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April 11, 2017

VIA EFILE

Mr. Blake A. Hawthorne
Clerk of the Texas Supreme Court
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 15-0763; *Miguel Angel Loya, Petitioner, v. Leticia B. Loya, Respondent*; In the Supreme Court of Texas; Respondent's Post-Submission Letter Brief.

Dear Mr. Hawthorne:

On March 23, 2017, Miguel Loya filed a Letter Brief commenting on supplemental research that Leticia Loya filed on March 21. The research was an excerpt from a publication discussing cases around the country that had ruled on the divisibility of bonuses paid after divorce for work done during marriage.

The multi-state survey involves equitable distribution jurisdictions and lists approximately thirty cases holding that bonuses paid after divorce, for work done during marriage, are divisible upon divorce. The publication lists two cases holding the opposite. One is *in re Marriage of Wendt*, 995 N.E.2d 439 (Ill. Ct. App. 2013). *Wendt* states Illinois law, and has not been cited as authority outside of Illinois. The court in *Wendt* distinguished several cases from other states on the ground that those husbands had employment contracts while Mr. Wendt did not. *Wendt*, 995 N.E.2d at 443. Miguel Loya has a written employment agreement that specifically mentions the company's bonus program, making this case distinguishable from *Wendt*. Supp. CR 125.

The other case against dividing post-divorce bonuses is *Dunham v. Dunham*, 125 P.3d 1015 (Wyo. 2006). In a later case, that same court characterized its ruling in *Dunham* in this way: "one spouse sought to include unvested future interests in the marital estate and we held that future property cannot be in-

cluded if it may never come into being." *Humphrey v. Humphrey*, 157 P.3d 451, 453 (Wyo. 2007). *Dunham* was based on the vested rights approach to dividing property upon divorce. Texas has eliminated the requirement that deferred compensation must be vested in order to be divisible upon divorce. *Cearley v. Cearley*, 544 S.W.2d 661, 665-664 (Tex. 1976); Tex. Fam. Code § 3.007(d). The *Humphrey* case does not help us determine Texas law.

Each state has its own law, based on its historical roots, constitution, statutes, and case law precedent. The importance of other states' views on dividing post-divorce bonuses is not the particulars of each state's laws, but rather the large number of American states that divide such bonuses upon divorce and the small number that do not.

In *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972), this Court wrote:

> A much later case of this Court reverted to a test more akin to that prevailing under the Spanish and Mexican law, and several early opinions of this Court, dealing with community property. It applied an affirmative test; i.e., that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such property, acquired by the joint efforts of the spouses, was regarded as acquired by "onerous title" and belonged to the community. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953); *DeBlane v. Lynch*, 23 Tex. 25 (1859); *Smith v. Strahan*, 16 Tex. 314 (1856); *Epperson v. Jones*, 65 Tex. 425 (1886); De Funiak, Principles of Community Property (1971) § 62; Moynihan, Community Property, 2 American Law of Property (1952) § 7.16.

A bonus received after divorce for work done during marriage meets this Court's affirmative test for community property. The Texas Legislature has determined that Texas courts should divide bonuses upon divorce, along with other deferred compensation paid under an employer plan. Tex. Fam. Code § 7.003. The mixed character of a bonus was recognized in *Sprague v. Sprague*, 363 S.W.3d 788, 802 (Tex. App.--Houston [14th Dist.] 2012, pet. denied), which held that, where a bonus was intended to compensate the husband for work done both before and during marriage, "a reasonable jury could find that the value of Bob's separate-property interest in that payment is 16.5/18 x $82,500, or $75,625."

By coincidence the *Wendt* opinion addresses an issue that arose in oral argument in this case, which is the propriety of borrowing the definition of earnings for child support purposes to determine marital property rights and the power of the court to divide property in a divorce. In *Wendt*, the Illinois court of appeals held that the post-divorce bonus would be considered for child support purposes but *not* for purposes of property division. *Wendt*, 995 N.E.2d at 303 ("As an initial matter, we emphasize that, no matter the outcome, any bonus received by Scott is expressly included in the calculation of his child support obligation, as provided in

the judgment for dissolution of marriage"). Miguel argues that the definition of "earnings" in Texas Family Code § 101.011 should be used to determine what constitutes marital property under Family Code Chapter 3 (Marital Property Rights and Liabilities) and Chapter 7 (Award of Marital Property). The legal and practical differences between child support and marital property are too great to borrow statutory language from one to determine the other. The Texas Legislature specifically avoided this problem by saying in Section 101.001, Applicability of Definitions, that "Definitions in this subchapter apply to this title." The statute makes plain that the definition of "earnings" given in Title 5, The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship, has no application to Title 1, The Marriage Relationship.

Miguel's final point in his Letter Brief is that the inception of title rule governs marital property in Texas. While it is true that the inception of title rule *usually* governs marital property in Texas, in the special case of deferred compensation Texas applies an apportionment rule, not the inception of title rule. *Cearley v. Cearley*, 544 S.W.2d 661, 665 (Tex. 1976) (describing the division of pensions upon divorce as "Apportionment As Contingent Property Interest"); *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977) (telling how to calculate "fractional interest" in pension benefits); *May v. May*, 716 S.W.2d 705, 710 (Tex. App.–Corpus Christi 1986, no writ) (describing the "*Taggart* apportionment fraction").

The distinction between inception of title and apportionment is very clear in the case of employee stock options. The courts of appeals initially applied the inception of title rule to employee stock options. *See Bodin v. Bodin*, 955 S.W.2d 380, 381 (Tex. App.--San Antonio 1997, no pet.) (employee stock options awarded during marriage were 100% community property even if they were not vested at the time of divorce); *accord*, *Boyd v. Boyd*, 67 S.W.3d 398, 410 (Tex. App.--Fort Worth 2002, no pet.); *Hewelt v. Hewelt*, No. 03-00-00166-CV (Tex. App.--Austin 2001, pet. denied) (memo. op.); *Charriere v. Charriere*, 7 S.W.3d 217, 219 (Tex. App.--Dallas 1999, no writ). The Legislature overturned that case law effective September 1, 2005, when it adopted Tex. Fam. Code § 3.007(d) to require a fractional apportionment of employee stock options based on the percent of the vesting period that accrues during marriage. The inception of title rule does not govern deferred compensation, like pension, stock options, restricted stock, and bonuses.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this document was produced on a computer using Corel WordPerfect X8, and contains 1,121 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Richard R. Orsinger
Richard R. Orsinger

Certificate of Service

I certify that on April 11, 2017, I served a copy of this letter brief on the parties listed below by electronic service and by email.

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