalling the settlement agreement over insisting that all checks be written to him and not to CCDKO, Defendants reached out to managing partners of CCDKO and entered into a Settlement Agreement, signed by three of the five partners, namely Jon Christensen, Mary Christen snen and Timothy Owens (confirmed verbally). (The "CC" and "O") in CCDKO. *See* DEFENDANTS' ANSWER AND COUNTERCLAIM, Sec. 39, **Exhibit A**. One partner may bind a partnership in dissolution. e.g., O.R.C. 1776.55 Dissociated partner's power to bind and liability to partnership.

On Oct. 05, 2010, estranged CCDKO partner Donchatz sued Leader and McKibben personally.

On Oct. 14, 2010, CCDKO partner Jon Christensen asked Defendants not to tell Donchatz about our Settlement Agreement, so as not to upset their coming arbitration in their partnership dissolution. (Jon Christensen: "Please leave the settlement agreement out of it [discussions with Donchatz] at this point because it's just going to stir the pot." Tr. 11:10-12).

On Mar. 03, 2014, the parties entered into a Judgment Entry and Settlement Agreement with CCDKO, sometimes referred to as Recovery Fund (used without prejudice).

From Mar. 04, 2014 to the current time, Defendants are current with all of their obligations under the Settlement Agreement.

On Mar. 23, 2015, the Cleveland Metropolitan Bar Association filed an amended complaint four-count complaint against Donchatz for numerous violations of the Rules of Professional Conduct captioned *In*

re. Kenneth R. Donchatz, Attorney Reg. No. 006221 v. Cleveland Metropolitan Bar Association, Case No. 2014-085.

On Oct. 07-08, 2015, the Board of Professional Conduct of the Supreme Court of Ohio conducted a hearing before a panel consisting of Keith A. Sommer, Roger S. Gates, and Robert B. Fitzgerald, chair in the matter of *In re. Kenneth R. Donchatz, Attorney Reg. No. 006221 v. Cleveland Metropolitan Bar Association*, Case No. 2014-085.

On Jun. 03, 2016, the Board of Professional Conduct of the Supreme Court of Ohio recommended that Donchatz be suspended from the practice of law for two years.

On May 16, 2017, following a Donchatz appeal, the Ohio Supreme Court indefinitely suspended Donchatz from the practice of law. *Cleveland Metro. Bar Assn. v. Donchatz*, Slip Opinion No. 2017-Ohio-2793. The grounds for that suspension included Count 4 regarding Donchatz's fraud on the court in this case.

All facts verified by the Supreme Court disciplinary process are *new facts* in this case for which judicial notice is respectfully requested.

The Court is respectfully requested to take judicial notice of the entire record provided by the Clerk as if fully written herein.

On Jun. 19, 2017, McKibben filed a motion to vacate the judgment for fraud on the court.

On Feb. 22, 2018, the motion to vacate was denied.

ARGUMENT AND LAW

ASSIGNMENT OF ERROR #1

Impermissibility Of Assigning Any Rights, Or Bifurcating Those Rights In A Legal Engagement Letter To A Non-Attorney. The court erred in entertaining an *ex parte* request from former Plaintiffs' attorney Kenneth R. Donchatz, signed it without consulting Defendants, and then did not resolve the matter when Defendants objected to the transfer of the Plaintiffs' real party in interest from CCDKO--a law firm with whom Defendants had multiple letters of engagement--to a financial collections company, Recovery Funding LLC, that is not a law firm, and is therefore not subject to the Rules of Professional Conduct regarding legal engagements (including nonassignability) that formed the basis of the claims in this case.

