IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	
	)	CASE NO. 00-64045
STEVEN F. BRAND and	)	CHAPTER 7
LORI A. BRAND,	)	JUDGE RUSS KENDIG
	)	
Debtors.	)	
	)	
----------	)	
ANNE PIERO SILAGY,	)	ADV. NO. 01-6020
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF DECISION**
	)	
STEVEN F. BRAND, et al.,	)	
	)	
Defendants.	)	

Trustee Anne Piero Silagy ("plaintiff") commenced this adversary proceeding to determine the validity and priority of liens, claims and encumbrances against the debtors' real property. The complaint alleged that the mortgage on debtors' residence was not executed in accordance with O.R.C. § 5301.01 and plaintiff sought to avoid the mortgage for an alleged defect in execution. In its answer, Contimortgage Corporation ("Contimortgage") denied any defect and raised several affirmative defenses.

The court has jurisdiction of this proceeding pursuant to 28 U.S.C. § 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (K).

Now before the Court is a motion for summary judgment by plaintiff. Defendant Contimortgage filed a responsive pleading which includes a cross-motion for summary

judgment. Plaintiff followed with an answer to Contimortgage's cross-motion and a reply brief. The motions are made pursuant to Fed. R. Civ. P. 56 as incorporated into bankruptcy practice at Fed. R. Bankr. P. 7056.

I. Standard of Review

The procedure for granting summary judgment is found in Federal Rule Civil Procedure 56(c), made applicable to this proceeding through Federal Rule Bankruptcy Procedure 7056, which provides in part that

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if there is a material dispute over the facts, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit has recognized that Liberty Lobby, Celotex and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street, 886 F.2d at 1479 (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment.

Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting Street, 886 F.2d at 1478).

II. Facts

The following facts appear from the record. Debtors, Steven F. and Lori A. Brand ("debtors") filed a joint petition under chapter 7 on November 28, 2000. Included in their schedules as an asset was residential real property located at 1217 - 38th Street, Canton, Ohio. Schedule D indicated two mortgages against the property, a first mortgage in favor of Contimortgage and a second mortgage in favor of Mortgage Loan Servicing. Debtors did not claim a homestead exemption and listed a home address in a different city at the time of the filing of the petition.

Plaintiff's complaint was filed on March 2, 2001. Plaintiff seeks to avoid the mortgage in favor of Contimortgage based on an alleged defect in execution, namely the failure to have two witnesses present at the signing. Defendant-debtors answered the complaint and admitted all the allegations contained therein. Contimortgage also filed an answer and denied that the mortgage was defectively executed. Contimortgage raised several affirmative defenses in its answer.

A copy of the mortgage shows the following. The open-end mortgage was executed on July 8, 1998 by the debtors. A security interest in their residential real property was granted to Heartland Home Finance, Inc. The facially valid mortgage bears the signatures of Steven Brand and Lori Brand as mortgagees. Victoria O'Donnell and Robin Hudspath signed the witness lines and the mortgage is notarized by Victoria O'Donnell. A name stamp of Robin Hudspath appears below her signature.

The mortgage was signed in the living room of the debtors' home. Victoria O'Donnell, who handled the closing, was present, as were the debtors. Debtor Lori Brand's mother, Joyce Skelley, was also in the home on the afternoon of the closing. Robin Hudspath's presence at the closing is the central issue. Both debtors and Mrs. Skelley remember only one person, a female, at the closing. Victoria O'Donnell cannot recall

anything about the closing with debtors. Robin Hudspath cannot recall anything about the closing with debtors.

III. Arguments Presented

The central issue is whether Robin Hudspath was present when debtors signed the mortgage. The essence of plaintiff's argument is that the deposition testimony of the debtors and Mrs. Skelley and Mrs. Skelley's affidavit, combined with the inability of Victoria O'Donnell to recall any facts of the closing and Robin Hudspath's testimony which suggests she did not attend, compel the conclusion that there is no genuine issue of material fact that Robin Hudspath was not present at the signing. Plaintiff denies the applicability of O.R.C. § 5301.234 and the 11 U.S.C. § 550 defenses to this proceeding.

Contimortgage relies on Victoria O'Donnell's testimony that it was company policy to have two witnesses present at a closing. With regard to Robin Hudspath's testimony, Contimortgage asserts that when viewed in a light most favorable to Contimortgage, the testimony is not conclusive, but creates a question of fact, thereby making summary judgment inappropriate. Contimortgage cross-moves for summary judgment under 11 U.S.C. § 550 and O.R.C. § 5301.01.

