

No. ED90143

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*In the Missouri Court of Appeals*  
**FOR THE EASTERN DISTRICT**

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ST. JOHN'S MERCY HEALTH SYSTEM, APPELLANT

v.

DIVISION OF EMPLOYMENT SECURITY, *ET AL.*, RESPONDENTS

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*ON APPEAL FROM AN ORDER OF THE  
MISSOURI LABOR & INDUSTRIAL RELATIONS COMMISSION,  
DIVISION OF EMPLOYMENT SECURITY*

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**APPELLANT'S REPLY BRIEF**

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## Table of Contents

	Pages
Table of Cases, and Statutes.....	ii
Argument.....	1
I.    The respondent-claimants erroneously argue that the deputy’s determinations on the disqualification issue also decided the eligibility issue.....	1
II.   The Claimants’ argument that the interpretation of the statute requires no causal connection between the adjudicated unfair labor practice and the Claimants’ motivation for striking would create a distinction based upon status that effectively would conflict with the Labor Management Relations Act’s remedies for unfair labor practices.....	4
III.  The claimants urge an overbroad interpretation of §288.040.6 that contradicts the Employment Security Law’s general exclusion from unemployment compensation benefits of employees that have caused their own unemployment.....	5
IV.   Contrary to the claimants’ argument, the contract negotiations that preceded the strike involved issues unrelated to the facts at issue in the unfair labor practice decided by the NLRB’s administrative law judge on December 6, 2004.....	7
V.    The Claimants argument that the difficulty of determining whether an adjudicated unfair labor practice motivated striking Claimants to strike ignores the well-developed NLRB case law that distinguishes economic strikes from unfair labor practice strikes.....	11
VI.   The claimants’ argument concedes that § 288.040.6’s text contradicts the Employment Security Law’s stated intention to exclude economic strikers from the receipt of unemployment compensation benefits during a strike.....	11
VII.  Conclusion.....	13
Rule 84.06 (c), (g) Certificate of Compliance.....	15

Certificate of Service.....15

**Table of Cases, Statutes, and Other Authorities Relied On**

**CASES:**

*Blue Hills Homes Corp. v. Young*,  
80 S.W.3d 471 (Mo. Ct. App. 2002).....2, 3

*Chemtech Industries, Inc. v. Labor and Industrial Relations Commission*,  
617 S.W.2d 121 (Mo. Ct. App. 1981).....3

*Chromalloy American Corp.*,  
236 N.L.R.B. 868 n.33 (1987).....11

*John Epple Const. Co. v. Labor and Industrial Relations Commission*,  
647 S.W.2d 926, 929 (Mo. Ct. App. 1983).....3

*Nash v. Florida Industrial Relations Commission*,  
389 U.S. 235, 239 (1967).....5

*NLRB v. State of Illinois Dept. of Employment Security*,  
988 F.2d 735, 739-40 (7<sup>th</sup> Cir. 1993).....5

*San Diego Building Trades Council v. Garmon*,  
359 U.S. 236 (1959).....5

*Scott County Reorganized School District R-V v. Division of Employment Security*,  
670 S.W. 2d 543 (Mo. Ct. App. 1984).....2, 3

*United Steelworkers of America v. Johnson*,  
830 F.2d 924, 928-29 (8<sup>th</sup> Cir. 1987).....5

**STATUTES:**

Labor Management Relations Act,  
29 U.S.C. §§ 151-187 (2007 online ed.).....5

Mo. Rev. Stat. § 288.020.1 (2007 online ed.).....7

Mo. Rev. Stat. § 288.040.1 (1)-(2).....2  
Mo. Rev. Stat. § 288.060.6.....6, 11, 12, 13, 14

The appellant, St. John's Mercy Health System ("System"), doing business as St. John's Mercy Medical Center ("Medical Center"), presents its reply brief. This reply brief addresses issues raised in the respondent-claimants' brief.