The Supreme Court in *Shealy* set for the standard for determining a real party in interest:

> A "real party in interest" has been defined as "* * * one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, *i.e.*, one who is *directly* benefitted or injured by the outcome of the case. *State, ex rel. Dallman, v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176 [64 O.O.2d 103]; *In re. Highland Holiday Subdivision* (1971), 27 Ohio App. 2d 237 [56 O.O.2d 404]." (Emphasis sic.) *West Clermont Edn. Assn. v. West Clermont Bd. of Edn.* (1980), 67 Ohio App.2d 160, 162 [22 O.O.3d 228].
>
> The purpose behind the real party in interest rule is "`* * * to enable the defendant to avail himself of evidence and defenses that the defendant has against the real

> party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.' *Celanese Corp. of America* v. *John Clark Industries* (5 Cir. 1954), 214 F. 2d 551, 556." *In re. Highland Holiday Subdivision, supra*, at 240.

Shealy v. Campbell, 20 Ohio St. 3d 23 (1985) at 24, 25.

Donchatz pressed the court's second Judge J. Bessey hard to get Recovery Funding as the substituted real party in interest in place of CCDKO. This situation was made more acute because the same Judge Bessey was presiding over the dissolution of the CCDKO partnership. In any event, it is now well know that Judge Bessey was in ill health and probably was not of a mind physically to resist Donchatz's pressure on him to push the real party in interest to Recovery Funding and away from his estranged CCDKO partnership. We have to believe that had Judge Bessey been healthy, he would not have just signed the order *ex parte* without hearing objections or conducting a hearing on the matter.

The law and common sense say that a financial collections company cannot be a legitimate real party in interest in a legal fee dispute governed by multiple engagement letters that expressly prohibit

assignment to third parties, and can only be litigated by the CCDKO legal partnership. Appellant's contract was with CCDKO and never the Recovery Funding interloper.

ASSIGNMENT OF ERROR #2

Constitutional Imperative To Set Aside A Settlement Agreement When Subsequent Supreme Court Disciplinary Discoveries Disbar An Attorney For Unconstitutional Acts That Tainted The Proceedings. The lower court's denial of Appellant's Civ.R. 60(B) motion to set aside the settlement agreement misperceived the fact that Appellee's egregious attorney misconduct for which he was later suspended indefinitely from the practice of law, infected and diminished the integrity of the future proceedings, so that Appellant was induced into the settlement agreement as a direct consequence of Appellee's fraud on the court (adjudicated so by the Supreme Court subsequently) and the court's complete inattention to policing Appellee's conduct during the proceedings subsequent to his fraud, which the Supreme Court found was systemic.

The Ohio Supreme Court in *Royal Indemnity* set forth the following standard for determining when egregious misconduct by an attorney is grounds for dismissing that attorney from a case. While the focus of *Royal Indemnity* was a *pro hac vice* attorney, the same principles from the Rules of Professional Conduct apply equally to all attorneys:

> Dismissing an attorney for misconduct "is part of the court's inherent power to regulate the practice before it and protect the integrity of its proceedings." at 33.
>
> "The trial court's power to protect its pending proceedings includes the authority to dismiss an attorney who cannot, or will not, take part in them with a reasonable degree of propriety. *Laughlin* v. *Eicher* (D.D.C. 1944), 145 F.2d 700. Similarly, attorney disqualification can be warranted in cases of truly egregious misconduct which is likely to infect future proceedings." at 34.
>
> "Thus, a trial court may revoke the *pro hac vice* [or any other] admission of an attorney who has engaged in egregious misconduct which could taint or diminish the integrity of future proceedings." at 36.
>
> "The court could and did properly find that these misrepresentations amounted to egregious misconduct which could taint and diminish the integrity of future proceedings." *Id*.

Royal Indemnity Co. v. JC Penney Co., 27 Ohio St. 3d 31 (1986).

Ohio contract law is clear that contracts entered into under the duress of fraudulent inducement can be set aside. *Restatement of the Law 2d, Contracts (1981)* states:

> §205. Duty Of Good Faith And Fair Dealing
>
> > "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."
>
> § 162. When A Misrepresentation Is Fraudulent Or Material

> "(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
>
> > (a) knows or believes that the assertion is not in accord with the facts, or
> >
> > (b) does not have the confidence that he states or implies in the truth of the assertion, or
> >
> > (c) knows that he does not have the basis that he states or implies for the assertion.
>
> (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."

