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**BEFORE
The PUBLIC UTILITIES COMMISSION OF OHIO**

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PETER J. WIELICKI)	Case No. 10-2329-EL-Css
Complainant,)	
v.)	Attorney Examiner : Kerry K. Sheets
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,)	
Respondent.)	<u>COMPLAINANT'S POST-TRIAL BRIEF</u>
)	

Complainant respectfully submits this post-trial brief to provide some additional legal analysis on a few discrete questions that were presented or distilled over the course of the trial of this matter. Complainant also incorporates his prior arguments, where applicable, by reference.

PRELIMINARY STATEMENT

This case involves the legal principal of Accord & Satisfaction through the use of a restrictively endorsed check.

All businesses that accept checks should be aware of ORC 1303.40 made effective on August 19, 1994. ORC 1303.40, based on UCC 3-311, defines the rules governing checks intended for the accord and satisfaction of debts that are disputed or unliquidated, also known as "payment in full checks". Debtors make the check out for less than the full amount due and either mark the check with a phrase such as "payment in full" or include a written statement explaining that the check represents an amount intended to be full satisfaction of the debt.

The general rule of ORC 1303.40 is that a creditor's acceptance of a "payment in full" check, tendered in good faith by the debtor is full satisfaction of the debt and any additional claim against the debtor is precluded. "Good faith" is defined in ORC section 1301.01(S) as "honest in fact in the conduct or transaction concerned."

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The general rule that acceptance of the check discharges any further claims against the debtor is subject to two statutory exceptions. First, a claim is not discharged if the creditor, within a reasonable time before the debtor receives the payment in full check, sent a conspicuous statement to the person that any communication concerning disputed debts must be sent to and a designated person, office, or place and the check was not received by the person, office, or place so designated. Second, if the first exception does not apply, a claim is not discharged if the creditor tenders repayment of the amount of the instrument to the debtor within ninety days after payment of the check.

Despite the exceptions, however, a claim may still be discharged by the payment in full check if the creditor or an agent of the creditor that is directly responsible for the disputed payment knew that the instrument was tendered in full satisfaction of the debt within a reasonable time before collection of the instrument was initiated. An agent of the creditor includes employees, collection agencies, attorneys, finance companies, and any other person or agency that is responsible for collecting delinquent debts. Acceptance of the check by any of the foregoing will discharge the remainder of the debt regardless of the two exceptions.

Any text affixed on a check or text contained in some form of document that refers to an accompanying check is considered a "restrictive endorsement" All states have adopted the recent revision of the Uniform Commercial Code, Article 3, Section 311 (UCC 3-311), which is commonly referred to as "Safe Harbor." The Safe Harbor principal is applicable to payments received in a system that is serviced by a third party, a lock box, post office box or personnel lacking the knowledge and expertise to make an informed decision relative to restrictive endorsements.

The Safe Harbor provision of UCC 3-311 specifies within 90 days of depositing the restricted payment from the debtor, the creditor can send one of their checks back to the debtor in the same amount of the restricted check and preserve the creditor's legal remedies. The debtor need not cash the

"reimbursement check", as the creditor's right to proceed with legal remedies is preserved by the act of sending back the amount originally submitted under endorsement text or provisions.

STATEMENT OF FACT

In August of 2006 Complainant experienced a sharp spike in usage in comparison to seven years of historical data. The usage in August 2006 was 2,750 KWH in comparison to the average historical usage for August of 1,515 KWH not including August 2006. During the historical data period the usage was a low of 1,140 KWH to a high of 2,098 KWH not including August 2006. The usage data was taken from Respondent's monthly billing statements. The temperature, pursuant to the National Weather Service, averaged 81.4 degrees in August 2006. During the historical data period the temperature varied from a low of 76.7 degrees to a high of 83.9 degrees. The average temperature during the historical data period for August was 81.3 degrees. This data was submitted as evidence during trial in a spreadsheet format. The temperature variance during the historical data period including August 2006 was 7.2 degrees with a usage variance of 1,610 KWH. This is more than twice the average usage for August during the historical data period.