**I. The respondent-claimants erroneously argue that the deputy's determinations on the disqualification issue also decided the eligibility issue.**

The deputy's determinations for each claimant found her or him "ineligible for benefits ... on a finding that the claimants were unemployed due to a strike." LF at 81.<sup>1</sup> The respondent-claimants ("Claimants") erroneously assert as follows: "[T]he Union points out that the deputy actually did find that the claimants were unemployed ... the deputy's determinations found that the claimants were 'unemployed due to a strike.'" Claimants' Brief<sup>2</sup> at 2. Their argument on this point ignores both the text of the Employment Security Law's eligibility for benefits provisions and this court's

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<sup>1</sup> As in the appellant's opening brief, this brief uses the following abbreviations: (1) JSOF followed by a paragraph reference means the joint statement of facts to which the counsel for the claimants, the appellant's counsel, and the Missouri Division of Employment Security's counsel each agreed and submitted to the Appeals Tribunal. Tr. 15. The Appeals Tribunal reproduced the JSOF in its entirety in its finding of facts at pages 2 through 8 of its decision. (2) EX followed by a numerical reference means the employer's exhibit of the same number admitted into evidence at the hearing before the Appeals Tribunal. (3) JX followed by a numerical reference means the joint exhibit admitted into evidence at the hearing before the Appeals Tribunal of the same number. (4) CX followed by a numerical reference means the claimants' exhibit of the same numerical reference. (5) Tr. followed by a number or numbers means the hearing transcript at page or pages of the numerical references. The Appeals Tribunal held the hearing regarding the claims involved in this appeal on June 26, 2006. (6) LF followed by a numeric reference means the legal file at the page number of the numeric reference.

<sup>2</sup> This brief uses the words "Claimants' Brief" followed by a numerical reference to cite to the respondent-claimants' brief filed in this appeal at the page number of the numerical reference.

precedents. Specifically, the statute requires a deputy to make the following eligibility findings:

A claimant who is unemployed and has been determined to be an insured worker shall be eligible for benefits for any week *only if the deputy finds* that:

(1) The claimant has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the division may prescribe;

(2) The claimant is able to work and is available for work. No person shall be deemed available for work unless such person has been and is actively and earnestly seeking work.

Mo. Rev. Stat. § 288.040.1 (1)-(2) (2007 online ed.) (emphasis added). In this case, the deputies' determinations cited the Claimants' unemployment because of their participation in a strike in determining whether to disqualify them from unemployment compensation benefits. *See id.* at § 288.040.6 (1). The deputies never made the threshold determination as to whether the Claimants met the statute's eligibility requirements. Contrary to the respondents' argument, a deputy's determination of a claimant's "unemployment" provides none of the mandatory findings as to any one or more of whether the claimant has registered for work, whether she or he has reported to an employment office, whether the claimant is able to work, or whether she or he is available for work. *See id.* at § 288.040.1 (1)-(2).

In both *Scott County Reorganized School District R-V v. Division of Employment Security*, 670 S.W.2d 543 (Mo. Ct. App. 1984) and *Blue Hills Homes Corp. v. Young*, 80 S.W.3d 471 (Mo. Ct. App. 2002), moreover, this Court rejected the Claimants' argument that the court reviewing the decision of the Labor and Industrial Relations Commission

(“Commission”) on the disqualification issue must ignore the deputy’s failure to perform her or his statutory duty to make specific findings regarding a claimant’s eligibility for benefits. In both cases, this Court found that a determination of the disqualification issue provides no finding on the eligibility issue. 670 S.W.2d at 544; 80 S.W.3d at 475. This Court has further held that even in the absence of the employer’s ever raising any issue before the deputy as to a claimant’s eligibility for benefits, the deputy *must* decide that issue and no presumption of eligibility occurs because of the employer’s failure to protest the claim on the grounds of a claimant’s lack of eligibility for benefits. *John Epple Const. Co. v. Labor and Industrial Relations Commission*, 647 S.W.2d 926, 929 (Mo. Ct. App. 1983); *accord Young*, 80 S.W.3d at 475.