On May 16, 2017, the Ohio Supreme Court indefinitely suspended Plaintiff Donchatz from the practice of law.

> "But Mr. Donchatz's misconduct also involves multiple instances of dishonesty, fraud, deceit, or misrepresentation. He has made knowingly false statements of fact and law to multiple tribunals. He has knowingly disobeyed his obligations under the rules of multiple Ohio courts. And he has prejudiced the administration of justice in multiple cases. Furthermore, Donchatz has continued to engage in dishonest conduct throughout this disciplinary proceeding."

Donchatz's fraud in this case is COUNT FOUR – THE MCKIBBEN/LEADER TECHNOLOGIES MATTER of the Slip

Opinion. *Cleveland Metro. Bar Assn. v. Donchatz*, Slip Opinion No. 2017-Ohio-2793, ¶51.

The Slip Opinion ruled, among other things, that ***Donchatz lied to the Court***, filed a materially false pleading, then defended his fraud after being asked multiple times to withdraw it.[1]

The most common basis for trial court disqualification of an attorney is the risk of a tainted trial due to an actual or potential conflict of interest. *Glueck* v. *Jonathan Logan, Inc.* (C.A. 2, 1981), 653 F.2d 746, at 748.

The lower court should have dismissed Donchatz the moment he engaged in his careering ending misconduct. "Recognizing the serious impact of attorney disqualification on the client's right to select counsel of his choice, we have indicated that such relief should ordinarily be granted only when a violation of the Canons of the Code of Professional Responsibility poses a significant risk of trial taint." *Glueck* at 741 cited in *Royal Indemnity*.

[1] Kenneth Ronald Donchatz, Reg. No. 0062221. Admitted: 11/08/1993. Suspended indefinitely, Effective Date: 5/16/2017. Ohio Supreme Court Case No. 2016-0859.

Indeed the Ohio Supreme Court confirmed these very circumstances here where the Code of Professional Responsibility (or its successor the Rules of Professional Conduct) is violated in such a way that the proceedings are tainted.

The U.S. Sixth Circuit said "As the Supreme Court explained more than 50 years ago in *Lawlor v. National Screen Service Corp*., 349 U.S. 322 (1955), *res judicata* does not bar a suit, even if it involves the same course of wrongful conduct as alleged earlier, so long as the suit alleges new facts or a worsening of the earlier conditions." *State of Ohio ex rel. Susan Boggs, et al. v. City of Cleveland*, Case No. 09-4403 (6th Cir. 2009).

The Ohio Supreme Court ruled that Donchatz violated the following ethical rules and "[f]urthermore, Donchatz has continued to engage in dishonest conduct throughout this disciplinary proceeding":

1. **Prof.Cond.R 3.1** (prohibiting a lawyer from bringing or defending a proceeding that is unsupported by law or lacks a good-faith argument for an extension, modification, or reversal of existing law),

2. **Prof.Cond.R 3.3(a)(1)** (prohibiting a lawyer from knowingly making a false statement of fact or law to a tribunal),

3. **Prof.Cond.R 3.4(c)** (prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal),

4. **Prof.Cond.R 8.4(c)** (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation),

5. **Prof.Cond.R 8.4(d)** (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice),

6. **Prof.Cond.R. 1.5(b)** (requiring an attorney to communicate the basis or rate of the fee and expenses within a reasonable time after commencing the representation, preferably in writing), and

7. **Prof.Cond.R. 1.8(a)** (prohibiting a lawyer from entering into a business transaction with a client unless the client is advised in writing of the desirability of obtaining independent legal counsel and the terms of the transaction are fair, reasonable, and fully disclosed in a writing signed by the client).

