

MISSOURI SUPREME COURT

No. SC88812

THOMAS E. MONROE,

Defendant/Appellant,

V.

WILLIAM O. CANNON,

Plaintiff/Respondent.

Appeal from the Missouri Circuit Court
Twenty-First Judicial Circuit (St. Louis County)
Division No. 2
The Honorable Maura B. McShane
Case No. 04CC-229

RESPONDENT'S BRIEF

Gary A. Growe, #26151
The Growe Law Firm
7733 Forsyth, Ste. 325
St. Louis, MO 63105
(314) 725-1912 / (314) 261-7326 (fax)

ATTORNEY FOR
PLAINTIFF/RESPONDENT
WILLIAM CANNON

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JURISDICTIONAL STATEMENT

Plaintiff/Respondent (“Plaintiff”) contests jurisdiction in this Court. As explained in more detail under Plaintiff’s Point I, it is Plaintiff’s position that Defendant has failed to properly preserve a constitutional issue for appeal. Although Defendant raised the issue of whether § 351.467 R.S.Mo.¹ violated the Contract Clause of the Missouri Constitution (Mo. Const. art. I, § 13) in his Amended Answer, he failed to do so at the first opportunity and offered no evidence on the constitutional issue during any evidentiary proceeding. Moreover, the Defendant did not ask the Trial Court to, and the Trial Court did not, specifically rule on the constitutional issue. As further detailed in Point I, Defendant’s challenge to the constitutionality of § 351.467 does not constitute a real and substantial constitutional issue. The challenged statute does not act on the contract (Shareholders’ Agreement) between Plaintiff and Defendant. At best, this case involves a matter of contract interpretation – namely, whether the Trial Court should have applied the terms of the Shareholders’ Agreement to the controversy between the Plaintiff and Defendant. For these reasons, Plaintiff believes that jurisdiction for this appeal lies with the Missouri Court of Appeals, Eastern District, and that the case should be transferred to that Court.

For the convenience of the Court, the parties will be referred to by their trial designation.

¹ All further statutory references are to R.S.Mo. (2007).

STATEMENT OF FACTS

Plaintiff William Cannon and Defendant Thomas Monroe are equal, fifty-fifty shareholders in two Missouri corporations, named Safe Deposit Company (hereinafter “SDC”) and CompuVault, Inc. (hereinafter “CV”). Plaintiff and Defendant are also equal partners and the sole members of Vault II, LLC. (L.F. 60, 66; Tr. 10, 11).

On July 31, 1989, Plaintiff and Defendant entered into an Agreement addressing their ownership of SDC. (A copy of this Shareholders’ Agreement is in the Legal File, beginning on page 31.) There was no Shareholders’ Agreement addressing the parties’ ownership of CompuVault, Inc. or Vault II, LLC. The SDC Agreement placed restrictions on the stock owned by Plaintiff and Defendant and, in paragraphs 1(a) and 1(b) provided, in pertinent part, as follows:

1. Restriction On Shares Of Stock

- (a) No shareholder shall transfer or encumber his shares of stock in the Corporation to any person without first receiving the written consent of all of the parties to this Agreement, or without first complying with the terms hereof; provided, however that Shareholders may pledge their shares of stock to a financial institution for the first two years of this Agreement without any further consent.
- (b) In the event that any of the Shareholders shall desire to sell, encumber or otherwise dispose of his stock in the Corporation, or any portion thereof, and the remaining

shareholders other than the Shareholder whose stock is being sold, encumbered or otherwise disposed of (“Remaining Shareholders”) have not consented to such encumbrance or disposition, such Shareholder shall first offer to sell the stock in writing, delivered by certified mail, to the Remaining Shareholders each of whom shall then have the option within thirty (30) days from the date of the receipt of said offer to purchase that proportion of the shares which is equal to the proportion which the number of shares of stock owned by each Remaining Shareholder bears to the total number of shares of stock owned by all the Remaining Shareholders for cash at the price determined under paragraph 5 hereof. A copy of said written offer shall be simultaneously sent via certified mail to the Corporation. . .²

In the event the Remaining Shareholders do not exercise their option to purchase all of the aforesaid stock so offered by the Shareholder, then in that event, the Corporation shall have the right,

² Paragraph 5 of the Agreement touched upon the process of determining the purchase price of shares of SDC tendered under paragraph 1. (L.F. 36). As will be discussed herein, there was no evidence that either Cannon or Monroe had followed the mandate of paragraph 5 to agree at least annually as to the fair market value of the stock.

privilege and option to purchase the unsold part of such offering within thirty (30) days from the expiration of the aforesaid thirty (30) day period fixed for the Remaining Shareholders to purchase such shares of the offer by the Corporation at the value determined under paragraph 5 hereof. If, however, at the expiration of such sixty (60) day period neither the Corporation nor the Remaining Shareholders have exercised their respective options to purchase all of said Shareholder's shares, then in that event, the said Shareholder so desiring to sell shall have the right to sell or otherwise dispose of his remaining shares in the Corporation in whatever manner and to whomsoever he desires. (L.F. 31-33).

Since the parties entered into the Shareholders' Agreement, Plaintiff has held certain managerial offices for the Companies. At time of the pleadings in this case, he was the President, principal Executive Officer, Treasurer and a Director of SDC. He was also President of CV. (LF. 60, 68). Defendant served as Chairman, Chief Executive Officer, Secretary and a Director of SDC. His offices were the same in CV. (L.F. 66). There had been no meetings of the Board of any of these entities for the purpose of electing officers for many years. (Tr. 14).

Management of each of these companies became deadlocked. (Tr. 14). Defendant alleged deadlock under 351.494 in his Second Amended Counterclaim. (L.F. 74-78). Plaintiff admitted those allegations. (Def. Supp. L.F. 288). Defendant further admitted in his testimony that there had been no regular meetings of Shareholders and Directors.

(Tr. 14). No directors had been elected. No officers had been appointed. Plaintiff agreed with this evidence and offered nothing in rebuttal.³

On January 16, 2004, Plaintiff filed his Petition under § 351.467 and § 347.143 seeking relief under the statute denominated Filing for Discontinuance of Certain Corporations. His Petition was accompanied by a proposed Plan of Discontinuance and Distribution. (L.F. 15-25). On February 20, 2004, Defendant filed his Answer. (Pl. Supp. L.F. 11-13). On March 10, 2004, Defendant filed his Amended Answer and first Counterclaim. (L.F. 26-30). As affirmative defenses, Defendant raised, among other defenses, that the parties' Agreement pre-empted Plaintiff's Petition and/or that § 351.467 was unconstitutional and in violation of the Contract Clause of the United States and Missouri Constitutions. (L.F. 28). Defendant's Counterclaim sought a declaratory judgment that the Shareholders' Agreement governed the allegations of Plaintiff's Petition and should be enforced. (L.F. 29, 30). This was the same allegation as set forth in paragraph 4 of Defendant's affirmative defenses. (L.F. 28). On June 1, 2004, Defendant filed his Motion for Summary Judgment. (L.F. 49, 50). On June 2, 2004, Plaintiff filed a Motion to Dismiss Defendant's Counterclaim. (Pl. Supp. L.F. 18, 19).

³ Defendant offered evidence as to unilateral actions taken by Plaintiff in connection with the affairs of the business. (Tr. 18-20). Plaintiff declined the opportunity to air his grievances against Defendant because it made no difference whether Plaintiff or Defendant was at fault for the total deterioration of their relationship. Both sides agreed that the Court needed to fashion a remedy.

On July 1, 2004, Plaintiff filed his Affidavit in Opposition to Defendant's Motion for Summary Judgment and Response to Statement of Uncontroverted Facts. (Pl. Supp. L.F. 20-25). On August 26, 2004, the Court sustained the motion and dismissed Defendant's Counterclaim and denied Defendant's Motion for Summary Judgment. (L.F. 59). The issue of the Shareholders' Agreement remained an issue in the case as one of Defendant's affirmative defenses. (L.F. 28).