In plaintiff's reply brief, plaintiff moves to strike the cross-motion filed by Contimortgage as untimely. The reply also contains a brief rebutting Contimortgage's response.

IV. Discussion

A. Motion to Strike Contimortgage's cross-motion for summary judgment

As a preliminary matter, the court addresses the plaintiff's motion to strike Contimortgage's cross-motion. The trial order entered on May 14, 2001 required dispositive motions to be filed by not later than July 27, 2001. Prior to the expiration of this deadline, the plaintiff sought an extension, applicable to the trustee only, of the deadlines. The motion was granted on July 25, 2001 and the order allowed the trustee to file dispositive motions through September 11, 2001. An extension was never requested, nor granted, to any other party. Contimortgage's cross-motion, filed on October 1, 2001, was untimely. The court grants the plaintiff's request to strike the cross-motion. *See* Fed. R. Bankr. P. 7016(f); 7037(b).

B. Execution of Mortgage

Ohio Revised Code § 5301.01 governs the execution of mortgages and states, in relevant part:

> A . . . mortgage . . . shall be signed by the mortgagor . . . . The signing shall be acknowledged by the . . . mortgagor . . . in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. The signing shall be acknowledged by the . . . mortgagor . . . before a . . . notary public . . . who shall certify the acknowledgment and subscribe his name to the certificate of acknowledgment.

The mortgage in question bears all the requisite signatures, as well as the notarial acknowledgment, and therefore carries a presumption of validity. Simon v. Chase Manhattan Bank (In re Zaptocky), 2001 WL 540458, *3 (B.A.P. 6th Cir. 2001). Plaintiff is attempting to rebut the facial validity with evidence of improper attestation. Specifically, plaintiff alleges that only one witness was present when debtors signed the mortgage.

Before proceeding, a synopsis of the testimony regarding the execution of the mortgage is helpful. Plaintiff's Exhibit B is the transcript of the deposition testimony of Steven F. Brand. He testifies to remembering one person coming to close on the loan, a woman with whom he had spoken on the phone. He did not recall the name of the woman. He remembered that his wife was present, and that his mother-in-law, her husband and daughter came "right as we were finishing up." Page 21, line 24. He testified that the woman was there about half an hour. He also gave a general physical description of the woman, stated he thought that she was in her mid-20s and that her hair was long and it was up. The signing occurred in the living room. He could not remember the woman's name or the type of car the woman drove. On cross-examination, he revealed that his mother-in-law was there for an early birthday celebration.

The deposition testimony of Mrs. Brand is attached as Plaintiff's Exhibit C. Mrs. Brand testified that her mother's birthday is July 16th. She recalled her husband and one other person at the closing, but she could not remember the person's name or gender. She said the person was there between one-half hour and an hour. The only other people she recalled coming to her home were her mother, stepfather and sister. Mrs. Brand remembered the closing was held in the living room, on tray tables. She recalled the person drove a nice car with "no rust." Page 11, line 22.

An affidavit of Mrs. Skelley is provided as Plaintiff's Exhibit D, and a transcript of her deposition is included as Exhibit E. The affidavit, executed on June 27, 2001, attests to her presence at the debtors' home on the date of the closing "for an early celebration of my birthday." Exhibit D, paragraph 3. Mrs. Skelley avers that she met a woman who "was there to sign papers for the refinancing of Steven and Lori's house." Exhibit D, paragraph 4. She also states that the signing was occurring in the living room and that the woman was the only one there for the signing other than her son-in-law and daughter. In the deposition, taken on August 27, 2001, Mrs. Skelley could not remember why she was at her daughter's on July 8, 1998. She did recall that her son-in-law and daughter were refinancing their house and that

another woman was present. She remembered the paperwork was being done in the living room. She stated that she was sitting on the chair, and they were on the couch with a little table in front of them. She remembered the woman had dark hair and it was pulled back and she was "rather pretty." Page 7, lines 23-24. She did not remember the woman's name. She thought the woman was about 30. She did not see the woman's car. She admitted that she was not there when the woman first arrived.