The Ohio Court of Appeals, 1st Appellate Dist. Stated:

> Contracts, including settlement agreements, can be unfair or favor one side over the other. *Krueger v. Schoenling Brewing Co. (1948)*, 82 Ohio App. 57, 61, 37 O.O. 375, 377, 79 N.E.2d 366, 368. They are still binding and enforceable, **so**

> **long as they are not procured by fraud, duress, overreaching or undue influence.** *Mack v. Polson Rubber Co.*, syllabus; Bolen v. Young (1982), 8 Ohio App.3d 36, 8 OBR 39, 455 N.E.2d 1316; *Kelley v. Kelley (1991)*, 76 Ohio App.3d 505, 602 N.E.2d 400. (emphasis added).

Walther v. Walther, 102 Ohio App. 3d 378 (1995).

The Ohio Supreme Court says:

> A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. "The fraud relates not to the nature or purport of the [contract], but to the facts inducing its execution * * *." *Haller v. Borror Corp.* (1990), 50 Ohio St.3d 10, 14, 552 N.E.2d 207, 210. In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiffs reliance, and that the plaintiff relied upon that misrepresentation to her detriment. *Beer v. Griffith (1980)*, 61 Ohio St.2d 119, 123, 15 O.O.3d 157, 160, 399 N.E.2d 1227, 1231.

ABM Farms, Inc. v. Woods, 81 Ohio St. 3d 498 (1998).

One cannot imagine a more apropos example of "facts inducing its execution" than the Donchatz fraud in handling the settlement entry that got him suspended indefinitely from the practice of law.

The Supreme Court in *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63 (2009) at ¶30 said:

> "A party challenging an arbitration agreement must prove a quantum of both procedural and substantive unconscionability. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶34."

Appellant has shown that the Ohio Supreme Court believed Donchatz's conduct to have been so substantively unconscionable that they indefinitely suspended him from the practice of law.

During the disciplinary hearings, many new facts emerged that showed the lower court did nothing to police Mr. Donchatz's misconduct, or create a more fair proceeding that squelched the deleterious effects his conduct was having on the proceedings. A caustic environment unfolded as a result of Mr. Donchatz's frauds and tainted the proceedings. Given this unfair circumstance, Appellee felt induced to settle at any cost out of concern that (a) the court would not reign in Donchatz and (b) that the proceedings would continue to drag on indefinitely at great cost in time and expense.

For example, on Jun. 03, 2016, the Board of Professional Conduct of the Supreme Court of Ohio recommended that Donchatz be suspended from the practice of law for two years. In its findings at ¶ 40

the Board reveals: "However, without the consent of the parties and without direction from the magistrate to do so, Respondent submitted the 'Stipulated Entry and Consent Judgment' to the Court." This is a *substantial* new fact that was not known during the settlement talks. Clearly this fraud tainted the proceedings. *In re. Kenneth R. Donchatz, Attorney Reg. No. 006221, Respondent, v. Cleveland Metropolitan Bar Association*, Relator, Case No. 2014-085.

Donchatz also told the Board at ¶62 that "a judgment entry terminating the case was not the outcome that he wanted." This too is a substantial new fact and fraud that would have certainly affected the outcome.

The Board verified new facts about Donchatz's other frauds against other clients that are also substantial. They revealed Donchatz's flawed moral character that would certainly have caused Appellant to insist on the CCDKO partners being involved before a settlement was reached.

ASSIGNMENT OF ERROR #3

Settlement Agreements Cannot Waive Substantial Constitutional Rights That Are Commercially Unreasonable. Waiver of claims against a party in a settlement agreement for past acts does not waive substantial constitutional rights to a fair and honest proceeding that is guided by the Rules of Professional Conduct, especially when subsequent Supreme Court scrutiny determined a party in the settlement had acted unconstitutionally and was disbarred for those acts.

The Ohio Supreme Court addressed this very issue in *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63 (2009):

> {¶ 33} An assessment of whether a contract is substantively unconscionable involves consideration of the terms of the agreement and whether they are commercially reasonable. *John R. Davis Trust 8/12/05 v. Beggs*, 10th Dist. No. 08AP-432, 2008-Ohio-6311, 2008 WL 5104808, ¶ 13; *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.*(1996), 113 Ohio App.3d 75, 80, 680 N.E.2d 240.