On September 3, 2004, Plaintiff filed his First Amended Petition, adding Count III. (L.F. 60-65). On October 28, 2004, Defendant filed his First Amended Counterclaim, seeking judicial remedies under § 351.494, alleging that the Companies were deadlocked as per the statute. (Pl. Supp. L.F. 26-35). Defendant again amended his Counterclaim on December 6, 2004. (L.F. 74-78).⁴ Defendant again raised the Shareholders' Agreement in both his first and second Amended Counterclaim, seeking its enforcement as a statutory remedy for a deadlocked corporation under § 351.494. (L.F. 74-77).

Plaintiff's Petition under § 351.467 and § 347.143 and request for appointment of a receiver came for hearing on April 7, 2005. (Pl. Supp. L.F. 14-16). By agreement of the parties, no evidence was adduced. Defendant chose not to offer evidence in support of his affirmative defenses, including the defense relating to the Shareholders' Agreement and his attack on the constitutionality of the statute. This stipulation was not included in

⁴ This pleading was denominated as a First Amended Counterclaim by Defendant. In fact, it was Defendant's Second Amended Counterclaim.

Defendant's Legal File. It is included in Plaintiff's Supplemental Legal File. (Pl. Supp. L.F. 36). The parties stipulated to the salient facts under the statute. The parties stipulated as follows:

1. Plaintiff and Defendant each own fifty percent (50%) of the issued and outstanding stock in The Safe Deposit Company, CompuVault and are 50-50 members in Vault II, LLC. (Pl. Supp. L.F. 36).
2. Exhibit A to Plaintiff's Petition (denominated Plan of Discontinuance and Distribution) was served on all appropriate parties. (Pl. Supp. L.F. 36).
3. There has been no agreement reached between the parties with respect to the Plan of Discontinuance and Distribution since it was served. (Pl. Supp. L.F. 36).
4. The Court shall enter Findings of Fact and Conclusions of Law in accordance with the pleadings, exhibits and argument of counsel. (Pl. Supp. L.F. 36).

The Court entered its Order accepting the stipulation of Facts and Proposed Findings of Fact and Conclusions of Law. (Pl. Supp. L.F. 46, 47). Defendant filed a Petition for Writ of Prohibition seeking to block the entry of Findings of Fact and Conclusions of Law following the entry of the Stipulation. Defendant's application for a writ requested the Court of Appeals to order the Trial Court to dismiss Plaintiff's Petition and to order the Trial Court to cease and desist with respect to the entry of the proposed

Findings of Fact and Conclusions of Law. On April 26, 2005, the Missouri Court of Appeals, Eastern District, denied Defendant's application for a Writ. (Pl. Supp. L.F. 41).

On May 3, 2005, the Trial Court entered its Findings of Fact and Conclusions of Law with respect to Plaintiff's claims under § 351.467 and § 347.143. (L.F. 82-84). Mr. Dudley McCarter was appointed Trustee.⁵

Trustee McCarter reported directly to the Court. In his first report, dated June 8, 2005 (L.F. 85), McCarter advised the Court that he was working with the parties to negotiate the sale of the Companies to a third party or to negotiate a private sale between the Shareholders (L.F. 85-86). The Trustee's stated goal was to preserve Shareholder value and maximize the benefit to all Shareholders (L.F. 85). No objection was filed by either party to this report. It was accepted by the Court. Trustee McCarter's second report to the Court was filed on September 23, 2005. (L.F. 87-89). In his second report, Mr. McCarter recommended that the Companies be marketed and sold through the use of

⁵ Defendant admits in his Brief that the parties concurred as to the findings entered by Judge Hartenbach and agreed to the appointment of Mr. McCarter. (App. Br. 11). The Findings of Fact and Conclusions of Law were described by Defendant as a "set of agreed upon Findings of Fact and Conclusions of Law". (App. Br. 11). Defendant did agree to the Findings of Fact and Conclusions of Law entered by Judge Hartenbach. (App. Br. 11). In a footnote, Defendant attempts to create wiggle room, by asserting that he did not "expressly or tacitly agree to the appointment of a Trustee". Suffice it to say, there is no record whatsoever of any objection.

a “recognized and experienced business broker”. (L.F. 88). A procedure was established for the parties to select one of the recommended brokers. (L.F. 88). No objection to the Trustee’s second report was filed. The Court approved the report. (L.F. 90). Following compliance with the protocol established in Trustee McCarter’s second report to select a business broker, the parties selected Clayton Capital Partners. On January 27, 2006, Trustee McCarter filed his Motion to Approve the Contract with Clayton Capital. (L.F. 93-98). In his motion, McCarter advised the Court that the procedures outlined in his second report to the Court had been followed and that together, the parties and the Trustee had selected Clayton Capital. (L.F. 93). On April 4, 2006, Defendant filed his first Motion to Stay Proceedings. (L.F. 99-102). Defendant’s motion expressed concern that because of uncertainty surrounding the status of Missouri Higher Education Loan Authority (“MOHELA”), (SDC’s largest customer), the potential value of the Companies had diminished and that the listing of the Companies for sale should be delayed until the uncertainty was resolved. (L.F. 101, ¶8). On the same date, Defendant filed his objections to the contract with Clayton Capital, raising issues about MOHELA, as well as objections to certain actual contract terms, as said terms related to Clayton Capital’s fee.⁶ (L.F. 103-106).

⁶ It is important to note that Defendant did not file an objection based on the decision to hire a broker or as to the method employed for selection of the broker. His objection was directed to timing and terms.

On April 4, 2006, the Trial Court denied Defendant's Motion to Stay, but granted his request to edit the terms of the listing contract. (L.F. 107). The Court entered a formal order approving the contract, but did delay its effective date for sixty (60) days. The specific purpose of this delay was to grant the parties time to negotiate a private sale between them. (L.F. 108, 109). Absent a private agreement between Plaintiff and Defendant, the parties were ordered to execute the contract with Clayton Capital on June 4, 2006. (L.F. 109).

One day before that deadline (June 3, 2006), Defendant filed his Second Motion to Stay and/or to Amend the April 4, 2006 Order. The basis was again the uncertainty attached to MOHELA. (L.F. 110-111). On June 13, 2006, the Court again granted Defendant's Motion to Stay for fifteen (15) additional days in order to again allow private negotiations. (L.F. 113). If these negotiations failed to result in an agreed sale between the parties, the contract to list the Companies for sale was ordered to be effective on June 28, 2006. (L.F. 113). During this fifteen day "Stay", offers were exchanged. No agreement was reached. On June 29, 2006, Defendant filed another Motion to Reconsider the Court's Approval of the Trustee's Motion to Approve the Contract with Clayton Capital. (L.F. 114-119). Defendant stated that engaging a broker to sell or liquidate the Companies was unnecessary in light of the parties' respective exchange of offers during the fifteen day "stay". (L.F. 117, ¶11). Defendant postulated that a sale to a third party was not "warranted or appropriate". (L.F. 117, ¶11). Plaintiff responded with his Motion to Compel Defendant to Execute the Contract with Clayton Capital. (L.F. 121-123). On July 18, 2006, the Trial Court entered its Order denying Defendant's

motions to reconsider. The Court ordered Plaintiff and Defendant to deliver executed copies of the listing contract with Clayton Capital to Trustee McCarter by July 21, 2006. (L.F. 138). Plaintiff complied. Defendant did not. On August 21, 2006, Plaintiff filed a Motion for Sanctions and to hold Defendant in contempt of Court for his failure to comply with the Court Order of July 18, 2006. (Pl. Supp. L.F.). Plaintiff's Motion for Sanctions and Contempt was heard on September 26, 2006. (Pl. Supp. L.F.). At that time, the parties agreed to change course. Plaintiff's Motion for Sanctions and Contempt was withdrawn. (Pl. Supp. L.F.). Rather than proceed with the listing with Clayton Capital, the parties would engage in a private sale under the direction of Trustee McCarter. (Pl. Supp. L.F.). In addition, Brent Baxter, of Clayton Capital, was to be hired to assist Trustee McCarter in his duties. (L.F. 139-143). The purpose of that appointment was to allow Mr. Baxter, an experienced investment banker, to assist Trustee McCarter in effecting a private sale between the parties. (L.F. 139-142). No objection was filed to that motion. The Court directed Trustee McCarter to submit a formal Motion for Court Approval as to the procedure to be utilized to conduct a private sale. (Pl. Supp. L.F.). On November 3, 2006, Trustee McCarter filed his Motion for Court Approval to Conduct Private Sale. In his motion, Trustee McCarter recited the following:

1. Both shareholders/owners William O. Cannon and Thomas E. Monroe have, through their counsel, advised the Trustee of their willingness to participate in a binding private sale of their respective interests in The Safe Deposit Company, CompuVault, Inc, and Vault II, L.L.C. (L.F. 144).