Plaintiff's Exhibit F is a transcript of the testimony of Victoria O'Donnell, who signed the mortgage as a witness and the notary. She testified that she knew a Robin when she worked at Clear Title and that she thought she would recognize her if she saw her. She remembered doing some closings with her and that Robin traveled sometimes with "me and other people." Page 8, lines 7-12. Ms. O'Donnell couldn't remember how many times she had been to Canton for Ohio Clear Title, nor did she have any recollection of the closing for Steven and Lori Brand. She did not know if Robin Hudspath was present or not. She did verify that it was her signature on the document and that if she signed it, the debtors had to be there. She did not remember a written company policy on closing, but did testify that she knew of the two witness requirement and followed it at all closings.

Plaintiff presented a transcript of Robin Hudspath's deposition testimony. Exhibit H. She testified that she did not travel much with Ohio Clear Title and that traveling was out of the norm. She didn't remember Victoria O'Donnell, but thought she might recognize her if she saw her. She testified that she did sign mortgages as a witness without actually witnessing the signing, possibly more than a hundred times. She does not remember visiting anyone in Canton, Ohio, nor did she recall traveling to Canton for Ohio Clear Title. She did not remember a closing for Steven and Lori Brand. She testified as to her signature on the mortgage. She also testified that the stamp with her name, used on the signature page, was kept in her drawer at the office and she did not think it was taken out of the office until she did work at home following the birth of her boys. She had no knowledge if she witnessed the signing or whether she would have signed in the documents in the office. She stated that she never drove if she had to go out of the office.

Finally, plaintiff also attached Exhibit 1which includes a copy of a subpoena for documents, including a loan processing guideline or policy manual for Ohio Clear Title Agency. The response, Exhibit 2, states that Ohio Clear Title could not find any such documents.

The issue is whether Robin Hudspath witnessed the debtors' signing of the mortgage. The debtors, and Mrs. Skelley, all testify to the presence of one person at the debtors' home. Robin Hudspath has no recollection of a signing with the debtors, but does know that she signed mortgages as a witness without witnessing the signing, perhaps more than one hundred times. Victoria O'Donnell does not affirmatively state that Ms. Hudspath was present. Contimortgage relies on Victoria O'Donnell's statement that she followed the requirement of having two witnesses present at the closing.

Upon review of the exhibits and arguments presented by the parties, the court concludes that Contimortgage has failed to establish a genuine issue of material fact regarding whether Ms. Hudspath was present at the signing of debtors' mortgage. The court must view the facts in the light most favorable to Contimortgage and draw reasonable inferences from those facts. Matsushita, 475 U.S. at 587. The "mere possibility" of a factual question is insufficient to defeat a motion for summary judgment. *See* Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992) (quoting Gregg v. Allen-Bradley Co., 801 F.2d 859, 863 (6th Cir. 1986)). The summary judgment standard "requires a court to make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimis*." Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996).

Reviewing the evidence, the court can only reasonably infer that one of the alleged witnesses was present at the execution of the mortgage. Deposition testimony from three separate people recall only one witness at the signing of the mortgage in the living room of debtors' home. Additionally, neither signatory witness to the mortgage had any specific recollection of the debtors or the execution of the mortgage at issue.[1] The company could not produce a written policy on the procedure for mortgage executions. The only contrary evidence, supporting the presence of two witnesses, is the statement made by Victoria O'Donnell that she did follow the requirement of having two witnesses present at the execution of a mortgage.

While Zaptocky held that a notary's testimony of always adhering to an inflexible rule is to be given "great weight," the court also determined that such testimony is not conclusive. Zaptocky at *4 (citing Helbling v. Krueger (In re Krueger), No. 98-18686, Adv. No. 99-1016, 2000 WL 895601, at *3 (Bankr. N.D. Ohio June 30, 2000) (parenthetical omitted)). The only evidence affirming the validity of the facially valid mortgage is the following testimony by the notary:

> Q. Are you familiar with the requirements for execution of a mortgage in the state of Ohio?
> A. Yes.

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[1] Although Contimortgage suggests that Ms. Hudspath's inability to recall either debtors or the signing of their mortgage should be viewed in its favor, the court fails to see how a finder of fact can reasonably infer a specific finding from the absence of any factual recollection in a circumstance such as this. Different circumstances could make the reverse of such an inference logical, for example, if the witness had no recollection of batting in the bottom of the ninth inning in game seven of the World Series or had no recollection of being on the U.S.S. Arizona at 9:00 a.m. on December 9, 1941. Such a failure of recollection by a healthy person would lead to the inference that they were not present. It is illogical to conclude that failure to remember being present at a banal event can result in the inference that one was present.