The Claimants have directed this Court to its decision in *Chemtech Industries, Inc. v. Labor and Industrial Relations Commission*, 617 S.W.2d 121 (Mo. Ct. App. 1981). In that case, the appellate court recognized both the deputy’s statutory duty to determine the eligibility for benefits issue as to each claimant and the absence of evidence in the record on appeal as to whether the deputy had done so. Unlike the appellate courts in *Young*, *Scott County*, and *Epple*, the *Chemtech* court observed the absence of any evidence of a deputy’s determination of the eligibility issue in the record, but identified the employer’s remedy as the appeal of the deputy’s decision on the eligibility issue. The facts in this case differ from those in *Chemtech*, moreover, because the record before this Court includes the entire record relating to the Claimants’ claims before the Division of Employment Security (“Division”), Appeals Tribunal, and the Commission. That record, however, omits any specific finding by any of the Division’s deputies regarding the

eligibility of any of the Claimants for benefits. System’s Brief<sup>3</sup> at 13-14. This Court’s later decisions in *Young*, *Scott County*, and *Epple*, moreover, have rejected the *Chemtech* court’s approach without specifically overruling that decision. Given its three later decisions remanding cases for a deputy’s explicit determination of the eligibility issue, this Court’s controlling precedents require the remanding of the Claimants’ claims for specific determinations by a deputy as to whether each Claimant satisfied the Employment Security Law’s threshold eligibility requirements for the collection of benefits.

**II. The Claimants’ argument that the interpretation of the statute requires no causal connection between the adjudicated unfair labor practice and the Claimants’ motivation for striking would create a distinction based upon status that effectively would conflict with the Labor Management Relations Act’s remedies for unfair labor practices.**

The Claimants first urge the absence of any need for a causal connection between their motivation for striking and an adjudicated unfair labor practice. Claimants’ Brief at 4-5. In so doing, they assert that an employer’s mere status as a party previously adjudicated to have committed an unfair labor practice totally unrelated to the reasons motivating claimants to strike to lose the benefit of the law’s general disqualification of economic strikers from eligibility for unemployment compensation benefits. Such an interpretation of the statute draws a distinction without any rational relationship to a legitimate governmental interest. It effectively punishes employers for their mere status

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<sup>3</sup> This brief uses the words “System’s Brief” followed by a numerical reference to cite to the appellant’s brief filed in this appeal at the page number of the numerical reference.

based on the National Labor Relations Board (“NLRB” or “Board”) or a court previously holding them to be liable for an unfair labor practice.

The Labor Management Relations Act, 29 U.S.C. §§ 151-187 (2007 online ed.) (“LMRA”), however, has pre-empted the field relating to remedies for unfair labor practices. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court held that conduct, which Congress has regulated by its establishment of unfair labor practices, requires both federal and state tribunals to defer to the Board. *Id.* at 244-46. The Court explained its *Garmon* holding in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989), as follows:

The *Garmon* rule is intended to preclude state interference with the NLRB’s interpretation and active enforcement of “the integrated scheme of regulation” established by the NLRA.

*Id.* at 108. The appellate courts, moreover, have applied the Supreme Court’s preemption analysis to mean that the Board has exclusive jurisdiction to remedy unfair labor practices by either employees or employers. *See, e.g., Nash v. Florida Industrial Relations Commission*, 389 U.S. 235, 239 (1967) (holding the LMRA preempted a state law that made persons filing an unfair labor practice against an employer ineligible for unemployment compensation benefits); *NLRB v. State of Illinois Dept. of Employment Security*, 988 F.2d 735, 739-40 (7<sup>th</sup> Cir. 1993) (holding that the LMRA preempted a state law requiring back pay awards made to remedy an unfair labor practice finding for weeks during which the employee collected unemployment compensation benefits to be made payable jointly to the employee and the state department of employment security); *United Steelworkers of America v. Johnson*, 830 F.2d 924, 928-29 (8<sup>th</sup> Cir. 1987) (holding that

the LMRA preempted a state law that denied unemployment compensation benefits to union members during a lockout, but permitted non-union employees to collect benefits). Thus, the Commission's overbroad application of the exemption of the Claimants from the general disqualification of economic strikers from unemployment compensation benefits pursuant to § 288.040.6 of the Employment Security Law effectively imposes a remedy for a prior adjudicated unfair labor practice beyond the remedy that the Board originally established for the unfair labor practice. In so doing, it creates a conflict between the national labor policy and the state's unemployment compensation law. Consequently, the LMRA preempts the Employment Security Law to the extent that it requires no causal connection between the Claimants' motivation to strike and the prior adjudicated unfair labor practice.