2. The Trustee believes that it is in the best interest of the Companies and the two shareholders that a private sale be conducted by the Trustee for the purpose of concluding this litigation by having one of the shareholders acquire the other shareholder's interests in the Companies. (L.F. 144-145).⁷

Thereafter, and after having expressed his consent and agreement to the private sale, Defendant changed his position. On December 15, 2006, Defendant filed his Motion to Compel an Alternative Method for Concluding the Case. (L.F. 157-165). In ¶8 of his motion (L.F. 158), Defendant requested that Plaintiff be ordered to sell his interest in the Companies to Defendant for "fair value". (L.F. 158, 159). Defendant asked the Court to order an appraisal or, in the alternative to adopt a process through which private negotiations would take place. (L.F. 158-160). On December 19, 2006, the Trial Court granted Trustee McCarter's Motion to Conduct a Private Sale and established protocol and parameters for the process. (L.F. 166-170).

The private sale was held on February 20, 2007 and February 22, 2007. Trustee McCarter reported to the Court on the outcome of the sale. (L.F. 171-173). A record of each offer to buy or sell was recorded and made a part of the record. (L.F. 174-216). At 2:43 p.m. on February 22, 2007, Plaintiff offered \$1,755,000.00 to purchase Defendant's interest. Defendant did not respond. Plaintiff's offer was the last offer. Plaintiff was declared to be the successful bidder. (L.F. 171-173). Prior to the sale, counsel for

⁷ There is no objection in the record to this filing. Defendant never challenged Mr. McCarter's assertions.

Plaintiff had prepared, at the request of the Trustee, a purchase agreement. (L.F. 209-235).

On April 20, 2007, Plaintiff filed his Motion for Entry of Final Judgment with respect to Plaintiff's Petition and the Trustee's report. The Trustee filed his Motion to Approve the Private Sale. (L.F. 166-242). Defendant filed his Motion for an Evidentiary Hearing on his Counterclaim. (L.F. 243-248). Hearing was held on May 11, 2007.

The Trustee's Report of Private Sale was received by the Court. (L.F. 250). Defendant was the sole witness to testify in his case. He opined that there was shareholder and director deadlock. (Tr. 14, 15). He further opined that the deadlock was injurious to the Companies. (Tr. 15). Defendant's stated position was that the Court should order Plaintiff to sell the Companies to him. Defendant offered two financial calculations in support of his position. First, Defendant presented evidence under the Shareholders' Agreement that Plaintiff should be ordered to sell his interest to Defendant for \$685,612.00. (Tr. 34, 35; Defendant's Exhibit F). Alternatively, Defendant opined as to "fair value" and asked the Court to order Plaintiff to sell his interest at \$1,012,379.00. (Tr. 34-35; Defendant's Exhibit F). Defendant objected to accepting \$1.755 million for his interest. (Tr. 30). That was the amount of Plaintiff's last bid. Defendant testified that his interest in the Companies was worth more than that. (Tr. 31). However, it was his opinion that Plaintiff's fifty percent (50%) interest should be purchased for \$1.191 million. (Tr. 41). Defendant admitted that he participated in the Court-ordered private

sale with no intention of honoring any bid he made over \$1,000,000.00.⁸ (Tr. 49). Defendant even denied agreeing to proceed with a private sale. (Tr. 53). This testimony is contrary to the record. (L.F. 144, 145). Defendant acknowledged knowing that before the private sale, Plaintiff would have sold his interest to him for \$1.5 million. (Tr. 54). Defendant never offered that amount to the Plaintiff during the private sale. (Tr. 54).

On May 24, 2007, the Trial Court entered extensive Findings of Fact, Conclusions of Law and Final Judgment. The Court entered judgment on Plaintiff's Petition and ordered Defendant to sell his interest in all companies for \$1,755,000.00. (L.F. 255-264). The Court found as a fact in the case that Plaintiff's offer of \$1,755,000.00 represented fair and reasonable value for the Shareholders' interest in the Companies. (L.F. 259, ¶19). The Court found in favor of Defendant on his Counterclaim under § 351.494. The Trial Court then addressed remedy. (L.F. 260; ¶22). The Court found, as a matter of fact and law that Trustee McCarter's Private Sale, conducted on February 20, 2007 and February 22, 2007 represented the best method of realizing maximum value for the shareholders. (L.F. 261; ¶27). The Court held that the remedy of Trustee McCarter's sale under either § 351.467 or § 351.494 should be, and would be, the same. (L.F. 262). In Defendant's Statement of Facts, he asserts that the Court, in its Findings and Judgment relied on 351.467 to the exclusion of other statutory sections. (App. Br. 24). That

⁸ Defendant's testimony here is in direct conflict with the Trustee's Report of Private Sale. At 2:50 p.m. on February 20, 2007, Defendant offered Plaintiff \$1,300,000.00 to purchase his interest and agreed to drop appeals and litigation. (LF. 197).

assertion is not an accurate reading of the Trial Court's Judgment. In paragraphs twenty-nine through thirty-one, the Trial Court stated:

29. The Court has considered the interplay of Mo.Rev.Stat. Sec. 351.467 and Sec. 351.494 and as previously stated, has concluded that reliance on Mo.Rev.Stat. Sec. 351.467 is appropriate in this case because the parties each own fifty percent (50%) of the stock in the Companies. However, the Court concludes that proceeding under Mo.Rev.Stat. Sec. 351.494 would not have changed the remedy available to either party. Under Mo.Rev.Stat. 351.494, the Court has the discretion to fashion a remedy for deadlock short of actual dissolution, similar to the discretion and directive granted in Mo.Rev.Stat. Sec. 351.467. The Courts in Missouri have recognized that a court has discretion to impose any number of equitable remedies depending on the facts of the case and the nature of the problem. *Fix v. Material Co., Inc.*, 538 S.W.2d 351 (Mo.App. 1976). (L.F. 262).
30. The Court concludes as a matter of law that the appointment of a trustee to work with the parties and under the supervision of this Court represented a fair and equitable remedy for shareholder and director deadlock under Mo.Rev.Stat. Sec. 351.467 as well as Sec. 351.494. (L.F. 262).

31. As a Court sitting in equity, the remedy fashioned in this case by the Trustee and the Court, including a Private Sale to allow one shareholder to buy out the other would be appropriate and equally applicable to resolving this dispute under either Mo.Rev.Stat. Sec. 351.467 or Sec. 351.494. Therefore, the court concludes as a matter of law that Plaintiff proved his case for discontinuation under Mo.Rev.Stat. Sec. 351.467 and Defendant prove his case for dissolution under Mo.Rev.Stat. Sec. 351.494. The equitable remedy of appointing a Trustee and breaking the deadlock through a procedure which allowed each shareholder to freely assess fair value and to have a full and fair opportunity to participate in the acquisition of the other interest was fair and equitable and the Court hereby approves the remedy as fair, reasonable and equitable under the Statute. (L.F. 262,263).

The appointment of Trustee McCarter and the ordering of a private sale was held to be appropriate and applicable under either Plaintiff's Petition or Defendant's Counterclaim. (L.F. 262, 263; ¶31). Accordingly, final judgment was entered. (L.F. 263). Defendant appealed the Judgment directly to this Court, claiming that the Supreme Court has exclusive jurisdiction of this case under Article V, Section 3 of the Missouri Constitution.

