

IN THE SUPREME COURT OF MISSOURI

SUPREME COURT APPEAL NO. 83383

PURCELL TIRE AND RUBBER COMPANY, INC.

APPELLANT,

V.

EXECUTIVE BEEHCRAFT, INC.

RESPONDENT.

**APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
HONORABLE LARRY D. HARMAN**

RESPONDENT'S SUBSTITUTE BRIEF

**DYSART TAYLOR LAY
COTTER & MCMONIGLE, P.C.
ROBERT W. COTTER, MO #25313
KENT M. BEVAN, MO #23626
PATRICK J. KAINE, MO#43959
4420 MADISON AVENUE
KANSAS CITY, MISSOURI 64111
PHO: (816) 931-2700
FAX: (816) 931-7377**

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JURISDICTIONAL STATEMENT

Executive Beechcraft agrees with the jurisdictional statement set forth in Purcell's Brief.

STATEMENT OF FACTS

A. STATEMENT OF UNDISPUTED FACTS

1. Plaintiff, Purcell Tire & Rubber Company, Inc. ("Purcell Tire") its subsidiaries and affiliates sell tires, both wholesale and retail, offer general automotive services at their retail locations and are involved in the sale of their own remanufactured product commonly known as "retreads." L.F. pp. 11, 33-34.

2. Purcell Tire does business with individuals, and, in addition, provides its products and services to companies with vehicle fleets. L.F. pp. 11, 34.

3. Purcell Tire, its subsidiaries and affiliates operate in approximately 50 locations throughout the country, and employ approximately eight hundred (800) workers. L.F. pp. 11, 30, 32-33.

4. Purcell Tire operates the 16th or 17th largest retail tire chain in the country. L.F. pp. 12, 34-35.

5. Purcell Tire ranks as the nation's third or fourth largest commercial tire dealer as well as the third or fourth largest provider of "retread" tires. L.F. pp. 12, 35.

6. Purcell Tire's net sales for the year ending December 1997 were in excess of \$65 million; its gross profit for the same year exceeded \$20 million. L.F. pp. 12, 29.

7. Robert Purcell ("Purcell") is president of Purcell Tire and has been since it incorporated in 1970. L.F. pp. 12, 19.

8. As president, Purcell monitors the company's PRT balance sheet, the progress of the company, its operations, and directs and supervises its employees and officers, among other duties. L.F. pp. 12, 19.

9. Purcell has a bachelor's degree in both business and public administration from the University of Missouri. L.F. pp. 12, 20.

10. Purcell was a private pilot until 1970. L.F. pp. 12, 20-21.

11. Purcell has been involved in the sale and purchase of 15 aircraft. Two or three of those aircraft were Purcell's personal acquisitions, the rest were for one or more of the companies with which Purcell is involved. L.F. pp. 12, 21-22.

12. On each of these aircraft transactions except one, Purcell has directed that a pre-purchase survey of the aircraft be done. L.F. pp. 12, 23.

13. Purcell did not request a pre-purchase survey on one of his aircraft purchases due to the extensive check that another entity had performed prior to that particular purchase. L.F. pp. 12, 23-24.

14. In July 1997, Purcell Tire entered into an agreement to purchase a 1986 Beechjet 400 ("Aircraft") from the RAN Corporation. L.F. p. 13, 56.

15. The purchase price for the aircraft was \$2,080,000. L.F. pp. 13, 49.

16. Prior to closing on the transaction, Purcell requested defendant, Executive Beechcraft, Inc. ("Executive"), to conduct a pre-purchase survey of the aircraft. L.F. pp. 13, 31, 56.

17. Pursuant to Purcell's request, Executive sent him a three page document entitled "AIRCRAFT PRE-PURCHASE SURVEY" ("Contract"). L.F. pp. 13, 36, 60-62.

18. The contract contained the following preliminary statement:

The following is a list of items that will be checked in order to complete an Aircraft Pre-Purchase Survey. This survey is a statement of aircraft condition at that time. It is NOT however, a statement of airworthiness.

Executive Beechcraft makes no guarantee or warranty, either express or implied, concerning the condition or the remaining useful life of the aircraft, it's systems, avionics or other installed equipment.

If the items listed below do not meet your needs for a pre-purchase survey, Executive Beechcraft, Inc. will be happy to perform an inspection in accordance with the manufacturers inspection programs or Federal Aviation Administration FAR's. L.F. p. 60.

19. Purcell read this preliminary statement before signing the contract, but never requested any changes to the terms of the contract before he signed it on behalf of Purcell Tire. L.F. p. 13, 42.

20. The checklist follows this preliminary statement. L.F. pp. 60-62.

21. Following the check list is a section setting forth prices which Executive charged for conducting pre-purchase surveys on various types of aircraft; Purcell Tire's aircraft was considered a "Light twin turbo jet" and, accordingly, the price for completing the pre-purchase survey was \$1,250. L.F. p. 62.

22. The last portion of the contract provides:

We the buyers / sellers agree to the above survey on aircraft N_____ Serial Number _____. We agree to pay in full at the completion of the Pre-Purchase Survey. It is expressly agreed that the liability, if any, of Executive Beechcraft, Inc. under this agreement shall be limited to the cost of services performed hereunder. All parties to this agreement expressly agree to indemnify and hold harmless Executive Beechcraft, Inc. from any damages or expenses claimed by any part to this agreement beyond the cost of the services performed hereunder. L.F. p. 62.

23. Purcell read this portion of the contract before signing it on behalf of Purcell Tire. L.F. pp. 14, 44-45.

24. Purcell signed the contract on behalf of Purcell Tire and returned it to Executive with the intent that Executive then conduct a pre-purchase inspection. L.F. pp. 14, 25-26, 43, 47-48.

25. Purcell read the contract before signing it. L.F. p. 14, 27.

26. Purcell does not believe that he requested any other Purcell Tire employees to review the contract before he signed it, including Purcell Tire in house counsel, Rick Ramos. L.F. pp. 14, 27-28.

27. Executive completed the pre-purchase inspection of the aircraft pursuant to the contract on July 1, 1997. L.F. pp. 14, 40-41.

28. Executive technicians discovered several minor defects or "squawks" during the inspection. Purcell met with Executive employees to discuss the written squawk list. L.F. pp. 14, 37-39.