**III. The claimants urge an overbroad interpretation of §288.040.6 that contradicts the Employment Security Law's general exclusion from unemployment compensation benefits of employees that have caused their own unemployment.**

The Claimants concede the Employment Security Law's exclusion of economic strikers from eligibility for unemployment benefits generally, because "their own fault" causes their unemployment. Claimants' Brief at 6. They further argue as follows:

[T]he statute exempts from this disqualification striking employees whose employers committed an unfair labor practice before or during the strike, presuming the employees not unemployed through their own fault due to the ULP finding. While there may be occasions on which some inequity results to the employer, there remains a rational basis for this decision and therefore, the legislature was with its constitutional limitations in drawing the distinction that it drew.

*Id.*

This argument, however, contradicts the Employment Security Law's stated prohibition against allowing employees that experience unemployment because of their own fault to collect unemployment compensation benefits. If followed, it would allow economic strikers to receive unemployment compensation benefits during a strike, because the NLRB or a court had found the employer had committed an unfair labor practice that had nothing to do with those strikers at some time in the past. That interpretation defeats the legislative intent that must inform any interpretation of the Employment Security Law. *See* Mo. Rev. Stat. § 288.020.1 ("As a guide to the interpretation and application of this law, the public policy of this state is declared to be as follows: .... The legislature, therefore, declares that ... the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, *for compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.*") (emphasis added). Therefore, contrary to the Claimants' argument, the Employment Security Law requires a causal connection between the adjudicated unfair labor practice and the Claimants' motive for striking to satisfy the legislature's stated intent.

**IV. Contrary to the claimants' argument, the contract negotiations that preceded the strike involved issues unrelated to the facts at issue in the unfair labor practice decided by the NLRB's administrative law judge on December 6, 2004.**

In addition, the Claimants argue that the Commission found a causal connection between the claimants' motivation for striking and the prior adjudicated unfair labor practice against the appellant. Claimants' Brief at 7. In so doing, they allege facts

beyond those upon which the Commission found as the basis for its ruling. Specifically, the Claimants assert as follows:

During negotiations for a successor agreement, one of the reasons the negotiations stalled was due to the Medical Center's insistence that its union security obligations be deleted from the successor agreement altogether.

Claimants' Brief at 7.

The Commission, however, identified the following operative facts for its decision. First, the United Food and Commercial Workers' Local 655 ("Union") filed an unfair labor practice against the System on August 25, 2003. Second, the Union's unfair labor practice charge alleged the System's unlawful conduct by its failure to fulfill the union security obligations imposed by the Agreement, because it had disregarded the Union's request for it to fire certain registered nurses. Third, the NLRB upheld the Union's unfair labor practice charge against the System on March 31, 2005 and a federal appellate court affirmed the Board's decision on February 1, 2006. LF at 16. Thus, contrary to the Claimants' argument, none of the Commission's findings concerned the contract negotiations between the System and Union that preceded the strike.

The facts in the record on appeal, moreover, include much information about the issues raised during the contract negotiations from the media. None of that information identifies the System's failure to fire any registered nurses that had violated their union security obligations as a reason for the strike. System's Brief at 5-6.

The Union, furthermore, issued a notice to the System on December 4, 2004 stating the Claimants' intention to begin a strike on December 15, 2004. LF 66; JSOF at

¶ 35. Consequently, the Claimants had decided to strike against the System *before* the administrative law judge issued his decision dated December 6, 2004. That decision described the following conduct as the basis for the adjudicated unfair labor practices:

The Respondent (i.e. the Medical Center) has violated Section 8(a) (5) and (1) of the Act, since December 19, 2003 by refusing to give effect to the provision in the collective bargaining agreement with the Union that requires the Respondent, upon written notice from the Union, to discharge unit members who have not met the contractual requirement of paying dues or fees to the Union.

LF 66; JSOF at ¶ 37. Thus, the conduct at issue in the adjudicated unfair labor practice concerned only the System's failure to fire registered nurses that had refused to pay dues or initiation fees to the Union.