Appellants never agreed in the Settlement Agreement to allow CCDKO to waive its requirement to follow the Rules of Professional Conduct. Such a term would be commercially unreasonable. Therefore, any attempt to argue that waiver of past attorney commercially unreasonable misconduct applies to times in the future regarding new discovery of misconduct by the Ohio Supreme Court is inapposite.

CONCLUSION

For the foregoing reasons, Appellant prays that this Court will reverse the lower court decision in manifest fairness, set aside the Settlement Agreement, remove Recovery Funding as a party in this proceeding, affirm CCDKO as the sole real party in interest, enjoin Donchatz and Brunner from having any further involvement with this CCDKO case (since Donchatz no longer holds a license to practice law, and Brunner has no engagement letter with CCDKO, so neither man is obliged to follow the Rules of Professional Conduct embodied in the engagement letters), remand the matter to the good faith mediation meeting with Magistrate Harilstadt that was pending, and order all the CCDKO partners (in dissolution) to participate. Further, kindly clarify Ohio Partnership Law requiring only one partner's agreement to bind the CCDKO partnership (in dissolution), and that it be strictly followed following remand. **In the alternative**, kindly rule that the Aug 24, 2010 Settlement Agreement and Release of Claims signed by CCDKO partners Jon Christensen, Mary Christensen and Timothy Owens is a fully sufficient agreement to dispose of this case.

Respectfully submitted.

/S/ Michael T. McKibben

_____

Michael T. McKibben, *Pro Se*
1676 Tendril Court
Columbus, Ohio 43229
(614) 890-1986
mmckibben@leader.com
Pro Se Defendant

April 23, 2018

COPY OF THE TRIAL COURT JUDGMENT

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Recovery Funding, LLC et al.,

Plaintiffs,

v.

Leader Technologies Incorporated, et al.,

Defendants.

Case No. 10 CV 014590

Judge Michael J. Holbrook

JUDGMENT ENTRY

This matter is before the court upon the mediation and settlement of the above-captioned matter of litigation. On May 3, 2013, the Court mediated the disputes of the Parties to this matter. Upon successful mediation of the Parties' differences, the Court held a hearing contemporaneous with the Parties reaching an oral settlement and placed the terms of their settlement upon the record of these proceedings.

At the mediation and hearing held on May 3, 2013, the Plaintiff and the Plaintiff's representative, Kenneth R. Donchatz, appeared and were represented by counsel, Jennifer L. Brunner of Brunner Quinn. Defendant Leader Technologies Incorporated ("Leader") and John Doe Directors #1-10 appeared and were represented by their attorney, Robert M. Storey, and Michael McKibben appeared *pro se*. The "Release and Settlement Agreement" ("Agreement"), between the parties, dated June 2, 2013, shall be enforceable by this Court as a result of this Entry. Accordingly, it is hereby

ORDERED that the terms of the Parties' Release and Settlement Agreement ("Agreement"), dated June 2, 2013 have been agreed to by the Parties; it is further

ORDERED that the Court shall retain continuing jurisdiction of the Parties' Agreement, any and all of whom shall produce the same to the Court upon further Order of this Court, and especially in the event of a breakdown of the satisfaction of its terms, until all terms of the Agreement are satisfied according to its terms; it is further

ORDERED that the Parties' promises to one another in the Agreement are hereby orders of this Court; it is further

ORDERED that this matter is and shall be DISMISSED upon the Clerk's docket; it is further

ORDERED that, notwithstanding said dismissal, the Parties shall comply with the terms of the Agreement, post-judgment, subject to the Court's continuing jurisdiction to enforce and interpret the Agreement.

It is so ORDERED, and this matter is DISMISSED upon the Clerk's docket.