As a result of this abnormal reading, Complainant contacted the Respondent by phone requesting an explanation. After speaking to a representative and receiving no satisfaction, Complainant requested to speak to a Manager. Complainant was advised that individual names could not be given due to Respondent's security policy. The Manager also did not have a valid explanation, but agreed to a credit from \$354.59 to \$109.00. Respondent has no record of this agreement, but also stated that since the recording of conversations is a human function, errors may be made in not recording calls. Claimant advised the Manager that he would be sending a restrictively endorsed check and requested the address and name of the individual who such a check would be sent. The Manager stated that the address was Illuminating Company, 76 S. Main St., A-RPC, Akron, Ohio 44308-1890 and it should be addressed to the Customer Service Manager. He also stated that it would take two billing cycles for the credit to appear on

the monthly billing. Complainant sent the check to the address and individual stated inclusive of a letter advising the Respondent the intent of the check. The check contained the following wording in red type on the rear of the check.

RESTRICTIVE ENDORSEMENT

Endorsement of this check voids all previous agreements and contracts, constitutes full Accord & Satisfaction without protest and voids all future claims on this account. Payee further agrees to remove all negative credit bureau information.

At trial, Respondent acknowledged that they negotiated the check and Complainant submitted a bank statement into evidence also confirming this. Unfortunately, no copy of the check or letter was available. When Claimant did not see a credit on his statements, he contacted the Respondent to learn that there was no record of the agreement and the Respondent had no intention of honoring the agreement.

In August 2007, twice in January 2007 and June 2007 subsequent restrictively endorsed checks with correspondence were sent to the same address. A copy of the August check was included with the Complaint. The letters were submitted into evidence. Respondent acknowledged negotiating all checks and receiving the accompanying letters. Claimant also included a bank statement copy into evidence supporting that the August 2007, #3528, was negotiated by CEI.

Respondent refused to offer an explanation for the abnormal usage or honor the agreement on the back of the check. On August 3, 2010, a Respondent's representative showed up at Claimant's home to shut off the power if payment was not made. A copy of the disconnection notice is attached to the Complaint and indicates a \$302.88 outstanding balance.

LAW AND ARGUMENT

(1) Check #3528 and its accompanying letter discharges Respondent's claim under ORC Sect. 1303.40

(See attached copy of code section for reference)

Before it can be shown that the claim is discharged under ORC Sect. 1303.40(A), it must be demonstrated that three prerequisites apply. The check was tendered in good faith based on a good faith

dispute involving an abnormal usage in August 2006, meeting element (1). Because the dispute was communicated to the Respondent by phone beforehand and sent the check with an explanatory cover letter addressed to the Customer Service Manager to make the effects of cashing the check clear as to its intended recipient. Element (2) is met because Complainant did not owe the amount claimed due to supporting data and reasons specified in the restrictive endorsement located on the back of the check agreed to by Respondent. Finally, element (3) is indisputably met because the Respondent admits that it negotiated the check. Respondent also admits in testimony that the check and letter were intentionally not referred to a Manager as requested in the letter, but rather handled by a clerical staff member who was not authorized to handle restrictive endorsed checks.

The Respondent's claim that the discharge should not occur because Claimant paid an "undisputed" amount, which could be seen as a challenge to element (3). However, ORC Sect. 1303.40 does not state anything against paying an undisputed amount, but only requires that the "claim" be "unliquidated" or subject to a bona fide dispute. In this matter, the claim itself was definitely subject to a bona fide dispute. The check and letter made it clear that the check was to settle the current amount due and also any claim the Respondent had for prior amounts claimed.

(2) Any debt was discharged under ORC Sect. 1303.40(A) because the check and accompanying letter both contained conspicuous statements that the check was to be regarded as payment in full

ORC Sect. 1303.40(A) specifies that a debt can be discharged if the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. A statement is conspicuous when "it is so written that a reasonable person against whom it is to operate ought to have noticed it" ORC Sect. 1301.01. The official comment to UCC 3-311 further specifies, "If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous."

