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TO: Wendy Burke

FROM: Andrew Washington

DATE: July 25, 2023

RE: In re Marriage of Burke

### **Statement of Recommendation**

Given the explanation provided below, I would recommend that before accepting Harlan's counsel offer, we move forward with a proper accounting of when DigitalAudio's shares began to see an increase due to the marketability of ProAudio. This will allow us to determine how much of the growth of DigitalAudio's shares from 1989 to 2009 was largely due to SoundAudio as opposed to ProAudio.

### **Harlan's DigitalAudio Shares**

Per *Rand*, property acquired by either spouse before marriage belongs to that spouse -- it is his or her separate property. Likewise, the proceeds of property that either spouse acquired before marriage also belongs to that spouse. Here, in founding DigitalAudio in 1983, Harlan made a capital contribution of \$5000 to the corporation. Harlan received 50% of the shares of capital stock. Similar to the facts in *Rand*, where the husband acquired his shares before marriage, here Harlan acquired his shares prior to his marriage to you, Ms. Burke, in 1989. Given that Harlan's DigitalAudio shares were acquired before his marriage in 1989, the DigitalAudio shares are the separate property of Harlan and any proceeds from the shares belong to Harlan. However, per *Rand*, whenever the community devotes more than minimal effort involving a spouse's separate property during marriage, the community acquires an interest in any increase of value during marriage, of the separate property, and that interest is community property. Based on your the transcript of your testimony and that of Harlan from the July 21, 2023 trial, it appears that Harlan was working "night and day" at DigitalAudio from 1989 to 2009. Similar to *Rand*, where the husband worked night and day, there may be a community interest here given Harlan's devotion of more than minimal effort to DigitalAudio during the marriage. Thus, though Harlan's DigitalAudio shares are his separate property because they were acquired prior to marriage, given Harlan working "night and day" at DigitalAudio from 1989 to 2009, the community may have an interest in the proceeds from DigitalAudio Shares. This will be further analyzed in the next point.

### **Community Interest**

Per \_\_\_\_\_ whenever the community devotes more than minimal effort involving a spouse's separate property during marriage, the community acquires an interest in any increase of

value during marriage, of the separate property, and that interest is community property. In 1989, by the date of your marriage, the value of Harlan's DigitalAudio shares had fallen to zero. This is similar to *Rand* where the value of husband's shares were valued at zero the year the couple was married here, Harlan's shares had fallen to zero. However, by 2009, the date of your separation, the value of Harlan's DigitalAudio shares had risen to \$200 million. According to the transcript of your testimony, you testified that Harlan was working "night and day" at DigitalAudio from 1989 to 2009. This is similar to *Rand*, where the husband worked night and day. Not only was Harlan working night and day, but according to the transcript of Pamela's testimony, Harlan was the Chief Scientific Officer of DigitalAudio. In that role, Pamela testified that Harlan "designed SoundAudio, updated SoundAudio, and sustained SoundAudio throughout its life as a marketable product." Moreover, Pamela testified that no one worked with Harlan on SoundAudio because it was "Harlan's baby" and "No one else knew much about it." This is enough evidence to demonstrate that Harlan devoted more than minimal effort to DigitalAudio during the marriage. With your testimony and Pamela's testimony combined, it paints a picture for the Court that not only did Harlan devote efforts to DigitalAudio, but it appeared that he alone spearheaded one of DigitalAudio's revolutionary products -- SoundAudio. Moreover, Pamela testified that between 1989 and 2009 DigitalAudio would not have come into existence and would not have remained in existence without Harlan. Pamela stated that Harlan was always working, "always at 110%." Moreover, Pamela testified that Harlan attracted many other skilled computer scientists and electrical engineers to DigitalAudio. This demonstrates that aside from the fact that Harlan was a Chief Scientific Officer of DigitalAudio, he not only founded DigitalAudio but held an integral part in the day-to-day activities of DigitalAudio, including attracting new talent to continue to expand DigitalAudio and its products. Lastly, though SoundAudio was no longer a marketable product and that it had ended its marketable life years earlier in 2009, the ability of DigitalAudio to continue forth to 2009 was because, as the transcript of Pamela's testimony evidenced, was because Harlan was able to keep updating SoundAudio, allowing DigitalAudio to keep selling SoundAudio until ProAudio became marketable. Pamela stated, "Without Harlan, DigitalAudio would have gone out of business and it would never have developed ProAudio." Similar to in *Rand*, where the early increase in value of the shares was due to the husband's personal efforts, here, DigitalAudio's shares and their increase early on the business was due to Harlan's personal efforts. Thus, all these facts combined are enough to show that the community did devote more than minimal effort involving Harlan's DigitalAudio shares during marriage so as to acquire an interest in any increase in value, during marriage.

### **Apportionment**

Per *Rand*, substantial justice between the spouses does not require the court to evenly divide the entire increase in value, during marriage, of one spouse's separate property. Instead, it requires the court to evenly divide only the portion of the increase principally due to [REDACTED] ty efforts. One approach to apportionment, under *Pereira*, applies when the increase in value, during marriage, of one spouse's separate property is principally due to

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community efforts. This approach requires the family court to apportion the increase in value mainly to the community estate. Here, there is no dispute that the earlier growth of DigitalAudio was due to Harlan's personal efforts given the transcript of Pamela's testimony where Pamela testified that DigitalAudio would not have come into existence without Harlan, Harlan was crucial in the recruitment of talented engineers and and computer scientists which arguably did contribute to the growth of the business, and the fact that Harlan kept DigitalAudio afloat while ProAudio was off to a rocky start because Harlan was able to update DigitalAudio to maintain a marketable product that brought in profits to the business in the meantime. It is likely the Court will apply Pereira in this instance given that the increase in value of DigitalAudio shares was largely due to Harlan's efforts during the early years of the business. Another approach to apportionment according to Rand, is under Van Camp, which applies when the increase in value, during marriage, of one spouse's separate property is principally due to factors other than community efforts. This approach requires the family court to apportion the increase in value mainly to the estate of the owning spouse. Here, given Pamela's testimony that SoundAudio was no longer a marketable product by 2009 and had ended its marketable life years earlier in 2009 and that ProAudio was the marketable product in 2009, contributing to the basis of value of DigitalAudio's shares, the Court will likely have to follow the approach the Court in *Rand* did. Similar to *Rand*, there is arguably a second period, where no longer is it Harlan's personal efforts that is causing the business to grow. Rather the growth was principally due to factors other than community efforts, as stated in *Rand*. In this instance, the Court must figure out when the first period ended, which was when the business was growing due to Harlan's personal efforts, and when. the second period began, which is when the business was growing due to factors other than Harlan's personal efforts which was the selling of ProAudio.

Thus, the only portion the Court must evenly divide is the portion of the increase principally due to community efforts, which pertains to the first period. Unfortunately, Wendy, the Court will not look to the fact that you are "barely" getting by and that as Harlan testified, he is "very comfortably" getting by. Instead, they will evenly divide the portion of the increase that is principally due to community efforts and the remainder will be Harlan's separate property.

Please let me know what times and dates are best available for you to set up a meeting to further discuss the matters discussed above.

Sincerely,

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Andrew Washington

Question #3 Final Word Count = 1397

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**END OF EXAM**