Q. And you're familiar that you need to have two witnesses present when you sign those? (sic)
A. Correct.
Q. And was this a policy, did you follow that requirement when you did closings?
A. Yes.
Q. That included when you worked for Ohio Clear Title?
A. Yes.

Plaintiff's Exhibit F, page 15, line 17 - page 16, line 3. This is less than a statement of an inflexible rule always adhered to.

The evidence negating the validity of the mortgage for the reason that the mortgage was not executed in the presence of two witnesses includes the following:

1. The debtors both remember only one witness present in their home for the signing of the mortgage.

2. Mrs. Skelley recalls only one witness at debtors' house the day that the mortgage was executed.

3. The debtors and Mrs. Skelley remember that the closing was in the living room of debtors' house.

4. The debtors and Mrs. Skelley recall that the closing occurred in the afternoon.

5. Mrs. Skelley testified that the woman was about thirty years old, while Steve Brand said she was in her mid-20s.

6. Steve Brand and Mrs. Skelley both remembered the person at the closing had dark or brown long hair and that her hair was pulled "up" or "back."

7. Steve Brand and Lori Brand remembered that Mrs. Skelley was at the house for an early birthday celebration. This is corroborated by Mrs. Skelley's affidavit.

8. Lori Brand testified that the woman was at their home for approximately one-half hour to an hour and her husband testified that the closing lasted approximately a half-hour. Both also thought that the closing occurred during the week.

9. Mrs. Skelley stated that the closing was being done on a little table and Mrs. Brand testified that they used a tray table during the execution.

10. Neither Victoria O'Donnell or Robin Hudspath remember the debtors or any details about the signing of the mortgage.

11. Robin Hudspath does not recall traveling to Canton for Ohio Clear Title.

12. Robin Hudspath does not recall removing her name stamp from the office until a time after the execution of debtors' mortgage.

13. Robin Hudspath testified that she did sign mortgages without being present to witness the execution, perhaps more than one hundred times.

The issue is whether the one shred of affirmative flotsam adrift in a sea of negative evidence is sufficient to hold that a rational trier of fact could find for Contimortgage or there is no genuine issue for trial. It is not. Plaintiff as the moving party has come forward with evidence establishing the absence of a genuine issue of material fact. *See* Celotex, 477 at 323. Thereafter, defendant, as the non-moving party, must demonstrate the existence of genuine issues of material fact. *See* id. at 322; Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989). This must be more than a scintilla. *See, e.g.*, Liberty Lobby, 477 U.S. at 248. "A genuine issue for trial exists only when there is sufficient 'evidence on which the jury could reasonably find for the [defendant].'" Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n, 262 F.3d 543, 549 (6th Cir. 2001) (citing Liberty Lobby, 477 U.S. at 252)).

Defendant has not demonstrated any fact upon which a reasonable fact finder could decide in its favor. One witness answered a disjointed question of questionable import: "Was this a policy, did you follow . . . ?" This is not a statement of fact or the affirmance of a rigid rule always followed. No reasonable fact finder could find in defendant's favor based on the evidence of record. Even when accepted as the fact promoted by defendant, it is unreasonable to elevate a single piece of evidence in defendant's favor to a level which discounts plaintiff's entire case. Standards such as a "reasonable fact finder" must require more than one shard of evidence, particularly where the shard is of questionable specificity and meaning. The court is not required to conduct a trial to see if defendant can find more or can get the witness to say more. Defendant's evidence is insufficient even if all inferences are made in its favor and all evidence viewed in a most favorable light.

C. O. R.C. § 5301.234

The trustee also moves to find that certain defenses raised by defendant are inapplicable. Trustee posits that O.R.C. § 5301.234 cannot apply retroactively to the mortgage at issue, while defendant argues to the contrary. The mortgage in this case was executed on July 8, 1998. O.R.C. § 5301.234 became effective on June 30, 1999.