29. In December of 1997, Purcell Tire discovered that one of the engines on the aircraft required extensive repair to remedy a "static oil leak." L.F. pp. 14, 57.

30. Purcell Tire sued Executive for breach of contract and negligence for failing to discover the static oil leak. L.F. pp. 14-15, 55.

31. Purcell Tire seeks damages in the amount of \$372,458.00, which amount is alleged to include loss of use, repair expense, engine shipping costs, and the cost to replace the aircraft during the repair period. L.F. pp. 15, 58.

32. Purcell Tire sold the aircraft in the spring of 1998 for approximately \$2,600,000 L.F. pp. 15, 50.

B. FACTUAL OVERVIEW

In its Statement of Facts, Purcell Tire includes disputed allegations from its Petition without identifying them as such. See Appellant's Substitute Brief, p. 8. In general, these allegations concern liability issues that the trial court did not adjudicate. Executive denied these allegations in its Answer. L.F. pp. 7-10. The allegations from Purcell Tire's Petition do not constitute facts as Executive vigorously denies them. The allegations should have been identified as such or omitted from Purcell Tire's Statement of Facts.

Plaintiff, Purcell Tire & Rubber Company, Inc., ("Purcell Tire") is a national wholesale and retail tire distributor with locations throughout the country. Defendant,

Executive Beechcraft, Inc. (“Executive”) is a “fixed base operator” with a facility at the Kansas City Downtown Airport; it provides maintenance, fueling, hangar and related services to aircraft owners and operators.

Purcell Tire contracted with Executive to perform a pre-purchase survey on a jet aircraft Purcell Tire was negotiating to purchase. The cost of the pre-purchase survey was \$1,250. The aircraft was delivered to Executive’s facility on June 30, 1997. Executive completed the pre-purchase survey on July 1, 1997. On or about July 16, 1997, Purcell Tire did, in fact, purchase the aircraft, a 1986 Beechjet 400, for \$2,080,000. In the Fall of 1997, Purcell Tire discovered a static oil leak coming from the left jet engine on the aircraft. In December 1997, after complete removal and disassembly of the engine, Purcell Tire learned that the source of the leak was a defective plug in the oil cover.

Purcell Tire claims extensive repair was required to fix the oil leak and related engine damage. It seeks contract and tort damages from Executive totaling \$372,458 for failing to discover the engine defect during the \$1,250 pre-purchase survey.

Executive strongly denies that it breached its contract with Purcell Tire or was negligent in any respect. Executive asserts that discovery of the defective oil plug, which would have required removal and disassembly of the engine, was far beyond the scope of the \$1,250 pre-purchase survey which Purcell Tire asked it to perform. There is an additional factual dispute over whether documentation of an earlier oil leak was located inside the engine logbook during the pre-purchase survey.

Notwithstanding the profound factual disputes which exist as to liability, Executive is entitled to summary judgment on damages. Purcell Tire entered into a written agreement with Executive, agreeing to certain terms and conditions of the pre-purchase survey. One of the terms of the agreement limited Executive's liability thereunder to the cost of services or \$1,250. Purcell Tire's president read and understood the contract, signed it and returned it to Executive with the intent that Executive then undertake performance of the pre-purchase survey. Purcell Tire's president testified that before he signed the contract, he, in fact, read the liability limitation clause, which is the subject of this appeal. The question presented by Executive's summary judgment motion is whether the liability limitation clause to which Purcell Tire agreed is effective.

The trial court granted Executive's Summary Judgment Motion. Purcell Tire appealed to the Missouri Court of Appeals, Western District, from a judgment entered upon Executive's Confession of Judgment. The Court of Appeals reversed the summary judgment and ordered the case remanded. It did not rule that the liability limitation clause was invalid under Missouri law. Rather, the Court of Appeals reversed and remanded because it did not believe there was any evidence that the parties had actually "bargained for" the liability limitation clause. The case is now before this Court on Executive's Motion to Transfer to the Supreme Court.

POINTS RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON DAMAGES TO EXECUTIVE BEEHCRAFT AND LIMITING DAMAGES TO \$1,250.00 IN THAT THE LIABILITY LIMITATION CLAUSE IS NOT AMBIGUOUS AND CLEARLY SETS FORTH THE CONDUCT TO WHICH IT APPLIES; THE PURPORTED LIABILITY-LIMITATION CLAUSE IN THE AIRPLANE PREPURCHASE SURVEY AGREEMENT IS ENFORCEABLE AS NO SEPARATE CONSIDERATION WAS NECESSARY FOR IT; MISSOURI LAW DOES NOT REQUIRE THAT THERE BE AN EXISTING CONTROVERSY BEFORE PARTIES CAN CONTRACTUALLY AGREE TO LIMIT OR RELEASE LIABILITY FOR FUTURE NEGLIGENCE; AND THE LIABILITY LIMITATION CLAUSE DOES NOT CONSTITUTE AN UNLAWFUL PENALTY.

Alack v. Vic Tanney International of Missouri, Inc., 923 S.W.2d 330 (Mo.banc 1996)

Braden v. von Stuck, 950 S.W.2d 489 (Mo.App. W.D. 1997)

Brizendine v. Conrad, ___S.W.2d ___ (Mo.App. W.D., April 10, 2001, Case No. 58266)

Cheval v. St. John's Mercy Medical Center, 958 S.W.2d 36 (Mo.App.E.D. 1997)

Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. banc. 1978)

Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482, 483 (Mo.App. 1994)

Hornbeck v. All American Indoor Sports, 898 S.W.2d 717, fn. 1 (Mo.App. W.D. 1995)

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Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo.banc 1997)

McGilley v. McGilley, 951 S.W.2d 632 (Mo.App. W.D. 1997)

MIF Realty v. Pickett, 963 S.W.2d 308 (Mo.App. 1998)

Missouri District Telephone Co. v. Southwestern Bell Telephone Co., 338 Mo. 692, 93 S.W.2d 19, 28 (1935)

Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo.App. 1998)

Ohlendorf v. Feinstein, 636 S.W.2d 687 (Mo.App. 1982)

Rock Springs Realty v. Waid, 392 S.W.2d 270, 272 (Mo. 1965)