Michael J. Holbrook, Judge

Date

Counsel and *Pro Se Defendant:*

For Plaintiff:
/s/ Jennifer L. Brunner
Jennifer L. Brunner, Esq.
Counsel for Recovery Funding, LLC and Kenneth R. Donchatz

For Defendant Leader Technologies Incorporated and John Doe Directors #1-10 John

/s/ Robert M. Story (email authority)
Robert M. Storey, Esq.,

/s/ Michael McKibben(email authority)
Michael McKibben, *Pro Se*

Franklin County Court of Common Pleas

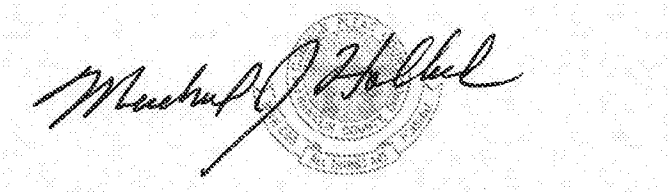
Date: 03-03-2014

Case Title: CHRISTENSEN CHRISTENSEN DONCHATZ KETTLEW -VS- LEADER TECHNOLOGIES INCORPORATED

Case Number: 10CV014590

Type: JUDGMENT ENTRY

It Is So Ordered.



/s/ Judge Michael J. Holbrook

Court Disposition

Case Number: 10CV014590

Case Style: CHRISTENSEN CHRISTENSEN DONCHATZ KETTLEW
-VS- LEADER TECHNOLOGIES INCORPORATED

Case Terminated: 12 - Default

Final Appealable Order: Yes

EXHIBIT A

SETTLEMENT AGREEMENT AND
RELEASE OF CLAIMS

This Settlement Agreement and Release of Claims ("Agreement") is made and entered into on this 24th day of August, 2010 ("Effective Date") by and among **Christensen, Christensen, Donchatz, Kettlewell & Owens, LLP**, including all beneficiaries, agents, partners and assigns in interest of any kind (collectively "CCDKO"), **Michael T. McKibben** ("McKibben"), individually, and **Leader Technologies Incorporated** corporately (hereinafter referred to collectively as "Leader"). CCDKO and Leader are hereinafter sometimes referred to individually as "Party" and collectively as "Parties".

WHEREAS, CCDKO provided legal service ("Services") to Leader from about June 14, 2007 until about January 31, 2009;

WHEREAS, certain disputes and claims have arisen between the Parties regarding the Services ("Disputes") resulting in Leader initiating and then agreeing to dismiss without prejudice a fee dispute against CCDKO with the Columbus Bar Association with regard to the fees charged in relation to the Disputes (referred to hereinafter as the "Disputed Fees");

WHEREAS, a certain representative of CCDKO has threatened to a Leader representative that CCDKO intends to take legal action against McKibben in some uncertain capacity and under some uncertain legal theory. Therefore, Mr. McKibben is included in this Agreement in both his capacities, individually and as a representative of Leader;

WHEREAS, the Parties desire to settle all claims in the Disputes and Disputed Fees (referred to hereinafter simply as the "Dispute".

NOW THEREFORE, in consideration of the agreements set forth herein, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Promissory Note.** CCDKO will receive a Promissory Note in the sum of $98,510.20 (Ninety-eight Thousand Five Hundred and Ten Dollars and Twenty Cents) ~~and~~ attached hereto as Exhibit A as part of the full and final settlement of all claims in the Dispute.

2. **No Admission of Liability.** The Parties agree that this Agreement is a compromise of any and all claims in the Dispute and is not to be construed as an admission of liability on the part of any Party.

3. **Release Without Prejudice and Tolling.** The Parties agree to release without prejudice ("Release") their respective claims in the Dispute and toll said claims, including malpractice claims, until such time as the terms of this Agreement have been satisfied. If any terms of this Agreement have not been satisfied, then either Party may reassert its respective claims. CCDKO agrees to make any and all court filings and pay any and all fees and other expenses necessary to file the Release with any and all courts or tribunals of competent jurisdiction with respect to any aspect of this Agreement, if any. The Parties agree that no statutes of limitation on claims shall be asserted as a defense against any renewal of the Dispute, including legal malpractice.