The court agrees with those courts which have found that O.R.C. § 5301.234 is prospective only. Therefore, the irrebuttable presumption of validity will be extended to only those mortgages executed after the effective date of the statute. *See* Blackmer v. TMS Mortgage, Inc. (In re Blackmer), 98-62773, Adv. No. 98-6259 (Bankr. N.D. Ohio June 21, 2000); Logan v. U.C. Lending, Inc. (In re Caldwell), 2000 WL 33123617 (Bankr. S.D. Ohio 2000); Simon v. Chase Manhattan Bank (In re Zaptocky), 232 B.R. 76, 82 at n. 2 (B.A.P. 6th Cir. 1999); Helbling v. Williams (In re Williams), 240 B.R. 884 (Bankr. N.D. Ohio 1999); Helbling v. Ducksworth (In re Ducksworth), 1999 WL 970273 (Bankr. N.D. Ohio 1999).

D. Defenses under 11 U.S.C. §550.

The trustee argues that the 11 U.S.C. §550 defenses raised by defendant are also inapplicable. Defendant claims that the trustee must avoid the interest and then recover the interest for the benefit of the estate. According to defendant, the defenses in section 550(b) prevent recovery in this case.[2]

The court declines to accept the position of the defendant and chooses to follow those cases finding that the trustee does not also need to "recover" the property following avoidance on the facts presented. Suhar v. IMC Mortgage Co. (In re Burns), 2001 FED App. 0011P, No. 00-8006 (B.A.P. 6th Cir. Nov. 2, 2001); Wasserman v. Barkley (In re Barkley), 263 B.R. 553 (Bankr. N.D. Ohio 2001); Hendon v. G.E. Capital Mortgage (In re Carpenter), 266 B.R. 671 (Bankr. E.D. Tenn. 2001); Eisen v. Allied Bankshares Mortgage Corp., L.L.C. (In re Priest), 2000 WL 821379 (Bankr. N.D. Ohio 2000).

IV. Conclusion

The defendant has failed to identify a genuine issue of material fact entitling it to proceed to trial. The trustee can avoid the improperly executed mortgage.

Additionally, the court finds that the O.R.C. §5301.234 is prospective in application and therefore does not apply to the mortgage at issue. The defenses raised under section 550 are also rejected. Upon avoidance of the mortgage, the avoided interest becomes property of the estate without the need for further recovery by the trustee. Section 550 is therefore inapplicable.

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[2] While defendant pled defenses under 11 U.S.C. §550(e) in its answer, and the trustee addresses an argument under section 550(e), defendant offers no response. In light of the absence of any counter-argument by defendant, the trustee will prevail in her section 550(e) argument. The defendant is not entitled to any protection from the exercise of the trustee's avoiding power under 11 U.S.C. §550(e).

An order in accordance with this decision follows.

_____

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	
	)	CASE NO. 00-64045
STEVEN F. BRAND and	)	CHAPTER 7
LORI A. BRAND,	)	JUDGE RUSS KENDIG
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Debtors.	)	
	)	
----------	)	
ANNE PIERO SILAGY,	)	ADV. NO. 01-6020
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
STEVEN F. BRAND, et al.,	)	
	)	
Defendants.	)	

Dated at Canton, Ohio this ___th day of November, 2001.

For the reasons set forth in the accompanying Memorandum of Decision, the Court finds that Defendant Contimortgage Corporation has failed to demonstrate the presence of genuine issues of material fact precluding an entry of summary judgment in favor of the trustee. The trustee's motion for summary judgment on the issue of improper execution under O.R.C. § 5301.01 is hereby **GRANTED.** Defendant's cross-motion for summary judgment was untimely and the court **GRANTS** the trustee's motion to strike the cross-motion.

Further, the trustee is entitled to succeed as a matter of law on the arguments presented relating to defendant's defenses under O.R.C. § 5301.234 and 11 U.S.C. § 550. The defenses raised by defendant are inapplicable to the issues presented in this adversary proceeding. The trustee's motion for summary judgment on these issues is **GRANTED.**

So ordered.

_____
RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

Copies of the within Memorandum of Decision and Order were mailed on this ___th day of November, 2001 to:

David A. Freeburg
McFadden & Assoc., L.P.A.
Suite 1700
1370 Ontario Street
Cleveland, OH 44113

Bruce R. Schrader, II
Robert B. Trattner
Roetzel & Andress L.P.A.
222 South Main St., Suite 400
Akron, OH 44308

Jeffrey H. Weltman
4819 Munson Street, N.W.
Canton, Ohio 44718

_____
Deputy Clerk