Roth v. Phillips Petroleum Company, 739 S.W.2d 598, 600 (Mo.App. 1987)

Samson, Inc. v. Honeywell, 465 N.E.2d 392 (Ohio 1984)

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Silver Dollar City v. Kitsmiller Construction, 931 S.W.2d 909 (Mo.App. S.D. 1996)

Warren v. Paragon Technologies Group, 950 S.W.2d 844, 845 (Mo. 1997)

Weindel v. DeSoto Rural Fire Protection Association, Inc., 765 S.W.2d 712, 715 (Mo.App.E.D. 1989)

Restatement (Second) of Contracts §3 (1981)

Restatement (Second) of Contracts §17 (1981)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON DAMAGES TO EXECUTIVE BEEHCRAFT AND LIMITING DAMAGES TO \$1,250.00 IN THAT THE LIABILITY LIMITATION CLAUSE IS NOT AMBIGUOUS AND CLEARLY SETS FORTH THE CONDUCT TO WHICH IT APPLIES; THE PURPORTED LIABILITY-LIMITATION CLAUSE IN THE AIRPLANE PREPURCHASE SURVEY AGREEMENT IS ENFORCEABLE AS NO SEPARATE CONSIDERATION WAS NECESSARY FOR IT; MISSOURI LAW DOES NOT REQUIRE THAT THERE BE AN EXISTING CONTROVERSY BEFORE PARTIES CAN CONTRACTUALLY AGREE TO LIMIT OR RELEASE LIABILITY FOR FUTURE NEGLIGENCE; AND THE LIABILITY LIMITATION CLAUSE DOES NOT CONSTITUTE AN UNLAWFUL PENALTY.

STANDARD OF REVIEW

Summary Judgment is appropriate where 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 judgment as a matter of law. *Daffron v. McDonnell Douglas Corp.*, 874 S.W.2d 482, 483 (Mo.App. 1994). Rule 74.04, Missouri Rules of Civil Procedure. All evidence is viewed in the light most favorable to the non-moving party and the facts set forth by affidavit or

otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. ITT Commercial Finance Corp. v. Mid-Am Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993).

When the movant is a "defending party," it is not necessary to controvert each element of the non-movant's claim to establish a right to summary judgment. Id. It is sufficient if a movant shows either: (1) facts negating any one of the claimant's elements, (2) shows that the party opposing the motion has presented insufficient evidence to allow the finding of the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support a properly pleaded affirmative defense. Id. Once the movant has established a right to judgment as a matter of law, the non-movant must show a genuine dispute as to the material facts. Id. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court in determining whether to sustain the motion initially. Id.

ANALYSIS

Executive's Summary Judgment Motion presented a straightforward and concise legal question. Is the clause which limits Executive's liability under its agreement with Purcell Tire effective? The validity of a non-liability clause is a question of the law for the court to decide. Warren v. Paragon Technologies Group, 950 S.W.2d 844, 845 (Mo. 1997). The key to an affirmative defense of release is that an agreement was, in fact, reached. Id. at 846.

Purcell Tire was negotiating to purchase a two million-dollar jet aircraft when it, through its president, Robert Purcell (“Purcell”), requested Executive to perform a pre-purchase survey. In response, Executive sent Purcell Tire an unsigned three page agreement called the “Pre-Purchase Inspection Survey” (“Contract”). The contract, simply drafted, in clear, large and readable type, contains the terms and conditions under which Executive performs its pre-purchase surveys. It is arranged in 4 sections: 1) warranty disclaimer, 2) list of items to be inspected, 3) pricing information and, finally 4) a clause limiting Executive’s liability under the contract to the cost of services.

The liability limitation clause reads as follows:

We agree to pay in full at the completion of the Pre-Purchase Survey. It is expressly agreed that the liability, if any, of Executive Beechcraft, Inc. under this agreement shall be limited to the cost of services performed hereunder. All parties to this agreement expressly agree to indemnify and hold harmless Executive Beechcraft, Inc. from any damages or expenses claimed by any part to this agreement beyond the cost of the services performed hereunder.

Purcell, on behalf of the company, read the contract, including the liability limitation clause (L.F. pp. 44-45), signed it and returned it to Executive with the intention that Executive then undertake performance of the pre-purchase survey. L.F. pp. 47-48. Purcell did not request Executive to conduct a more detailed survey than set forth in the contract, though this option was expressly made available in the first part of the contract.

Clearly, once Purcell executed the contract on behalf of his company, there was an agreement between the parties limiting Executive's liability "under this agreement" to the cost of services or \$1,250.

Clauses exonerating one from future acts of negligence are not against public policy in Missouri; however, such clauses are strictly construed. Clear and explicit language in the contract is required to absolve a person from such liability. *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330 (Mo.banc 1996).

Alack is a natural starting point when analyzing the validity of exculpatory clauses in Missouri. Plaintiff was injured while using exercise equipment at a health club owned by defendant. Defendant required plaintiff to sign a form contract to join the health club. The form contract was a double-sided document containing 17 paragraphs of boilerplate. One of the paragraphs purported to release defendant from "any damages", "any ... injuries" and "any and all claims, demands, damages, rights of action, present or future ... resulting from or arising out of the Member's ... use ... of said gymnasium or the facilities and equipment thereof." The plaintiff admitted that he read the subject exculpatory clause, but testified that he did not understand he was releasing the defendant from its own future negligence. Defendant argued this clause was unambiguous and barred plaintiff's claim.

The majority opinion in *Alack* held that the exculpatory clause was ambiguous and, thus, not sufficiently clear and explicit to serve its intended purpose. The court analyzed the law of Missouri and other jurisdictions before concluding that because the

exculpatory clause at issue did not specifically state that plaintiff was releasing defendant from future acts of negligence, it was not enforceable. It stated

The words ‘negligence’ or ‘fault’ or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs. There must be no doubt that a person agreeing to an exculpatory clause actually understands what future claims he or she is waiving. Alack, 923 S.W.2d at 337-38.

Like the exculpatory clause in Alack, the liability limitation clause in Executive’s contract does not contain the words “negligence” or “fault.” Instead, as in Alack, the clause is stated in broad general terms; it limits Executive’s “liability, if any”, under the agreement and indicates that the parties agree to hold harmless Executive for “any damages or expenses” beyond the cost of services. However, the holding of Alack does not render Executive’s liability limitation clause void.