POINTS RELIED ON

I. THE SUPREME COURT MUST DECLINE JURISDICTION OF DEFENDANT'S APPEAL FOR THE REASON THAT DEFENDANT FAILED TO PRESERVE OR RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION WITH RESPECT TO WHETHER § 357.461 VIOLATES THE CONTRACT CLAUSE OF THE UNITED STATES OR MISSOURI CONSTITUTION AND THEREFORE, THIS CAUSE MUST BE REMANDED TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT FOR FURTHER APPELLATE PROCEEDINGS.

II. POINT ONE OF DEFENDANT'S POINTS RELIED ON SHOULD BE DENIED FOR THE REASON THAT DEFENDANT'S APPEAL FROM THE TRIAL COURT'S DENIAL OF HIS SUMMARY JUDGMENT MOTION AND THE GRANTING OF PLAINTIFF'S MOTION TO DISMISS WERE INTERLOCUTORY ORDERS AND PRESENT NO REVIEWABLE ISSUE AS TO THE ENFORCEABILITY OF THE SHAREHOLDERS' AGREEMENT.

III. POINT TWO OF DEFENDANT'S POINTS RELIED ON SHOULD BE DENIED FOR THE REASON THAT DEFENDANT'S APPEAL FROM

THE TRIAL COURT'S ORDER DENYING HIS MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION TO DISMISS HIS ORIGINAL COUNTERCLAIM WERE INTERLOCUTORY ORDERS AND PRESENT NO REVIEWABLE ISSUE AND FOR THE FURTHER REASON THAT DEFENDANT HAS FAILED TO PRESENT OR PRESERVE A CONSTITUTIONAL CHALLENGE TO § 351.467.

IV. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON HIS CLAIM UNDER § 351.467 FOR THE REASON THAT THE PARTIES STIPULATED TO THE PREDICATE FACTS NECESSARY FOR RELIEF UNDER THE STATUTE, AGREED TO THE ORIGINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (INCLUDING THE APPOINTMENT OF TRUSTEE MCCARTER), AND THE COURT WAS WITHIN ITS DISCRETION IN APPROVING AND ACCEPTING THE EVIDENCE OF THE PRIVATE SALE AS AN EQUITABLE REMEDY.

V. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON HIS CLAIM UNDER § 351.467 FOR THE REASON THAT THE PARTIES STIPULATED TO THE PREDICATE FACTS NECESSARY FOR RELIEF UNDER THE STATUTE, AGREED TO THE ORIGINAL FINDINGS OF FACT AND CONCLUSIONS OF

LAW (INCLUDING THE APPOINTMENT OF TRUSTEE MCCARTER), AND THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANT'S CLAIM UNDER § 351.494 AND ORDERING THE PRIVATE SALE BETWEEN THE PARTIES AS AN EQUITABLE REMEDY FOR THE DEADLOCK.

VI. THE TRIAL COURT'S JUDGMENT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S PETITION AND DEFENDANT ON DEFENDANT'S COUNTERCLAIM WAS SUPPORTED BY THE SUBSTANTIAL WEIGHT OF THE EVIDENCE IN THIS CASE.

STANDARD OF REVIEW

With respect to Defendant's Points Relied On I and II, there is no standard of review as those points do not present reviewable issues. As to Points III, IV and V, the standard of review, in this Court tried matter, is in accordance with *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The Judgment of the Trial Court is to be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or unless the Court erroneously declared or applied the laws. *In re: Liquidation of Professional Medical Ins. Co.*, 92 S.W.3d 775 (Mo. banc 2003). The facts are considered in the light most favorable to the Trial Court's ruling.

ARGUMENT

I. THE SUPREME COURT MUST DECLINE JURISDICTION OF DEFENDANT'S APPEAL FOR THE REASON THAT DEFENDANT FAILED TO PRESERVE OR RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION WITH RESPECT TO WHETHER § 357.461 VIOLATES THE CONTRACT CLAUSE OF THE UNITED STATES OR MISSOURI CONSTITUTION AND THEREFORE, THIS CAUSE MUST BE REMANDED TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT FOR FURTHER APPELLATE PROCEEDINGS.

It is well recognized that in order to preserve a constitutional question for review in the Supreme Court, it must be raised at the earliest possible opportunity; the relevant sections of the Constitution must be specified; the point must be preserved in the motion

for new trial, if any; and it must be adequately covered in the briefs. *Shipley v. Cates*, 200 S.W.3d 529 (Mo. banc 2006). As a corollary to the requirement that a constitutional issue must be raised at the earliest possible opportunity, a litigant must, in addition to merely citing a section of the Constitution, set forth the facts on which the constitutional claims were predicated. *Kansas City v. Reed*, 216 S.W.2d 514 (Mo. banc 1948). In addition, a party must be diligent in preserving the issue at each step of the judicial process. *Miller v. Miller*, 210 S.W.3d 439 (Mo.App. W.D. 2007). In order for the issue of the constitutional validity of a statute to be preserved for appellate review, the trial court must have ruled thereon. An examination of the record in this case reveals that Defendant failed to preserve his constitutional challenge to the validity of § 351.467.

Defendant failed to assert a constitutional challenge at his first opportunity. His original Answer was filed on February 18, 2004. (Pl. Supp. L.F. 11, 13). The Answer failed to raise a constitutional challenge to the statute. (Pl. Supp. L.F. 11, 13). On March 10, 2004, Defendant filed his Amended Answer and in paragraph 5 of his affirmative defenses, raised his constitutional challenge. (L.F. 26-30). Moreover, and particularly fatal to his claim of having preserved the constitutional issue, Defendant failed to preserve the point at each step of the process and failed to present the point for Trial Court determination. Indeed, there is no record of the Trial Court deciding the purported constitutional issue.

The allegations as set forth in Plaintiff's Petition were called for hearing on April 7, 2005. At that time, Defendant and Plaintiff submitted a stipulated set of facts to the Court including a stipulation that the Court would enter Findings of Fact and Conclusions

of Law. (Pl. Supp. L.F. 36). Although the constitutionality of the statute had been raised as an affirmative defense in an Amended Answer, Defendant offered no evidence in support of his constitutional challenge at that time. Defendant offered no briefing on the issue. Defendant offered no proposed findings on the issue. The Trial Court was not asked to and did not decide the constitutional issue at that time.⁹

The next opportunity for at least the offering of evidence was at the Court hearing scheduled for Plaintiff's Motion for Entry of Final Judgment, the Trustee's Motion for Acceptance of his Report on the Private Sale and Defendant's Counterclaim. At this stage of the proceedings, Defendant failed to offer any evidence in support of his constitutional challenge, failed to address the Court verbally on the issue, failed to brief the issue and failed to present findings directed to the constitutional issue. The Trial Court was not requested to rule on or enter any findings with respect to the constitutional issue. The Trial Court's Findings of Fact, Conclusions of Law and Judgment did not rule on or even mention the constitutional issue. (L.F. 255-264).¹⁰ In *Sharp v. Curators of*

⁹ Defendant filed a Motion for Summary Judgment before the scheduled hearing on Plaintiff's Petition but elected not to raise the constitutional issue as a basis for his Motion for Summary Judgment. As the record reflects, the basis for his motion was based on Defendant's request that the Shareholders Agreement be enforced. (L.F. 49-50).

¹⁰ Defendant filed a post-judgment motion for new trial and in paragraph 1 mentioned his constitutional theory but did not seek an amended judgment or new trial on that issue.

the University of Missouri, 138 S.W.3d 735 (Mo.App. E.D. 2003), the Missouri Court of Appeals instructed:

. . . If the appellant’s claim regarding the constitutional validity of the statute has not been properly preserved for appellate review, jurisdiction would be in this Court, rather than the Supreme Court . . . To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and presented at each step of the judicial process. Further, in order for the issue of the constitutional validity of a statute to be preserved for appellate review, the issue must not only have been presented to the Trial Court, but the Trial Court must have ruled thereon. And, the point raised on appeal must be based upon the theory advanced at the Trial Court. *Id.* at 738.