Check #3528 and its accompanying letter clearly meet these requirements. Check #3528 included a restrictive endorsement on its rear side, with "RESTRICTIVE ENDORSEMENT" in large red block letters and specified that the check was an accord and satisfaction (see Check #3528 attached to the Complaint). Furthermore, the letter sent with the check specified that it was "offered as payment in full for any and all current and prior claims." The letter was short and could have been read in a matter of seconds. The letter was also sent with an "Attn: Customer Service Manager" line at the top, so that the Customer Service Manager would receive the check and make a decision on whether to cash it or return it. Therefore, both the check and accompanying communication were very clear that cashing the check would cause a full discharge of the debt.

The Respondent has stated in their testimony that the statement on the back of the check is insufficient because nobody looks at the back of checks, they merely look at the front and send them to the bank to be cashed. As discussed above, any statement on the check should be sufficient if it is expected that someone will examine the check. I had plenty of reason that the check would be examined because the cover letter was addressed to the Customer Service Manager and informed the reader that the check had a restrictive endorsement.

As stated in the preliminary statement section above, ORC Sect. 1303.40(B) contains two protections against the accidental cashing of restrictively endorsed checks, giving the recipient 90 days to return the check or the accepted amount with a statement that the money was not accepted as an accord and satisfaction, or alternatively allowing them to send a conspicuous statement stating that such communications were to be sent to a particular office. The Respondent failed to utilize either of these relief provisions thus barring them from collection.

SUPPORT CITATIONS

Accord and satisfaction is accomplished when creditor accepts and deposits a check which debtor offers as full payment for unliquidated or disputed debt; by cashing the check, creditor manifests assent to terms of new contract which extinguishes earlier contractual obligation. Party alleging accord and satisfaction may prove requisite notice to creditor that tendered amount was offered as payment in full of creditor's claim either by extrinsic evidence of agreement or by sufficient notation on the check. Two essential safeguards built into doctrine of accord and satisfaction protects creditors: first, there must be a good faith dispute about the debt; and second, creditor must have reasonable notice that check is intended to be in full satisfaction of debt. *Allen v. R.G. Indus. Supply* (Ohio, 05-19-1993) 611 N.E.2d 794, 66 Ohio St.3d 229, 1993-Ohio-43.

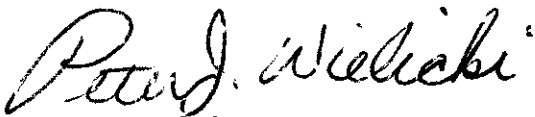
CONCLUSION

The facts of this matter are clear. The Respondent cashed a restrictively endorsed check bearing a clear conspicuous indication the amount of the check was in full satisfaction of the outstanding debt. The check was also accompanied by a cover letter. The Complainant fully complied with the law and it's intent concerning UCC 3-311 to create an accord and satisfaction.

Wherefore:

Based on the above, the Commission should find in favor of the Complainant and issue an order for the Respondent to credit Claimant's account in the amount of \$302.88 for the outstanding claim and \$35.00 for the amount of copying, postage and miscellaneous costs.

Respectfully Submitted,



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1303.40. (UCC 3-311) Accord and satisfaction by use of instrument.

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§ 1303.40. (UCC 3-311) Accord and satisfaction by use of instrument.

If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, all the following apply:

(A) Unless division (B) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(B) Subject to division (C) of this section, a claim is not discharged under division (A) of this section if either of the following applies:

(1) The claimant, if an organization, proves both of the following:

(a) Within a reasonable time before the person against whom the claim is asserted tendered the instrument to the claimant, the claimant sent a conspicuous statement to the person that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place.

(b) The instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. Division (B)(2) of this section does not apply if the claimant is an organization that sent a statement complying with division (B)(1) of this section.

(C) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

HISTORY: 145 v S 147. Eff 8-19-94.

Not analogous to former RC § 1303.40 (129 v S 5), repealed 145 v S 147, § 2, eff 8-19-94.

Official Comment

1. This section deals with an informal method of dispute resolution carried out by use of a negotiable instrument. In the typical case there is a dispute concerning the amount that is owed on a claim.

Case #1. The claim is for the price of goods or services sold to a consumer who asserts that he or she is not obliged to pay the full price for which the consumer was billed because of a defect or breach of warranty with respect to the goods or services.

Case #2. A claim is made on an insurance policy. The insurance company alleges that it is not liable under the policy for the amount of the claim.