A footnote to the above quoted statement from Alack states:

4. This case does not involve an agreement negotiated at arms length between equally sophisticated commercial entities. Less precise language may be effective in such situations, and we reserve any such issues.

As the dissenting opinions in Alack point out, the language of the Vic Tanny exculpatory clause is not ambiguous at all. It, like the liability limitation clause in Executive’s agreement, is “comprehensive and all inclusive.” Alack, 923 S.W.2d at 339 (Limbaugh dissent). The majority’s holding, although couched in terms of ambiguity, was clearly

based upon the disparity of bargaining power between the plaintiff and defendant. Footnote 4 confirms this by implicitly stating that exculpatory clauses containing clear and unambiguous language such as that found in the Vic Tanny contract, while not sufficient in consumer situations, may be effective in situations involving arms length transactions between equally sophisticated commercial entities.

Subsequent to Alack, the court of appeals, Eastern district, considered whether an indemnity agreement without the specific language mandated by Alack was effective where the contracting parties were sophisticated commercial entities. Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo.App. 1998). The clause at issue provided that Gould would indemnify and hold harmless:

Monsanto, its present, past and future directors, officers, employees and agents, from any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of such PCB's (sic) by, through or under Buyer. . .Id. at 316.

This clause was included in a "Special Undertaking" dated January 12, 1972 which Monsanto required Gould to sign prior to Monsanto's sale of PCBs to Gould.

In 1987 there was an incident involving transformers that Gould manufactured using PCBs supplied by Monsanto. As a result, third parties sued Monsanto for negligence in 1988. Monsanto requested that Gould provide a defense for Monsanto pursuant to the Special Undertaking. Gould refused. After the case was resolved, Monsanto sued Gould claiming the indemnity and hold harmless clause entitled it to

recover damages resulting from the defense of the PCB contamination case. The trial court entered judgment in favor of Monsanto.

On appeal, Gould relied on Alack, arguing that to be enforceable, an exculpatory clause must provide notification that one party is indemnifying the other for its own acts of negligence in more than general terms. The court of appeals noted that the Alack majority specifically declined to extend the holding to arms length transactions between equally sophisticated commercial entities. It then referred to the case of Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo.banc 1997) which specifically relied on the Alack case when determining whether to enforce a lease which contained a clause waiving a jury trial.

The court in Malan, noted that the relative bargaining position of the parties to a contract was an important factor in construing a contract. It held that a court is bound to enforce the contract as written if the contract terms are unequivocal, plain and clear, and there is no showing that the contract was procured by fraud, duress, or undue influence. Malan, 953 S.W.2d at 627. Applying this principal to the exculpatory clause in the Monsanto/Gould contract, the court of appeals stated “[s]uch terms clearly and unequivocally provide for Gould to indemnify Monsanto against any and all claims. Thus, the contract terms must be enforced absent a showing of duress, fraud, or undue influence.”

Other Missouri decisions favor the enforcement of contract terms to which the parties agree so long as there is no disparity of bargaining power. The Supreme Court upheld an exculpatory clause contained within a residential lease in Warren v. Paragon,

950 S.W.2d 844 (Mo.banc 1997). Using a similar analysis and citing Malan, this Court upheld a clause requiring automatic appointment of a receiver in a commercial financing agreement in MIF Realty v. Pickett, 963 S.W.2d 308 (Mo.App. 1998).

The same rationale applies to the liability limitation clause in the current case. The clause at issue clearly and unambiguously limits Executive's liability under the contract to the cost of services, in this case \$1,250. As indicated in the undisputed facts, Purcell Tire and Executive are equally sophisticated commercial entities. The concerns expressed in Alack with respect to whether a person signing a contract containing an exculpatory clause understands its meaning are simply not present in this case. Purcell Tire is a large, national tire distributor. Its president has been involved in the sale/purchase transactions for 15 aircraft. Purcell Tire has in house counsel. Purcell Tire's president, in fact, read the subject liability limitation clause before signing the contract. There was no chance of overreaching in this case. Unlike the exculpatory clause contained in the Vic Tanney contract which was akin to a take-it-or-leave-it adhesion contract, Executive's Pre-Purchase Survey contract invited Purcell Tire to negotiate different terms. L.F. p. 60, paragraph 3.

Further, it is obvious that the liability limitation clause at issue was intended to apply to this very situation. The purchase price for the aircraft at issue was \$2,080,000. Executive performed this survey for \$1,250. Executive simply cannot afford to offer a warranty of perfection on every \$2,000,000 aircraft it inspects. To discover the defect in this case would have required Executive to partially disassemble the turbine engine. However, this is something Executive does not do during its pre-purchase surveys. To

invalidate the liability limitation clause in this case would essentially convert the Executive's "Aircraft Pre-Purchase Survey" into an insurance policy. The language in the introductory paragraphs of the Pre-Purchase Survey expressly disclaiming guarantee or warranty of aircraft condition and the concluding paragraph limiting liability under the contract to the cost of services was clearly intended to avoid this result. Again, this is not a consumer case; it is one between two sophisticated commercial entities. Any doubt that the liability limitation clause is unambiguous is erased when the "entire agreement" is viewed as a whole and the object, nature and purpose of the agreement is considered. *Braden v. von Stuck*, 950 S.W.2d 489 (Mo.App. W.D. 1997) and *McGilley v. McGilley*, 951 S.W.2d 632 (Mo.App. W.D. 1997).

In *Liberty Financial Management v. Beneficial Data*, 670 S.W.2d 40 (Mo.App. 1984), the court upheld an exculpatory clause in a contract between two commercial entities. Liberty was a consumer credit company. It contracted with defendant to assist in the conversion to a new information management system. There were problems with the conversion and Liberty sued defendant. The trial court denied defendant's request to put the liability limitation clause before the jury. The court of appeals reversed, finding the liability limitation clause was proper and sufficient. In so holding the court of appeals reasoned

[a]s indicated above, a party dealing with private interests may properly bargain for its exoneration from the consequences of its ordinary negligence in arriving at the meeting of minds necessary to the formulation of a contract. Moreover, Bencom's efforts to do so

in the circumstances present here were perfectly understandable. Liberty's brief stresses the careful planning, programming, and testing necessary to accomplish a successful conversion; and it is obvious from the record amassed during this twelve-week trial that relatively minor errors at any stage in the process could have major consequences. Moreover, Liberty was undoubtedly aware of this fact, as it had been involved in computer data processing long before negotiations with Bencom opened. Liberty could and did agree to the exoneration clause, and Liberty cannot now be heard to say that its agreement was against public policy.