(L.F. 273-281). Paragraph 1 simply seeks post-judgment relief by requesting enforcement of the Agreement. In either event, even after the hearing on Defendant’s post-trial motion, the Trial Court was not requested to and did not specifically rule on the issue. It was not briefed either at the time of trial or as part of post-judgment submissions. As such, defendant waived his constitutional challenge. As this Court stated in *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996): “An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or an appeal. *Id.* at 684.

Defendant merely asserted in an amended pleading that § 351.467 R.S.Mo. is unconstitutional. An assertion alone does not preserve the issue for Supreme Court review. *See also, Magenheim v. Board of Education of School District of Riverview Gardens*, 340 S.W.2d 619 (Mo. 1960) at 621; *Wright v. Missouri Department of Social Services, Div. of Family Services*, 25 S.W.3d 525 (Mo.App. W.D. 2000). As clearly articulated by this Court: “Raising a constitutional question is not a mere matter of form”. *Magenheim* at 621.

In the case at bar, at no time did Defendant present his constitutional challenge to the Trial Court for determination and the record is clearly void of any Trial Court decision on the constitutional challenge. There was no evidence on the issue. There was no briefing pre-trial or post-trial. There is only one conclusion – that Defendant has failed to preserve a constitutional challenge to the statute and therefore, the Supreme Court of Missouri does not have jurisdiction of this appeal. The case should be remanded to the Missouri Court of Appeals.

In addition, this Court should decline jurisdiction for the reason that Defendant has failed to present a real and substantial constitutional challenge – a jurisdictional prerequisite. As stated by this Court in *Magenheim*:

. . . Raising a constitutional question is not a mere matter of form; the question must really exist and if it does not exist, it is not raised (citations omitted). *Id.*

In other words, the constitutional issue must be real and substantial, not merely colorable. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. banc 1999);

Schumann v. Missouri Highway and Transportation Commission, 912 S.W.2d 548, 551 (Mo.App. W.D. 1995). A claim is substantial when:

. . . upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but if such preliminary inquiry discloses the contention is so obviously unsubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable. *Estate of Potaschnick*, 841 S.W.2d 714, 718 (Mo.App. E.D. 1992).

At best, Defendant's constitutional claim is colorable. In reality, it is non-existent. It is fundamental that in order to have a constitutionally protected impairment with respect to the Contract Clause, the challenged law must act on the contract itself as distinguished from the property which is the subject of the contract. *Metropolitan St. Louis Sewer District v. Ruckelshaw*, 590 F.Supp. 385 (E.D. Mo. 1984). A preliminary question under Contract Clause analysis is always whether the legislative action impaired or changed a specific contractual obligation. *City of Atlanta v. Metropolitan Rapid Transport*, 636 F.2d 1084 (5th Cir. 1981). See generally, *Energy Reserve Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983).

A cursory review of the Shareholders' Agreement and § 351.467 reveal the absence of any direct statutory impact on the Agreement. The statute did not relieve Plaintiff of any obligations under the Shareholders' Agreement. The statute did not relieve Defendant of any obligation under the Shareholders' Agreement. The statute does

not mention the Cannon-Monroe Shareholders' Agreement or shareholder agreements in general. The statute simply does not act or purport to act on the Shareholders' Agreement. Section 351.467 of the Missouri Corporate Statute provides as follows:

1. If the stockholders of a corporation of this state, having only two shareholders each of which own fifty percent (50%) of the stock therein, shall be unable to agree upon the desirability of continuing the business of such corporation, either stockholder may file with the circuit court in which the principal place of business of such corporation is located a petition stating that it desires to discontinue the business of such corporation and to dispose of the assets used in such business in accordance that they plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved. Such petition shall have attached thereto a copy of the proposed plan of discontinuance and distribution and a certificate stating that copies of such petition and plan have been transmitted in writing to the other stockholder and to the directors and officers of such corporation. (A copy of the Delaware statute is set forth in Defendant's Appendix).

Defendant's argument that §351.467 directly alters the Shareholders' Agreement or relieves the Plaintiff and Defendant from their duties under that Agreement is fantastical; Defendant failed to present any evidence (either verbal or written) at any appropriate stage in the case demonstrating that §351.467 altered the Shareholders' Agreement or the duties of the parties. There is no constitutional challenge here meeting

the dictate of Article V, § 3 of the Missouri Constitution, which grants this Court exclusive jurisdiction of all cases involving the constitutional validity of a statute. Defendant has only a breach of contract defense here: whether the terms of the Shareholders' Agreement cover the claims of the parties, under either § 351.467 or § 351.494. The issue of interpreting this contract does not equate to a constitutional issue. Therefore, the appeal should be remanded and transferred to the Missouri Court of Appeals.

II. POINT ONE OF DEFENDANT'S POINTS RELIED ON SHOULD BE DENIED FOR THE REASON THAT DEFENDANT'S APPEAL FROM THE TRIAL COURT'S DENIAL OF HIS SUMMARY JUDGMENT MOTION AND THE GRANTING OF PLAINTIFF'S MOTION TO DISMISS WERE INTERLOCUTORY ORDERS AND PRESENT NO REVIEWABLE ISSUE AS TO THE ENFORCEABILITY OF THE SHAREHOLDERS' AGREEMENT.

Under Point I of his appeal, Defendant argues that the Trial Court erred in denying his Motion for Summary Judgment seeking Trial Court enforcement of the Shareholders' Agreement. (App.Br. 31). The issue of whether the Shareholders' Agreement should be enforced as a remedy in the case was raised both as an affirmative defense and in Defendant's Counterclaim for Declaratory Relief. (L.F. 74-78). On August 26, 2004, the Trial Court denied Defendant's Motion for Summary Judgment. (L.F. 59). Defendant has appealed this denial. Indeed, Defendant's only point relied on in this appeal that raises whether the Shareholders' Agreement should have been enforced is Point I,

addressing the denial of his summary judgment motion. In appealing the Trial Court's denial of his Motion for Summary Judgment, Defendant has misread or misinterpreted binding Missouri law. It is recognized hornbook law in Missouri that an order which overrules a motion for summary judgment is interlocutory and, therefore not appealable. *Gillespie v. Gillespie*, 634 S.W.2d 493 (Mo.App. E.D. 1982); *Gambill v. Cedar Fork Mutual Aid Society*, 967 S.W.2d 310 (Mo.App. S.D. 1998); *Londoff v. Vuylsteke*, 996 S.W.2d 553 (Mo.App. E.D. 1999). It has been stated that a denial of a motion for summary judgment is never subject to appellate review, even when the appeal is taken after entry of a final judgment. *Gilmore v. Erb*, 900 S.W.2d 669 (Mo.App. E.D. 1995). Defendant's appeal from the denial of his Motion for Summary Judgment simply does not present an appealable issue for this Court; it was purely interlocutory in nature.

After the denial of his Motion for Summary Judgment, Defendant had ample opportunity to present evidence on the enforceability of the Shareholders' Agreement. Defendant declined to do so and therefore waived this issue. The Trial Court's denial of his Motion for Summary Judgment did not strike his pleadings or bar his right to pursue the issue as a defense in the case.

Following the Trial Court's denial of Defendant's Motion for Summary Judgment, a hearing on Plaintiff's Petition was scheduled and called. At that time, Defendant declined to present evidence on the Shareholders' Agreement or any other issue. Instead, the parties stipulated to a set of facts. (Pl. Supp. L.F. 36). Defendant could have presented evidence on his affirmative defense on the applicability and enforceability of the Shareholders' Agreement. Moreover, at the trial on Defendant's Counterclaim,

Defendant did offer “some evidence” of the Shareholders’ Agreement, at least with respect to the value assigned to Plaintiff’s interest under the Agreement. Defendant presented this evidence under his theory that as a remedy for corporate deadlock under § 351.494, the Trial Court should have enforced the Shareholders’ Agreement. (Tr. 35-37). Over objection, the Trial Court heard the evidence. Defendant had ample opportunity to continue to pursue his claim to enforce the Shareholders’ Agreement. There is simply no appealable issue from the denial of Defendant’s Motion for Summary Judgment.