In their brief, the Claimants urge a connection between the contract negotiations and the unfair labor practice finding issued against the System on December 6, 2004. According to the Claimants, "one of the reasons the negotiations stalled was due to the Medical Center's insistence that its union security obligations be deleted from the successor agreement altogether." They cite the System's Brief at its fifth page as the authority for that assertion. Actually, the System's Brief describes the unfair labor practice charges that the Union filed on December 6, 2004 there. It summarizes those charges as having alleged the System's failure to bargain in good faith during the contract negotiations. The System's Brief described the Union's specific allegations as follows: "the System's making regressive proposals during the contract negotiations, proposing the System's unilateral authority to change fringe benefits, proposing an open shop thereby eliminating the union security obligations in the contract, and inviting members

of the bargaining unit to deal directly with the System.” System’s Brief at 5. In addition, the System’s Brief noted the NLRB’s regional director’s dismissal of the Union’s unfair labor practice charges on April 29, 2005. *Id.* Consequently, the Claimants base their argument on allegations that the Union made, but could not prove, to the Board. In addition, none of those allegations of unfair labor practice charges made on December 6, 2004 accused the System of its failure to fire any registered nurses that had paid neither union dues nor initiation fees. JX-9a. Therefore, contrary to the Claimants’ argument, the facts upon which the NLRB had adjudicated an unfair labor practice against the System lacked any connection to the negotiations between the Union and the System that preceded the Claimants’ strike against the System. *Compare* JE-8 with JE-9a.

Thus, the Claimants’ motivation to strike against the System involved economic issues rather than the unfair labor practice that the administrative law judge found after they had made their decision to strike. The factual basis of that unfair labor practice, namely the System’s failure to fire certain registered nurses that had not paid initiation fees and dues to the Union, moreover, involved none of the issues raised during the contract negotiations preceding the Claimants’ economic strike. *Compare* JE-1 at SJMMC#0022-23, 0025-26, 003132, 0034-35, 0045-50, 00555-61, 0084, 0122-25, 0130-31, 0150, 0154, 0157, 0169, 0191, 0199, 0209, 0218, 0222-24; CX-1C, CX-1D, CX-1E, CX-1F, CX-1G, CX-3, Tr. 72-77, 79-80, 82-86. Consequently, the record lacks any evidence of a causal connection between the Claimants’ motivation to strike against the System and the unfair labor practice finding that the NLRB’s administrative law judge’s decision issued on December 6, 2004.

**V. The Claimants argument that the difficulty of determining whether an adjudicated unfair labor practice motivated striking Claimants to strike ignores the well-developed NLRB case law that distinguishes economic strikes from unfair labor practice strikes.**

In the course of their arguments against an interpretation of the Employment Security Law's § 288.040.6 that requires a causal connection between the adjudicated unfair labor practice and the Claimants' motivation for striking, they cite the difficulty of determining "the reasons for a strike." Claimants' Brief at 8. This section of their argument, however, disregards a well-developed body of NLRB case decisions that conduct just such an inquiry. Both the Board and federal appellate courts have decided cases that require them to determine whether conduct during a strike has transformed the strike from an economic strike to an unfair labor practice strike. *See, e.g., Chromalloy American Corp.*, 236 N.L.R.B. 868 n.33 (1987). Thus, the motivation causing claimants to strike concerns an issue susceptible to judicial determination based upon evidence.

**VI. The claimants' argument concedes that § 288.040.6's text contradicts the Employment Security Law's stated intention to exclude economic strikers from the receipt of unemployment compensation benefits during a strike.**

The Claimants admit the irrationality of § 288.040.6 (2)'s text. Claimants' Brief at 10. Section 288.040.6 (2) plainly states the ineligibility of "employees in the bargaining unit who initiated the strike [and] are participating in the strike" from collecting unemployment compensation benefits. It also excludes from those otherwise ineligible striking employees any whose "employer has been found guilty of an unfair labor practice by the National Labor Relations Board or a federal court of law for an act or actions preceding or during the strike." Mo. Rev. Stat. § 288.040.6 (2). As previously

discussed, the plain wording of the exception contradicts the Employment Security Law's stated intent to preclude any employee participating in an economic strike from receiving unemployment compensation benefits. *Supra* at 7-8. This contradiction makes § 288.040.6 (2) irrational. Thus, the avoidance of that contradiction requires interpreting the § 288.040.6 (2) to mean something different from its plain meaning.