The same reasoning applies in this case. A minor error in the pre-purchase survey of a \$2,000,000 jet aircraft could have major consequences. Purcell Tire agreed to the liability limitation clause and should not now be heard to say that it should not be enforced.

Executive asserts that Missouri law clearly supports the enforcement of the liability limitation clause against Purcell Tire in the circumstances. The trial court correctly granted Executive's summary judgment motion.

Executive will address the four arguments Purcell Tire has put forth in opposition to the enforcement of the liability limitation clause to which it agreed. It will then address the Court of Appeals' opinion.

1. The Liability Limitation Clause is enforceable, because it clearly and unambiguously limits Executive's liability under the contract to the cost of services,

Purcell Tire was aware of the clause before signing the contract and because the contract was between two sophisticated commercial entities

Purcell Tire argues that the liability limitation clause in the Executive pre-purchase survey is unenforceable because it does not contain the terms “negligence” or “fault” as required under Alack. Executive has addressed this issue previously in this Brief. The Alack Court specifically left open the enforceability of such clauses when the contract is between two sophisticated commercial entities. Subsequent to Alack, the Monsanto Court ruled that a broad, general indemnification agreement, which did not contain the specific language, required by Alack was enforceable in a contract between two sophisticated commercial entities where there was no showing of hardship, fraud or duress.

In its Substitute Brief, Purcell Tire argues that Monsanto is distinguished from the present case. First, it argues that because the indemnity clause at issue in that case arose out of a sale of PCBs "occurring in the past" (Purcell Tire's Substitute Brief, p. 18), it was "not a release for *future* negligence committed by Monsanto" (Purcell Tire's Substitute Brief, p. 18). Thus, Purcell Tire argues, Monsanto is different and not applicable. Executive disagrees.

The facts in that case plainly show that the parties signed the indemnity agreement on January 12, 1972 and that "[t]he Undertaking (containing the indemnity clause) was required by Monsanto, **prior to its sale of PCBs to Gould**.(emphasis added)" Id. at 316. Thus, contrary to Purcell Tire's statement in its brief, the indemnity clause could only apply to the sale of PCBs from Monsanto to Gould after January 12, 1972, the date the

indemnity agreement was executed, and not to sales which "occurred in the past." Further, there is nothing in the language of the Monsanto indemnity clause which indicates that it would not apply to the future negligence of Monsanto with respect to its supply of PCBs to Gould after the parties executed the indemnity agreement. Purcell Tire is simply mistaken when it implies that the Monsanto indemnity clause did not apply to Monsanto's future negligence. It clearly did.

Third parties sued Monsanto in 1988 for "negligence". Id. at 316. Again, the indemnity provision would have only applied to the negligence of Monsanto arising out of its supply of PCBs to Gould after January 12, 1972. Purcell Tire states "the indemnity agreement . . . did not address negligence." (Purcell Tire's Substitute Brief, p. 19). Executive agrees that the Monsanto indemnity clause did not expressly state that it applied to Monsanto's "negligence." Nevertheless, the Monsanto court held that the indemnity agreement did require Gould to indemnify Monsanto for Monsanto's own negligence. The very significance of Monsanto is that a clause immunizing Monsanto from its own future negligence was held to be valid between sophisticated commercial entities even though it was stated in broad, general terms, and did not comply with the exacting requirements of Alack. Monsanto clearly supports the trial court's entry of summary judgment in Executive's favor.

Purcell Tire also argues that the liability limitation clause in the present case, unlike the indemnity clause at issue in Monsanto, does not identify the conduct to which it applies. Executive contends that the indemnity clause in the Monsanto case and the liability limitation clause in the present case are equally clear with regard to what conduct

is covered. The indemnity clause in the Monsanto case applied to claims brought against Monsanto by third parties arising out of its sale of PCBs to Gould. In the present case, the liability limitation clause limits Executive's liability to Purcell Tire under "this agreement" to the cost of services. Purcell Tire's petition seeks relief based upon its allegations that Executive breached the "agreement" and was negligent in carrying out the "agreement." It cannot seriously argue that the liability limitation clause does not specify the conduct to which it applies; it clearly applies to Executive's performance of the "agreement." See Brizendine v. Conrad, ___S.W.2d ___ (Mo.App. W.D., April 10, 2001, Case No. 58266)(reference in liquidated damages clause in lease/purchase agreement to "this agreement" without any limitation suggests clause applies across the board to all provisions of agreement.) Purcell Tire's attempt to distinguish Monsanto on these grounds is not persuasive.

For the first time on appeal, Purcell Tire attacks certain language in the liability limitation clause claiming the language renders the clause "overbroad, confusing, and nonsensical." While Purcell Tire did, at the trial court level, raise the issue of whether the liability limitation clause sufficiently identified the conduct to which it applied, it did not object to the specific language to which it now refers as making the clause "confusing and nonsensical." A party's failure to raise an objection at the trial court level precludes it from raising it for the first time on appeal. Ohlendorf v. Feinstein, 636 S.W.2d 687 (Mo.App. 1982). In any event, these new arguments on appeal afford no basis for relief. Under the unique circumstances of this case in which Executive has asserted the liability limitation clause as an affirmative defense to the claims of Purcell Tire, the language

used is clear and effective. Further, Purcell Tire's new argument that the term "part" is confusing or nonsensical is without merit. Clearly this is a typographical error; from the context of the entire paragraph, it is clear that the term "part" refers to party. This last ditch argument should not be considered by the court. A typographical error in a contract does not render it ambiguous. *Roth v. Phillips Petroleum Company*, 739 S.W.2d 598, 600 (Mo.App. 1987).