Joined in Point I with Defendant’s misguided appeal from the Trial Court’s denial of his Summary Judgment Motion is an attempt to appeal the Trial Court’s dismissal of his first Counterclaim. Defendant’s Point Relied On seems to combine the two. However, Missouri law does not support an appeal from the dismissal of the original Counterclaim because Defendant, in filing two subsequent Counterclaims, abandoned the claims asserted in his first Counterclaim. By abandoning these original claims, nothing was preserved for appeal. The record reveals the following procedural history. On March 12, 2004, Defendant filed his first counterclaim, seeking a declaratory judgment that the Shareholders’ Agreement between the parties be enforced. (L.F. 26-30). On June 2, 2004, Plaintiff filed a one paragraph motion to dismiss the counterclaim for failure to state a claim. (L.F. 57). On August 26, 2004, the Trial Court sustained Plaintiff’s motion. (L.F. 59). On October 28, 2004, Defendant filed, by leave of court, his First Amended Counterclaim. (Pl. Supp. L.F. 26-35). On December 6, 2004, Defendant filed a Second Amended Counterclaim (denominated First Amended Counterclaim). (L.F. 74-78). Plaintiff filed an Answer to the Second Amended

Counterclaim. (Def. Supp. L.F. 288-290). Defendant's filing of his two Amended Counterclaims, after the Order of Dismissal as to the First Counterclaim, presents the issue of whether Defendant has preserved any issue relating to the dismissal of the first Counterclaim for appeal. The simple and short answer is no. The law was succinctly stated in the recent case of *Johnson v. GMAC Mortgage Corp.*, 162 S.W.3d 110 (Mo.App. W.D.2005), where the Court stated:

. . . By filing an amended pleading, a plaintiff generally abandons his former pleadings and those pleadings may not be considered for any purpose afterward. *Beckmann v. Miceli Homes, Inc.*, 45 S.W.3d 533, 543 (Mo.App. E.D. 2001). . . . This rule is valid "when the original pleading and the amended pleading are addressed to the same defendant or arise from a dismissal with leave to amend". *R.C. v. Southwestern Bell Tel. Co.*, 759 S.W.2d 617, 619 (Mo.App. E.D. 1988). When a court dismisses a petition with leave to amend, the plaintiff has a choice between standing on the original petition and appealing the dismissal or making the amendment and proceeding to the Trial Court on the amended petition. *Id.* Because the plaintiff in this situation has a choice between appealing or amending, "it is reasonable that the pleading a plaintiff elects to go to trial on is the one that forms the basis for appeal". *Id.*

Defendant made no effort to incorporate or preserve his Petition for Declaratory Judgment into either of his subsequent Counterclaims. Therefore, the claim is abandoned and can receive no further consideration in the case or in this appeal. *State ex rel.*

Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998). Indeed, it has been stated that an abandoned petition becomes a mere “scrap of paper” insofar as the case is concerned. *Trimble v. Pracna*, 51 S.W.3d 481 (Mo.App. S.D. 2001) at 490.

It is clear in this case that Defendant’s two Amended Counterclaims were addressed to the same party (Plaintiff Cannon) and arose directly from the dismissal of the original claim. Defendant went to trial on his Second Amended Counterclaim, which actually raised the same issue as was asserted in the original Counterclaim – that of the enforceability of the Shareholders’ Agreement. In Defendant’s Second Amended Counterclaim, he sought relief as a result of deadlocked Shareholders and Directors under § 351.494. For his claim of relief, Defendant sought enforcement of the Shareholders’ Agreement. (L.F. 76). Point I must be denied.

Although Plaintiff contends that Point I has preserved no issue for appeal, in an abundance of caution, Plaintiff will dissect the substance of Defendant’s argument that the Shareholders’ Agreement should have prevailed over the dissolution provision of § 351.467.

The Shareholders’ Agreement between the parties in this case reveals that as written, the Agreement only applies in the event that a Shareholder desires “to sell, encumber or otherwise dispose of his stock in the Corporation, or any portion thereof” and requires that said Shareholder first offer his shares of stock to the “remaining Shareholders”. (L.F. 31-41). There is no evidence in the record from which an argument could be made that Plaintiff triggered the terms of the Agreement by attempting to sell, encumber or dispose of his stock.

Plaintiff initiated this cause of action under § 351.467 and 347.143 with a Petition to discontinue the Companies. There was no evidence that Plaintiff attempted or desired to sell his shares of stock to a third party or to dispose of his shares of stock. Moreover, no action has been cited in the record that would lead credence to any suggestion that Plaintiff has encumbered his stock.

On its face, the buy-sell provision of the Shareholders' Agreement was intended to prevent either Plaintiff or Defendant from transferring his interest and control in the corporation to a third party who would then assume his position as a voting shareholder of the corporation.¹¹

At the time of filing his Petition, Plaintiff was not seeking Court approval to transfer his stock or control in the Corporation to a third party. He was seeking the remedies provided by the statutes (and seeking re-organization with Defendant as part of a larger plan of restructuring the corporations). Plaintiff was seeking to separate his ownership and business from those of Defendant. Defendant was seeking the same.

¹¹ The only possibility of a sale to a third party existed when the Trustee, with Court supervision and pursuant to Court Order, attempted to have the Companies listed for sale with an independent business broker. Had that been accomplished as the remedy, then of course the parties may have ended up selling their stock to an independent third party. Since the Court entered its Order approving, as a remedy under §351.467 or § 351.494, the process of a private sale, the specter of the Agreement did not come into play. There was no sale to a third party.

Certainly, there was no encumbrance of either parties' stockholdings. Black's Law Dictionary defines "encumbrance" as "[a] claim or liability that is attached to property or some other right that may lessen its value, such as a lien or mortgage..." *Black's Law Dictionary* (8th ed. 1999). The contractual provision disallowing encumbrance serves to protect each shareholder against the actions of another party, such as a bank, who might seek to assert a claim against the stock as a lien or collateral. Defendant has never demonstrated that the filing of the Petition created an encumbrance.

As a matter of pure logic, proceeding under § 351.467 and §347.143 results in each of the Shareholders' interest remaining unchanged. For example, on dissolution, a corporation continues to exist while its affairs are resolved. *McCormick v. Cupp*, 106 S.W.3d 563 (Mo.App. W.D. 2003). During the time Trustee McCarter served as Court appointed Trustee, both Plaintiff and Defendant continued to possess an equal interest in SDC.

The irony in Defendant's argument is that Defendant himself brought on the necessity of having the Court appoint Mr. McCarter as Trustee. Under Plaintiff's Petition, and the mandate of the statutes, Plaintiff endeavored to obtain an agreement from Defendant to reorganize the Companies so that each Shareholder could own and operate one-half of the businesses. Had the Defendant reached an agreement with the Plaintiff, there would have been no appointment of Trustee. Rather, there would have been an allocation of the business pursuant to an agreed reorganization plan, as called for by § 351.467. The Defendant's action, in refusing to accept Plaintiff's Petition for

distribution, that resulted in the Court exercising its jurisdictional and equitable power to appoint a Trustee.

Moreover, Defendant's position ignores the case law that holds that buy-sell provisions of shareholders agreements do not prevail over statutory rights between dissenting shareholders. In the Delaware case of *In re: McKinney-Ringham Corp.*, 1998 W.L. 118035 (Del. Ch. 1998), the petitioner and respondent were fifty percent (50%) shareholders and had always been the only officers and directors of the company. The parties in *McKinney-Ringham* disagreed on virtually every business decision, as in the case at bar. The Court noted the evidence in that case that "on at least one occasion, petitioner suggested that he and respondent separate their joint ownership of operation and assets, and respondent had refused." *Id.* at 4. Although the respondent in his pleadings denied that the parties disagreed on the desirability of continuing the venture, the Court pointed out this position "can hardly be taken seriously," *Id.*¹²

In *McKinney-Ringham*, the Court rejected the argument that a buy-sell provision in a shareholders' agreement should be applied to defeat the right of a fifty percent (50%) shareholder to dissolution under the statute. The Court specifically instructed:

¹² Similarly, in this case, Defendant essentially denied each of Plaintiff's allegations under § 351.467 and specifically denied any disagreement on continuing or the desirability of continuing the venture. Then, Defendant served a Counterclaim seeking statutory dissolution under § 351.494.