Exhibit A

4. **Leader Confidentiality.** CCDKO shall comply with its duties and obligations to Leader and McKibben as its former clients pursuant to the Ohio Rules of Professional Conduct which includes the continuing confidentiality of privileged client information.

5. **Return of Client Files.** CCDKO agrees to assist Leader in obtaining all of its client files and other Leader property on the Effective Date.

6. **Non-disparagement.** The Parties agree not to disparage one another and that in response to any inquiries concerning the disputes that have arisen, the Party being questioned shall respond that all disputes have been resolved to their satisfaction.

7. **Enforceability**. All provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against, the respective heirs, executors, administrators, personal representatives, officers, directors and successors and assigns of the Parties.

8. **Severability.** The invalidity or unenforceability of any provision herein shall not affect the validity or enforceability of the remainder of the provisions, including that provision, in another jurisdiction. If any provision of this Agreement is held to be unenforceable for any reason, it shall be adjusted rather than voided, if possible, in order to achieve the intent of the Parties hereto to the greatest extent possible.

9. **Captions.** The captions herein set forth are for convenience only and should not be deemed to define, limit or describe the scope of intent of this Agreement.

10. **Counterparts.** This Agreement may be executed through the use of separate signature pages or in any number of counterparts and each of such counterparts shall, for all purposes, constitute one agreement binding on all the Parties and their successors, legal representatives and assigns.

11. **Resolution of Differences.** The best interests of the Parties are served by resolving any disputes regarding this Agreement, including the Promissory Note, without resorting to wasteful litigation. Should the Parties be unable to resolve a disagreement within a reasonable length of time, the disputing Party shall notify the other Party in writing of that Party's desire to enter arbitration. The arbitration shall be conducted by a three-person panel comprised of a Leader arbiter, a CCDKO arbiter and a third arbiter selected by the first two arbiters. The costs of the third arbiter shall be shared equally between the Parties. Should the first two arbiters be unable within three (3) calendar months to select a third arbiter for any reason or no reason, the third arbiter shall be designated by the binding recommendation of the Dean of the Moritz School of Law at Ohio State University. The arbitration panel shall have up to six (6) calendar months to reach a simple majority decision. This decision shall be final and non-appealable. The arbiters shall establish their own procedures and guidelines and shall be generally guided by the Business Judgment Rule. Further, the Parties agree that in the event of a breach or threatened breach of this paragraph, the Party targeted by the breach is likely to suffer irreparable harm for which damages would not be an adequate remedy, and that the targeted Party shall therefore be entitled to seek and obtain injunctive relief to enforce the

provisions of this paragraph, without the need to post any bond or similar undertaking, and that the provisions of this paragraph may be asserted as a complete defense against, and as a basis for dismissal of, any action (whether judicial, administrative or otherwise) brought in violation of the provisions of this section.

12. **Entire Agreement.** This document sets forth the entire agreement between the Parties regarding the subject matter hereof and does hereby supersede and nullify all previous representations, arrangements, understanding, or agreements, oral or written, relating to the subject matter of this Agreement. No changes to the terms of this Agreement may be made or shall be binding unless they are made in writing and are agreed to in writing by the Parties.

13. **Governing Law**. This Agreement shall be construed according to the laws of the State of Ohio.

IN WITNESS WHEREOF, the Parties have caused this Agreement and Release to be executed on the Effective Date.