The case of *Cheval v. St. John's Mercy Medical Center*, 958 S.W.2d 36 (Mo.App.E.D. 1997), cited by Purcell Tire, is also consistent with Executive's position. In that case, the indemnification clause applied to claims arising out of "the rendering or failure to render the professional services and obligations, including clinical duties, which are the subject of and which are described **in this agreement**(emphasis added)." Similarly, it is clear that the liability limitation clause in Executive's pre-purchase survey applies to the services Executive provides which are described in the agreement.

Purcell Tire argues that the liability limitation clause is unenforceable because the clause "does not state that Purcell is indemnifying Beech for its own conduct." The reasoning of the *Cheval* court, however, supports Executive's position on the issue, not that of Purcell Tire. In *Cheval*, the court found that the indemnity provision

explicitly encompasses "clinical duties," which by the terms of the Agreement, are only duties of the Physician. Thus, the indemnity provision clearly encompasses liability of the Physician for sums relating to injuries arising out of his professional services at the two identified clinics of the Medical Center. Id. at 42.

Executive's liability to Purcell Tire "under this agreement" either in tort or contract could only arise out of its failure to perform its own duties under the contract. Those duties (the checklist of items covered in the pre-purchase survey) are specifically set forth in the agreement. Thus, the liability limitation clause in Executive's contract sufficiently identified for Purcell Tire, the conduct to which it applied.

2. The Liability Limitation clause is enforceable since no separate consideration was required for it.

Purcell Tire first cites the well-established principal that an agreement to terminate or release one from a contract is a new contract, which must be supported by new consideration. Executive agrees that this is a correct statement of the law. However, it has no application in the present case. The case cited by Purcell Tire in support of the above-stated proposition of law is Weindel v. DeSoto Rural Fire Protection Association, Inc. 765 S.W.2d 712, 715 (Mo.App.E.D. 1989). That case is clearly distinguishable from the present case. First, the Weindel case is a consumer case. The individual plaintiff paid \$12.50 for a fire tag which entitled him to certain fire protection services. Upon payment of the \$12.50, the plaintiff was provided a receipt which contained additional terms, including the limited liability clause which was not bargained for. In analyzing the transaction, the Weindel court considered the case of Liberty Financial Management Corp. v. Beneficial Data Processing Corp., 670 S.W.2d 40, 48 (Mo.App.E.D. 1984). In that case, the Court held that the clause of the contract exonerating defendant was a bargaining point which plaintiff was free to grant or withhold as part of the negotiating process for the contract. When plaintiff granted the exoneration, the contract's purpose

was then shaped to fit within certain parameters so that the exoneration clause did not cause the contract to fail of its essential purpose. The present case is similar to Liberty Financial in that the parties to the contract were sophisticated commercial entities and Purcell Tire like the defendant in Liberty Financial was free to grant or withhold as part of the negotiating process the liability limitation clause. Accordingly, Weindel is not particularly relevant to this particular case.

Purcell Tire also cites Shaffer v. Property Evaluation, Inc. 854 S.W.2d 493 (Mo.App.E.D. 1993), in support of its position that the liability limitation clause in the Executive contract should not be enforced. Purcell Tire boldly asserts, without any citation to authority, that liability limitation clauses in inspection agreements are unenforceable. Clearly in light of Rock Springs Realty v. Waid, 392 S.W.2d 270, 272 (Mo. 1965), Liberty Financial Management Corp. v. Beneficial Data Processing Corp., 670 S.W.2d 40, and Alack v. Vic Tanny International of Missouri, Inc., 923 S.W.2d 330 (Mo.banc. 1996), Purcell Tire's assertion that such clauses are unenforceable is incorrect.

In Missouri, an agreement to exonerate one from the consequences of his or her own future acts of negligence is not against public policy. The Shaffer case is distinguishable from the present case, again in that it is a consumer situation. In any event, in light of the Alack v. Vic Tanny case, the results of Shaffer would probably be the same, but based upon different grounds. Because the Shaffer contract was a consumer one and the liability limitation clause did not meet the requirements set forth in Alack v. Vic Tanny, the liability limitation clause would be unenforceable. However, Purcell Tire's broad statement that Shaffer stands for the proposition that liability limitation

clauses contained in inspection agreements are unenforceable is clearly erroneous in light of Alack v. Vic Tanny.

In short, Executive asserts that this case is more akin to the Liberty Financial Management Corp. case and that the analysis set forth therein adequately addresses Purcell's argument of failure of consideration. This is because Purcell Tire was free to agree to or withhold agreement to the liability limitation clause in the Executive contract and when it agreed to the liability limitation clause by signing the contract, the contract's purpose was then shaped to fit within certain parameters so that the liability limitation clause did not cause the contract to fail of its essential purpose. Again, as stated previously in this Brief, Executive's reasons for including the liability limitation clause were perfectly understandable.

Purcell Tire argues that because there was no give and take bargaining for the liability limitation clause, it should not be enforced. This is disingenuous. Executive strongly disagrees with Purcell Tire's statement that "[t]here cannot be bargaining without a discussion." Just because there was no discussion between the parties about the liability limitation clause does not mean that it was not a bargained for clause. Purcell Tire does not dispute that this was an arms length transaction between two sophisticated commercial entities and that it was actually aware of the liability limitation clause before signing the contract. Nor does it claim that it did not have the ability or opportunity to bargain for amendment or deletion of the liability limitation clause in its contract with Executive. Purcell Tire should not be heard to complain about the liability limitation clause when it was freely able to reject same but did not do so.

3. The Liability Limitation clause is enforceable, even though no controversy existed at the time the agreement was signed.

Purcell Tire argues that because there was no controversy in existence between Purcell Tire and Executive at the time Purcell Tire executed the pre-purchase survey, the liability limitation clause is unenforceable. However, the Supreme Court in the *Alack v. Vic Tanny* case, puts this argument to rest when it affirms that in Missouri contracts releasing an individual from his or her own future negligence are not prohibited as against public policy. If Purcell Tire's argument is followed to its logical conclusion, such clauses can never be enforceable because by their very nature they contemplate future acts of negligence and not the existence of a present controversy. This argument is without merit and should be rejected by the Court.