Respondent misconstrues the agreement. It merely provides each shareholder a right of first refusal on the other's shares before his fellow shareholder may sell his interest to a stranger. Under the agreement MRC (the corporation) would continue to exist, for as under § 273 (the Delaware dissolution statute), MRC will be dissolved. *Id.* at 4.

Therefore, the Court refused to consider the buy-sell provision of the Shareholders' Agreement when determining whether the corporation should be dissolved.

In the case of *Levant v. Kowal*, 86 N.W.2d 336 (Mich. 1957), the Supreme Court of Michigan similarly rejected an argument that the option of a shareholders' agreement requiring that stock be offered to specific parties before any interest in the corporation was sold, assigned or transferred should be applied in a corporation dissolution proceeding. The Court held that:

The language employed permits no such construction. The option provision was directed at a transfer of the only interest plaintiffs then had in the corporation, mainly its capital stock. This the plaintiffs are not attempting to sell or transfer. What they are praying is that the Court sell the assets, not that the parties sell their stock. The provision before us is manifestly intended to restrict the membership of a going corporate business and has no application to a court-ordered dissolution and distribution. It looks at corporate life, not death . . . a prayer for dissolution and distribution of corporate assets is not expressive of an offer or desire to transfer the capital stock of the corporation. *Id.* at 345.

Defendant also ignores other applicable provisions of the Shareholders' Agreement in continuing to assert that there was error in not enforcing the Agreement. Paragraph 9(a) of the Shareholders' Agreement provides that the it terminates upon "the occurrence of any of the following events: (a) . . . dissolution of the corporation". It is therefore clear that the parties intended that voluntary dissolution could occur and if it did, the buy-sell provision would terminate, along with the entirety of the Agreement.¹³

It is fundamental hornbook corporate law in Missouri that agreements to restrict transfer of share are given effect according to the actual terms of limitation and not beyond. The manifest intention of the parties to the contract is confined to the plain meaning of the terms of restriction employed. *Witte v. Beverly Lakes Investment Company*, *supra* footnote 12 at 44. Therefore, regardless of whether Defendant appropriately preserved and presented an issue regarding the enforceability of the Agreement in this Appeal, it is clear that the buy-sell provision of the Agreement did not

¹³ Plaintiff also believes that the case of *Witte v. Beverly Lakes Investment Company*, 715 S.W.2d 286 (Mo.App. W.D. 1986) is instructive on this issue. In that case, the Missouri Court of Appeals held that a restriction on the transferability of stock in a corporation did not apply to the transfer of stock pursuant to a Court order following dissolution of a marriage, as the language of the restriction did not extend to cover such an involuntary transfer. That holding is analogous here. Should there be any transfer of stockholdings in this case, it would be pursuant to Court Order and clearly outside the scope of the buy-sell restriction in the Agreement.

apply to Plaintiff's action under § 351.467 or §347.153, or to Defendant's Counterclaim under § 351.494. There has been no error by the Trial Court in this regard.

III. POINT TWO OF DEFENDANT'S POINTS RELIED ON SHOULD BE DENIED FOR THE REASON THAT DEFENDANT'S APPEAL FROM THE TRIAL COURT'S ORDER DENYING HIS MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION TO DISMISS HIS ORIGINAL COUNTERCLAIM WERE INTERLOCUTORY ORDERS AND PRESENT NO REVIEWABLE ISSUE AND FOR THE FURTHER REASON THAT DEFENDANT HAS FAILED TO PRESENT OR PRESERVE A CONSTITUTIONAL CHALLENGE TO § 351.467.

In Defendant's Second Point Relied On, he again seeks to appeal the denial of his Motion for Summary Judgment and the granting of Plaintiff's Motion to Dismiss his first Counterclaim. The issues set forth under Point II fail to present reviewable questions for the same reasons as discussed in Plaintiff's response to Count I. First, Defendant has no right to an appeal from a denial of a summary judgment motion. That Order was interlocutory. Second, Defendant abandoned his first Counterclaim by the filing of two subsequent claims, neither of which incorporated or preserved the declaratory judgment claim. Rather than re-stating his arguments again, Plaintiff will simply incorporate the body of his argument under Point II of his Brief herein.

Within Defendant's Second Point Relied On, he has also attempted to include an appeal based upon a constitutional argument that § 351.467 violates the Contract Clause of the Missouri Constitution. Mo. Const. art. I, § 13 (2007). Plaintiff has already fully

briefed this issue under Point I of this Brief. Therefore, Plaintiff will incorporate Point I of his Brief here rather than re-argue the same points. Suffice it to say that there is no substantial constitutional question which has been presented or preserved in this case. Moreover, Defendant did not even seek summary judgment on any issue relating to the constitutionality of § 351.467. The record is clear that the only issue raised in Defendant's Motion for Summary Judgment was whether, as a matter of law, the Shareholders' Agreement should be enforced so that Plaintiff Cannon should have been ordered to sell his interest to Defendant Monroe under the price set forth in the Agreement. This is evidenced by both the motion (L.F. 49, 50) and the proposed order which was attached. (Pl. Supp. L.F. 17). Point II of Defendant's Points Relied On therefore should be denied.

IV. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON HIS CLAIM UNDER § 351.467 FOR THE REASON THAT THE PARTIES STIPULATED TO THE PREDICATE FACTS NECESSARY FOR RELIEF UNDER THE STATUTE, AGREED TO THE ORIGINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (INCLUDING THE APPOINTMENT OF TRUSTEE MCCARTER), AND THE COURT WAS WITHIN ITS DISCRETION IN APPROVING AND ACCEPTING THE EVIDENCE OF THE PRIVATE SALE AS AN EQUITABLE REMEDY.

In Point III of his Brief, Defendant claims that the Court erred in entering judgment on Plaintiff's Petition because there was no substantial evidence to support it.

(App. Br. 42). This assertion is not supported by the record in this case. Perhaps Defendant has forgotten that Plaintiff and Defendant entered into a stipulation at the time Plaintiff's Petition was called for hearing before Judge Hartenbach. (Pl. Supp. L.F. 36). This stipulation represented an agreement that the evidence supported a finding in favor of Plaintiff under the statute. Clearly, there was evidence to support the Judgment.¹⁴ As Plaintiff set forth in his Statement of Facts, throughout this process the Trustee, supervised by the Court, worked to establish an equitable remedy. The evidence supporting that remedy was received into evidence as the Trustee's Report of Private Sale. (L.F. 171-216). The Supreme Court of Missouri has made clear that when a Court tried case is submitted on stipulated facts, the only question before it is whether the Trial Court drew the proper legal conclusions from the facts stipulated. *Junior College District of St. Louis v. City of St. Louis*, 149 S.W.3d 442 (Mo. 2004); *Williams v. National Casualty Co.*, 132 S.W.3d 244 (Mo. 2004). The stipulated facts clearly supported the appointment of Trustee McCarter. Defendant does not even argue that the Trial Court drew an improper legal conclusion. Therefore, Defendant's Point III should be summarily denied.

¹⁴ In commentary, authors have observed that once the criteria under the statute are met, the court must dissolve the corporation and appoint one or more trustees to wind-up the affairs of the corporation. The statute is essentially self-executing. Mark Sophir and John O'Brien, *The Family Business Divorce: No-Fault Dissolution in Missouri and Practical Applications for Resolution of Deadlock*, 59 J. Mo. B. 178 (2003).