The Claimants suggest an interpretation of the words "preceding the strike" to mean in the period leading up to the strike. Claimants' Brief at 11. Their suggestion, however, retains the contradiction between § 288.040.6 (2) and the ineligibility for unemployment compensation benefits of economic strikers. For example, assume the NLRB issued a finding on July 1 of the current year that an employer committed an unfair labor practice for conduct a year earlier at its Kansas City warehouse where a Teamsters' local union represents the employees. In addition, presume that the employer's sales employees at its St. Louis facility begin an economic strike on September 1 of the current year after their union, a local of the Service Employees International Union, had negotiated with the employer for the six preceding months without reaching an agreement. In accordance with the claimants' suggested interpretation, the St. Louis sales employees on strike for economic reasons could collect unemployment compensation benefits. Such an interpretation turns the statute's disqualification of economic strikers from eligibility for unemployment compensation benefits on its head. It further serves no legitimate governmental purpose to exclude the St. Louis economic strikers irrationally from the disqualification of economic strikers from eligibility for unemployment compensation benefits. Finally, the claimants'

suggested interpretation would impose a remedy against employers with a prior adjudicated unfair labor practice on the basis of that status, which the LMRA's preemption of conflicting state laws prohibits. *Supra* at 5-6.

Ultimately, the Claimants assert an alternative interpretation of § 288.040.6 (2) that would adopt a gloss on the statute's actual text by construing it to require the adjudicated unfair labor practice to be "a factor leading to the strike." Claimants' Brief at 11. In this case, the Commission made no such construction of the statute. Its findings, moreover, omit any that identify the unfair labor practice finding that the administrative law judge made on December 6, 2004 to be a factor leading to the strike. In fact, it lacked any evidentiary basis for such a finding. *Supra* at 8-10. Consequently, the Claimants offer no grounds upon which to uphold the Commission's decision in their favor and against the System in this case.

## **VII. Conclusion.**

In closing, the Commission's decision in this case deserves an order reversing it on either statutory grounds or constitutional grounds. First, the record lacks any evidence of a deputy or deputies that issued determinations as to the eligibility of each Claimant for unemployment compensation benefits in accordance with the Employment Security Law's requirements. To remedy this error, the Court must remand each of the Claimants' claims to the Division of Employment Security for a deputy or deputies to make the necessary eligibility findings.

If this Court reaches the constitutional issues, then they require the reversal of the Commission's decision. The Commission erred because it interpreted § 288.040.6 in an

unconstitutional manner by failing to require a causal connection between the adjudicated unfair labor practice and the Claimants' motivation for striking against the System. The record on appeal, however, lacks any evidence of any such causal connection.

Alternatively, § 288.040.6 violates the equal protection of the law provisions of the state and federal constitutions because of its use of an irrational classification and its lack of a legitimate governmental purpose. It lacks a legitimate governmental purpose, because it penalizes employers against whom the Board or a court has found an unfair labor practice. Only the NLRB or a court enforcing a Board order can impose a remedy because of an unfair labor practice. That classification also enables economic strikers to collect unemployment compensation benefits because of their employer's status based upon its prior adjudicated unfair labor practice that, as in this case, had nothing to do with their motivation to strike.

**Rule 84.06(c), (g) Certificate of Compliance**

The undersigned attorney certifies that this brief satisfies the page limitations imposed by the Missouri Court of Appeals, Eastern District, Special Rule 360. Specifically, it contains 3,596 words in Times New Roman font, the information that Missouri Supreme Court Rule 55.03 requires, and otherwise fulfills the requirements of Missouri Supreme Court Rule 84.06.

A CD-ROM containing an electronic copy of this brief has been submitted in accordance with Rule 84.06(g). The CD-ROM has been scanned for viruses and is virus-free.

Respectfully Submitted,

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Dated: December 31, 2007

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the counsel listed below by depositing both a written copy and a CD-ROM containing an electronic copy of the same in the U.S. mail, postage prepaid, this 31<sup>st</sup> day of December 2007:

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