4. The Liability Limitation clause is not an unenforceable penalty.

Purcell Tire argues that the liability limitation clause in the Executive pre-purchase survey is an unenforceable penalty. It cites *Samson, Inc. v. Honeywell*, 465 N.E.2d 392 (Ohio 1984). The present case is distinguished from *Samson* in several respects. First, the *Samson* case involved a consumer contract for the provision of an alarm service at a home; it was not between two sophisticated commercial entities as is the case at bar. Second, the total purchase price for the alarm system was \$10,500.00 while the liquidated damages clause limited recovery to \$50.00, or less than 1% of the total purchase price. The Ohio Supreme Court noted that the Plaintiff clearly had not paid \$10,500.00 for the mere possibility of recouping \$50.00 if Honeywell provided no service under the contract.

In the present case, Executive's liability limitation clause limited its liability to \$1,250.00, or 100% of the purchase price. Such a clause, which provides a 100% refund of the cost of services, is far more reasonable than the liquidated damages clause at issue in the Samson case which did not even provide recovery of 1% of the purchase price.

Finally, and most importantly with regard to Purcell Tire's reliance on Samson, the case is not controlling Missouri law. The controlling Missouri law set forth in Alack v. Vic Tanny is that clauses exonerating one from future acts of negligence are not against public policy. Thus, Executive could have completely exonerated itself from future acts of negligence, barring any recovery by Purcell Tire had it chosen to do so. Purcell Tire in effect argues that because Executive chose not to completely bar recovery, but instead chose to limit recovery to the cost of services, the liability limitation clause is unenforceable. This argument is unsound.

In short, the Samson case is not controlling Missouri law. The controlling Missouri law as set forth in Alack v. Vic Tanny requires that this Court reject Purcell Tire's argument.

5. The Court of Appeals' Opinion.

The Court of Appeals did not express disagreement with the major arguments Executive advanced in support of the trial court's summary judgment. It did not dispute that the transaction was one between sophisticated commercial entities. While critical of the language of the liability limitation clause, the Court of Appeals did not state that it was ambiguous. While the clause is broad, it is not ambiguous. The Court of Appeals, moreover, agreed with Executive that exculpatory clauses between sophisticated

commercial entities are not held to the same exacting standards as those that are applied to exculpatory clauses in consumer contracts. This is consistent with Footnote 4 from this Court's opinion in Alack. Nevertheless, the Court of Appeals remanded the case because it did not believe the evidence offered in support of the summary judgment motion established that Purcell Tire and Executive had bargained, either explicitly or implicitly, for the liability limitation clause in the pre-purchase inspection agreement.

In reaching its conclusions, the Court of Appeals begins by stating that the "logic" of having a liability limitation clause in an agreement for a \$1,250 pre-purchase inspection of a \$2,000,000 jet aircraft is not "readily apparent" and would not be "logically anticipated." Executive does not agree that it was illogical to include a liability limitation clause in the pre-purchase inspection agreement. Certainly, Purcell Tire has never argued that the liability limitation clause should not be enforced because it did not anticipate it. Further, Executive contends that the Court of Appeals' reversal and remand in this case could lead to an illogical result.

Initially, it should be remembered that Purcell Tire, as the aircraft buyer, clearly bore the risk that the \$2,000,000 jet aircraft it purchased might have latent defects. Also, there is no allegation that Executive caused \$372,458 in damages to the aircraft. Purcell Tire simply asked Executive to perform a \$1,250 inspection and now alleges that Executive either did not discover or did not alert Purcell Tire to information about an oil leak allegedly in the logbook.(Executive strongly denies these allegations. Yet despite the clear and unambiguous liability limitation clause in the pre-purchase inspection agreement, of which Purcell Tire was made aware before it signed the contract, the Court

of Appeals' decision would allow Purcell Tire to reallocate that entire risk to Executive for the \$1,250 inspection price, thus, converting the pre-purchase inspection agreement into an insurance policy, warranty or guarantee. As stated before, the language in the introductory paragraphs of the Pre-Purchase Survey expressly disclaiming guarantee or warranty of aircraft condition and in the concluding paragraph limiting liability under the agreement to the cost of services was clearly intended to avoid this result. Again, this is not a consumer case; it is one between two sophisticated commercial entities. Any doubt that the liability limitation clause is unambiguous is erased when the "entire agreement" is viewed as a whole and the object, nature and purpose of the agreement is considered. *Braden v. von Stuck*, 950 S.W.2d 489 (Mo.App. W.D. 1997) and *McGilley v. McGilley*, 951 S.W.2d 632 (Mo.App. W.D. 1997). The tenor of the Court of Appeals' opinion makes it appear that as a matter of public policy the buyer of a \$2,000,000 jet aircraft should be able to shift the enormous risk of latent defects to a maintenance facility upon payment of a minimal inspection fee even if the buyer signs and agrees to an unambiguous liability limitation clause. The need for adopting such a protective attitude toward sophisticated commercial entities, liked Purcell Tire, is not apparent. Purcell Tire, which bought the subject aircraft on July 16, 1997 for \$2,080,000, sold it in the Spring of 1998 for approximately \$2,600,000. L.F. pp. 15,50.

The Court of Appeals held that the evidence in the record did not establish that the parties bargained for the liability limitation clause. It stated that Executive could not argue that:

Purcell must have noticed the language in question and therefore must be held to have explicitly *agreed* to retain virtually all of the economic risk of a negligently performed inspection. Slip Opinion at p. 15.

Actually, Executive did not argue, either to the trial court or the Court of Appeals, that Purcell Tire "must have noticed" the liability limitation clause and therefore it must be held to have explicitly agreed to same. Executive has consistently maintained that Purcell Tire should be bound by the liability limitation clause because it, in fact, **noticed** the liability limitation clause and explicitly agreed to same. This is undisputed. L.F. 45.

Thus, whether or not the liability limitation clause was anticipated or not is irrelevant under the unique circumstances of this case. Restatement (Second) of Contracts §3 (1981) states "A bargain is an agreement . . .to exchange performances." Comment b. to §3 states "A bargain is ordinarily made by an offer by one party and an acceptance by the other party. . ." Restatement (Second) of Contracts §17 (1981) states in part "...the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." The "objective theory" of contracts, which emphasizes the outward manifestations of assent made to the other party in contrast to the idea that the contract was a true meeting of the minds, is embodied in Restatement (Second) of Contracts §17 (1981). *Silver Dollar City v. Kitsmiller Construction*, 931 S.W.2d 909 (Mo.App. S.D. 1996).