In either case the person against whom the claim is asserted may attempt an accord and satisfaction of this disputed claim by tendering a

check to the claimant for some amount less than the full amount claimed by the claimant. A statement will be included on the check or in a communication accompanying the check to the effect that the check is offered as full payment or full satisfaction of the claim. Frequently, there is also a statement to the effect that obtaining payment of the check is an agreement by the claimant to a settlement of the dispute for the amount tendered. Before enactment of revised article 3, the case law was in conflict over the question of whether obtaining payment of the check had the effect of an agreement to the settlement proposed by the debtor. This issue was governed by a common-law rule, but some courts held that the common-law was modified by former section 1-207 which they interpreted as applying to full settlement checks.

2. Comment d. to Restatement of Contracts, section 281 discusses the full satisfaction check and the applicable common-law rule. In a case like case #1, the buyer can propose a settlement of the disputed bill by a clear notation on the check indicating that the check is tendered as full satisfaction of the bill. Under the common-law rule the seller, by obtaining payment of the check accepts the offer of compromise by the buyer. The result is the same if the seller adds a notation to the check indicating that the check is accepted under protest or in only partial satisfaction of the claim. Under the common-law rule the seller can refuse the check or can accept it subject to the condition stated by the buyer, but the seller can't accept the check and refuse to be bound by the condition. The rule applies only to an unliquidated claim or a claim disputed in good faith by the buyer. The dispute in the courts was whether section 1-207 changed the common-law rule. The Restatement states that section "need not be read as changing this well-established rule."

3. As part of the revision of article 3, section 1-207 has been amended to add subsection (2) stating that section 1-207 "does not apply to an accord and satisfaction." Because of that amendment and revised article 3, section 3-311 governs full satisfaction checks. Section 3-311 follows the common-law rule with some minor variations to reflect modern business conditions. In cases covered by section 3-311 there will often be an individual on one side of the dispute and a business organization on the other. This section is not designed to favor either the individual or the business organization. In case #1 the person seeking the accord and satisfaction is an individual. In case #2 the person seeking the accord and satisfaction is an insurance company. Section 3-311 is based on a belief that the common-law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.

4. Subsection (a) states three requirements for application of section 3-311. "Good faith" in subsection (a)(i) is defined in section 3-103(a)(4) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender. Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute. Subsection (a)(ii). Other law applies to cases in which a debtor is seeking discharge of such a debt by paying less than the amount owed. For the purpose of subsection (a)(iii) obtaining acceptance of a check is considered to be obtaining payment of the check.

The person seeking the accord and satisfaction must prove that the requirements of subsection (a) are met. If that person also proves that the statement required by subsection (b) was given, the claim is discharged unless subsection (c) applies. Normally the statement required by subsection (b) is written on the check. Thus, the canceled check can be used to prove the statement as well as the fact that the claimant obtained payment of the check. Subsection (b) requires a "conspicuous" statement that the instrument was tendered in full satisfaction of the claim. "Conspicuous" is defined in section 1-201(10). The statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it." If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally indorse it. Since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's indorsement of the check, the claimant "ought to have noticed" the statement.

5. Subsection (c)(1) is a limitation on subsection (b) in cases in which the claimant is an organization. It is designed to protect the claimant against inadvertent accord and satisfaction. If the claimant is an organization payment of the check might be obtained without notice to the personnel of the organization concerned with the disputed claim. Some business organizations have claims against very large numbers of customers. Examples are department stores, public utilities, and the like. These claims are normally paid by checks sent by customers to a designated office at which clerks employed by the claimant or a bank acting for the claimant process the checks and record the amounts paid. If the processing office is not designed to deal with communications extraneous to recording the amount of the check and the account number of the customer, payment of a full satisfaction check can easily be obtained without knowledge by the claimant of the existence of the full satisfaction statement. This is particularly true if the statement is written on the reverse side of the check in the area in which indorsements are usually written. Normally, the clerks of the claimant have no reason to look at the reverse side of checks.