JON CHRISTENSEN

By: Jon C. Christensen

Title: _____

Date: 8/25/10

MARY CHRISTENSEN

By: Mary K. Christensen

Title: _____

Date: 8/25/10

KEN DONCHATZ

By: _____

Title: _____

Date: _____

CHARLES KETTLEWELL

By: _____

Title: _____

Date: _____

TIMOTHY OWENS

By: _____

Title: _____

Date: _____

CHRISTENSEN, CHRISTENSEN, DONCHATZ, KETTLEWELL & OWENS, LLP

By: _____

Title: _____

Date: _____

LEADER TECHNOLOGIES INCORPORATED

[redacted]

Chief Operating Officer

Date: 08/27/10

MICHAEL T. MCKIBBEN

By: Michael T McKibben

Individually

Date: Aug 27, 2010

EXHIBIT A

PROMISSORY NOTE

$98,510.20 **August 24, 2010**

For values received, Leader Technologies Incorporated, a Delaware corporation located at 737 Enterprise Drive, Suite A, Lewis Center, Ohio 43035, for itself and on behalf of all of its affiliates and related entities (collectively, "Leader") promises to pay to the order of Christensen, Christensen, Donchatz, Kettlewell & Owens, LLP and its beneficiaries, agents, partners, assigns in interest of any kind (collectively "CCDKO") 100 East Campus View Blvd. Suite 360 Columbus OH 43235 or at such other address as may be designated in writing by CCDKO, the principal amount of $98,510.20 (Ninety-eight Thousand Five Hundred and Ten Dollars and Twenty Cents) with interest on the principal amount from time to time outstanding between the date hereof until paid together with simple interest of Three Percent (3%) per annum.

Redacted Terms

[redacted]

This Note, and other consideration exchanged between the Parties, is given as full and final settlement and release of all claims the parties have or may have without prejudice pursuant to the SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS to which this Note is affixed.

Leader may prepay all or any portion of the principal sum of this Note at any time without penalty. All such prepayments shall be applied to the payment of the principal installments due on the Note in the inverse order of their maturity, and shall be accompanied by the payment of accrued interest on the amount of the prepayment to the date thereof.

Redacted Terms

[redacted]

Any payments received by CCDKO on the principal amount of this Note shall be applied first to any outstanding interest. Notice of non-payment or non-compliance shall be given by certified mail or express mail to Leader at the address set forth above or at such other address for notices as may be designated by Leader to the Plaintiffs in writing. Upon payment in full of this Note, CCDKO shall surrender the original Note to Leader marked to indicate that the Note has been paid in full.

All Leader checks shall be made payable and addressed to:

CCDKO
Address to be specified
at time of payment.

This Note was executed in Franklin County, Ohio, and shall be construed in accordance with the laws of the state of Ohio.

LEADER TECHNOLOGIES, INCORPORATED Redacted

By: [redacted]

Print Name:

Title:

Notary Seal:

NOTARY PUBLIC STATE OF OHIO

PATRICK BALOG
Notary Public, State of Ohio
My Commission Expires 11/30/2013

IN THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO

CERTIFICATE OF SERVICE

I, Michael McKibben, hereby certify that on Apr. 23, 2018, the undersigned certifies that a true and accurate copy of the foregoing MOTION FOR LEAVE TO PLEAD INSTANTER and BRIEF OF APPELLANT was served by regular mail or ECF upon the following:

/S/ Michael T. McKibben

Rick L. Brunner (00129998)
35 North Fourth Street, Suite 200
Columbus, Ohio 43215-0000
Telephone: (614) 241-5550
Facsimile: (614) 241-5551
Email: rlb@brunnerlaw.com

Attorney for Appellee

Christensen Christensen Donchatz Kettlewell & Owen LLP

Kenneth R. Donchatz
Charles J. Kettlewell
Jon A. Christensen
Mary W. Christensen
Timothy J. Owens

Michael T. McKibben *Pro Se*
1676 Tendril Court
Columbus, Ohio 43229
(614) 890-1986
mmckibben@leader.com

Pro Se Appellant

Courtesy copy to:
Robert M. Storey #0025232
737 Enterprise Drive, Suite B
Lewis Center, Ohio 43081-8885
Phone: (614) 885-2066
Fax: (614) 841-0581
rstorey@meadeandassociates.com

Attorney for Defendants

April 23, 2018