Clearly, the evidence in the record demonstrates the outward manifestations of assent necessary to establish that Purcell Tire and Executive bargained for the liability limitation clause. Executive made a written offer to perform the services of its pre-

purchase survey under certain terms and conditions; Purcell Tire received the offer, read it and signed it, thereby agreeing to those certain terms including the liability limitation clause. The evidence of a bargain could not be clearer. Yet both Purcell Tire and the Court of Appeals would now require that in order to show a bargain, one must adduce evidence that there was some kind of give and take communication concerning a particular contract clause. Executive has found no authority which would require such evidence to establish the fact of a bargain in cases where it is undisputed that both parties were aware of a particular clause before executing the contract. Executive recognizes that the fact of a bargain will not be presumed simply because a boilerplate provision is included in a written agreement. See *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. banc. 1978) That is not the case here, however. Further, Executive understands that this Court in *Alack* invalidated an exculpatory clause even where the plaintiff admittedly read the provision before signing the contract.

The Supreme Court in *Alack* ruled that exculpatory clauses in consumer cases need to contain precise language so that a consumer understands that a shifting of risk results from such a clause. It held clauses without the precise language are ambiguous. The Court of Appeals' opinion very much follows the reasoning of *Alack* in terms of whether one would understand whether a shifting of risk is occurring. However, by reversing the trial court's entry of summary judgment based upon an unambiguous liability limitation clause where the record undisputedly shows it was bargained for in the classic sense, the Court of Appeals in effect extended *Alack*'s requirements to arms length transactions between equally sophisticated commercial entities. Footnote 4 from

Alack was an acknowledgement that sophisticated commercial entities do not require the protections of Alack's strict requirements because they deal with concepts such as shifting of risk on an everyday basis. Moreover, by disregarding the unambiguous liability limitation clause in Executive's contract and requiring Executive to go outside the contract to prove its enforceability, the Court of Appeals has rewritten the contract between the parties. The validity of a non-liability clause is a question of the law for the court to decide. Warren v. Paragon Technologies Group, 950 S.W.2d 844, 845 (Mo. 1997). The key to an affirmative defense of release is that an agreement was, in fact, reached. *Id.* at 846.

Finally, Executive contends that the Court of Appeals' attempt to distinguish Monsanto is not persuasive. The Court of Appeals claims that Gould's agreement to indemnify Monsanto was clearly bargained for "because both parties knew the whole purpose of the contract was to provide indemnity." Slip Opinion at 14. Yet the indemnity agreement in Monsanto was not an ordinary indemnity agreement. The usual indemnity contract is where the indemnitee can seek recovery from the indemnitor for damages it has paid as the result of the indemnitor's negligence. Hornbeck v. All American Indoor Sports, 898 S.W.2d 717, fn. 1 (Mo.App. W.D. 1995); see also Missouri District Telephone Co. v. Southwestern Bell Telephone Co., 338 Mo. 692, 93 S.W.2d 19, 28 (1935). Yet in the Monsanto case, Monsanto sought indemnity from Gould for Monsanto's own negligence. Notwithstanding, the rule that this type of indemnity agreement requires clear language, *Id.*, the Monsanto court upheld the validity of the indemnity clause based upon the fact that the parties were sophisticated commercial

entities and the agreement was not the product of fraud, duress or undue influence. It so held even though the indemnity agreement immunizing Monsanto from its own future negligence did not meet the requirements imposed by this Court in Alack. Monsanto clearly supports the trial court's order granting the summary judgment.

A court should not interfere with a party's right to contract. Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo.banc 1997). Accordingly, a court is bound to enforce the contract as written if there is no showing that the contract was procured by fraud, duress or undue influence. Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo.App. E.D. 1998). The Court of Appeals agreed with Executive that this was an arms length transaction between sophisticated commercial entities and that **the subject liability limitation clause was not ambiguous**. In light of the undisputed evidence in the record that Purcell Tire was aware of the liability limitation clause before signing the contract and that the subject contract was, in fact, bargained for, Executive contends the trial court correctly granted summary judgment below pursuant to Alack and Monsanto. The Court of Appeals' opinion reversing and remanding the matter unnecessarily extends the stringent requirements for exculpatory clauses from Alack to arms length transactions between sophisticated commercial entities and, in effect, rewrites the contract between the parties contrary to Missouri public policy.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should reverse the order of the Court of Appeals and affirm the trial court's entry of Partial Summary Judgment.

Respectfully submitted,

DYSART TAYLOR LAY
COTTER & McMONIGLE, P.C.

By _____
Robert W. Cotter MO #25313
Kent M. Bevan MO #23626
Patrick J. Kaine MO #43949
4420 Madison Avenue
Kansas City, Missouri 64111
PHO: (816) 931-2700
FAX: (816) 931-7377
ATTORNEYS FOR DEFENDANT
EXECUTIVE BEECHCRAFT, INC.

CERTIFICATE OF SERVICE

I hereby certify on this 27th day of April 2001, two copies of the foregoing Respondent's Substitute Brief were mailed, via U.S. Mail, postage prepaid to: Maurice B. Graham, Esq., Gray Ritter & Graham, P.C., Gateway One On The Mall, 701 Market, Suite 800, St. Louis, Missouri 63101-1826.

SPECIAL RULE NO. 1(c) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Special Rule No. 1(c) and that brief contains 9,057 words and 792 lines according to the word count of Microsoft Word 97.

DYSART TAYLOR LAY
COTTER & McMONIGLE, P.C.

Robert W. Cotter MO #25313
Kent M. Bevan MO #23626
Patrick J. Kaine MO #43949
4420 Madison Avenue
Kansas City, Missouri 64111
PHO: (816) 931-2700
FAX: (816) 931-7377

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I hereby certify that this disk has been checked for viruses in compliance with Special Rule No. 1(f) and that it is virus free.

DYSART TAYLOR LAY
COTTER & McMONIGLE, P.C.

Robert W. Cotter MO #25313
Kent M. Bevan MO #23626
Patrick J. Kaine MO #43949
4420 Madison Avenue
Kansas City, Missouri 64111
PHO: (816) 931-2700
FAX: (816) 931-7377