Indorsement by the claimant normally is done by mechanical means or there may be no indorsement at all. Section 4-205(a). Subsection (c)(1) allows the claimant to protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. The statement must be given to the customer within a reasonable time before the tender is made. This requirement is designed to assure that the customer has reasonable notice that the full satisfaction check must be sent to a particular place. The reasonable time requirement could be satisfied by a notice on the billing statement sent to the customer. If the full satisfaction check is sent to the designated destination and the check is paid, the claim is discharged. If the claimant proves that the check was not received at the designated destination the claim is not discharged unless subsection (d) applies.

6. Subsection (c)(2) is also designed to prevent inadvertent accord and satisfaction. It can be used by a claimant other than an organization or by a claimant as an alternative to subsection (c)(1). Some organizations may be reluctant to use subsection (c)(1) because it may result in confusion of customers that causes checks to be routinely sent to the special designated person, office, or place. Thus, much of the benefit of rapid processing of checks may be lost. An organization that chooses not to send a notice complying with subsection (c)(1)(i) may prevent an inadvertent accord and satisfaction by complying with subsection (c)(2). If the claimant discovers that it has obtained payment of a full satisfaction check, it may prevent an accord and satisfaction if, within 90 days of the payment of the check, the claimant tenders repayment of the amount of the check to the person against whom the claim is asserted.

7. Subsection (c) is subject to subsection (d). If a person against whom a claim is asserted proves that the claimant obtained payment of a check known to have been tendered in full satisfaction of the claim by "the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation," the claim is discharged even if (i) the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1), or (ii) the claimant tendered repayment of the amount of the check in compliance with subsection (c)(2).

A claimant knows that a check was tendered in full satisfaction of a claim when the claimant "has actual knowledge" of that fact. Section 1-201(25). Under section 1-201(27), if the claimant is an organization, it has knowledge that a check was tendered in full satisfaction of the claim when that fact is

"brought to the attention of the individual conducting that transaction, and in any event when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information."

With respect to an attempted accord and satisfaction the "individual conducting that transaction" is an employee or other agent of the organization having direct responsibility with respect to the dispute. For example, if the check and communication are received by a collection agency acting for the claimant to collect the disputed claim, obtaining payment of the check will result in an accord and satisfaction even if the claimant gave notice, pursuant to subsection (c)(1), that full satisfaction checks be sent to some other office. Similarly, if a customer asserting a claim for breach of warranty with respect to defective goods purchased in a retail outlet of a large chain store delivers the full satisfaction check to the manager of the retail outlet at which the goods were purchased, obtaining payment of the check will also result in an accord and satisfaction. On the other hand, if the check is mailed to the chief executive officer of the chain store subsection (d) would probably not be satisfied. The chief executive officer of a large corporation may have general responsibility for operations of the company, but does not normally have direct responsibility for resolving a small disputed bill to a customer. A check for a relatively small amount mailed to a high executive officer of a large organization is not likely to receive the executive's personal attention. Rather, the check would normally be routinely sent to the appropriate office for deposit and credit to the customer's account. If the check does receive the personal attention of the high executive officer and the officer is aware of the full satisfaction language, collection of the check will result in an accord and satisfaction because subsection (d) applies. In this case the officer has assumed direct responsibility with respect to the disputed transaction.

If a full satisfaction check is sent to a lock box or other office processing checks sent to the claimant, it is irrelevant whether the clerk processing the check did or did not see the statement that the check was tendered as full satisfaction of the claim. Knowledge of the clerk is not imputed to the organization because the clerk has no responsibility with respect to an accord and satisfaction. Moreover, there is no failure of "due diligence" under section 1-201(27) if the claimant does not require its clerks to look for full satisfaction statements on checks or accompanying communications. Nor is there any duty of the claimant to assign that duty to its clerks. Section 3-311(c) is intended to allow a claimant to avoid an inadvertent accord and satisfaction by complying with either subsection (c)(1) or (2) without burdening the check-processing operation with extraneous and wasteful additional duties.

8. In some cases the disputed claim may have been assigned to a finance company or bank as part of a financing arrangement with respect to accounts receivable. If the account debtor was notified of the assignment, the claimant is the assignee of the account receivable and the "agent of the claimant" in subsection (d) refers to an agent of the assignee.