Under Point III, Defendant argues that the Court's remedy (the Trustee-led private sale) was flawed. Plaintiff does not read Point III as actually challenging the equitable remedy ordered in this case. The point of appeal appears to center around the sufficiency of evidence to support the judgment. However, once again, out of an abundance of caution, Plaintiff will discuss the evidentiary and legal support for the remedy of the private sale.

Although ignored by the Defendant, the standard of review is an essential element of this Court's work. The standard is well known. An appellate court must sustain the decree or judgment of the Trial Court unless there is no substantive evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applied the law. *Coyle v. Director of Revenue*, 181 S.W.3d 62 (Mo. 2005); *Lane v. Lensmeyer*, 158 S.W.3d 218 (Mo. banc 2005). In this case, Defendant appears to challenge only whether there was evidence to support the Trustee's recommendation and the Court's approval of a private sale as a remedy under either § 351.467 or § 351.494. The answer is clear: Defendant agreed to proceed with a private sale. The unchallenged record is in the Trustee's motion which, without objection, recites that the parties had agreed to engage in a private sale. (L.F. 144). Moreover, once the Court has the basis to proceed under § 351.467, the mandate of the statute is clear. The court is expressly empowered to appoint: "one or more trustees or receivers, administer and wind up its affairs in a method intended to realize the maximum value for the stockholders, including the sale of the company as a going concern, if appropriate". §351.467(2). The Trustee, with the Court's supervision (and involvement of the parties)

proceeded in this case to realize the maximum value for the stockholders. There is ample evidence to support the fact that Trustee McCarter sought to enhance the value of the company. Defendant stated that the value of his one-half of the Companies was \$1,191,000.00.¹⁵ (Tr. 41). The Trustee's private sale resulted in a value of \$1,755,000.00 for Defendant's one-half share. As a result, the private sale resulted in substantial increased shareholder value.¹⁶ Defendant's argument that the Court ordered the private sale without evidence (Def. Br. 47), is simply misleading. There was a stipulation and many hours in motion practice. Defendant's argument that the sale was "off the record" is also mystifying. If Defendant wanted a transcript of the process he could have, and should have, ordered one. To now claim that the Trustee's Report was admitted unverified also strains credulity. At the hearing, the Trustee's Report was offered into evidence. (Tr. 79). There was a stipulation with respect to its authenticity, from which Defendant attempted to back out of, at the end of the hearing. (Tr. 82-83). At that point, an objection was made. However, Defendant failed to articulate the basis of any objection. (Tr. 83). Defendant withdrew his stipulation and interposed an objection. However, Defendant's objection failed to meet the required specificity. It failed to advise the Trial Court or counsel of the basis for exclusion, which is required.

¹⁵ Defendant's opinion evidence failed to mention the assets of the company, which include valuable real estate in Frontenac.

¹⁶ Defendant also testified that his interest was worth substantially more than \$1,755,000.00. (Tr. 30, 31).

Keller v. Anderson Motor Serv., Inc., 652 S.W.2d 735, 737 (Mo. App. E.D. 1982). The rule is that the objection should be so specific as to apprise the Trial Court of the rule of evidence being invoked and the reason why that rule prohibits the admission of the evidence. *Tauchert v. Ritz*, 909 S.W.2d 687, 690 (Mo.App. E.D. 1995). Defendant's objection to receipt of the Trustee's Report failed to meet this specificity requirement. Therefore, any objection was waived. *Firestone v. Crown Center Redev. Corp.*, 693 S.W.2d 99, 107 (Mo. banc 1985). Without articulating the basis for the objection, nothing was preserved for appeal. (Cite on objection needs to be specific.) There was no objection on any recognized legal basis. It was the Court-ordered report from the Court appointed Trustee. There was no challenge to its foundation, reliability or veracity. The Report certainly constituted evidence to support the Judgment.

Defendant ignores that the Trial Court, in addition to granting Plaintiff's Petition, also granted his Counterclaim under § 351.494. The Companies were clearly deadlocked. Under either or both § 351.467 or § 351.494, the Trial Court had discretion to appoint a Trustee with the authority to fashion a remedy to extract the parties from one another and still preserve shareholder value.

Since the Court's Judgment granted both Plaintiff's Petition under § 351.467 and Defendant's Counterclaim under § 351.494, the issue under Point IV of Defendant's Counterclaim is simply whether there was evidence to support the approval of the private sale. As mentioned above, the first evidence to support the approved remedial action was the agreement of parties. Moreover, Missouri law is clear that once there is evidence to support proceeding with judicial dissolution under § 351.494 or discontinuation under §

351.467, the Trial Court has vast authority and discretion to fashion a remedy that best preserves shareholder value. That is an express statutory mandate of § 351.467. Under § 394.467 (the statute invoked by Defendant, Missouri case law is clear that courts are not limited to the remedy of dissolution. Sitting in equity, the Court is empowered to consider alternative forms of relief. *21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858 (Mo. App. E.D. 1995).

The scope of the remedial power to be exercised by a Trial Court was explored in the case of *Fix v. Fix Material Company, Inc.*, 538 S.W.2d 351 (Mo.App. E.D. 1976). In that case, a minority shareholder brought suit to compel dissolution because of alleged illegal and oppressive conduct by the majority in control. In the case, the Court discussed its role in resolving shareholder disputes under the statute:

. . . The statute contemplates that the court of equity shall take jurisdiction of the cause, once the requisite showing is made, and bring its discretion to bear in granting or refusing equitable relief. (citations omitted) . . .

The complaining shareholder has the burden of proof to establish the requisite jurisdictional facts and the equitable grounds for dissolution . . .

The court is not limited to the remedy of dissolution but may consider other appropriate alternative equitable relief. *Id.* at 357.

The *Fix* court then proceeded, in footnote three, to enumerate a list of equitable remedies that courts have utilized in shareholder litigation.

The very remedy in this case – private sale between the shareholders – has been expressly approved by the Delaware courts interpreting a statute which is very similar to § 351.467 R.S.Mo.¹⁷ In the case of *Fulk v. Washington Service Associates, Inc.*, 2002 Del. Ch. LEXIS 78 (Del. Ch. 2002), the Court of Chancery in Delaware heard an objection to a Trustee’s recommendation that there be a private sale between two dissident shareholders. The Petition was filed under 8 Del. C. § 273, which provides, in language very similar to § 351.467, as follows:

(a) If the stockholders of a corporation of this State, having only 2 stockholders each of which own 50% of the stock therein, shall be engaged in the prosecution of a joint venture and if such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture, either stockholder may, unless otherwise provided in the certificate of incorporation of the corporation or in a written agreement between the stockholders, file with the Court of Chancery a petition stating that it desires to discontinue such joint venture and to dispose of the assets used in such venture in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved. Such petition shall have attached thereto a copy of the proposed plan of

¹⁷ Defendant references in his Brief that the Missouri statute is modeled after the Delaware statute. Plaintiff concurs with that assessment.

discontinuance and distribution and a certificate stating that copies of such petition and plan have been transmitted in writing to the other stockholder and to the directors and officers of such corporation. The petition and certificate shall be executed and acknowledged in accordance with § 103 of this title.

(b) Unless both stockholders file with the Court of Chancery (1) within 3 months of the date of the filing of such a petition, a certificate similarly executed and acknowledged stating that they have agreed on such plan, or a modification thereof, and (2) within 1 year from the date of the filing of such petition, a certificate similarly executed and acknowledged stating that the distribution provided by such plan had been completed, the Court of Chancery may dissolve such corporation and may by appointment of 1 or more trustees or receivers with all the powers and title of a trustee or receiver appointed under § 279 of this title, administer and wind up its affairs. Either or both of the above periods may be extended by agreement of the stockholders, evidenced by a certificate similarly executed, acknowledged and filed with the Court of Chancery prior to the expiration of such period. 8 Del. C. § 273.

The Court in *Fulk* appointed a Custodian. After an exhaustive procedure, which included interviewing the parties and conducting a review of operations, the Custodian issued his report in which he recommended a sale. The Custodian concluded (almost identical to the conclusion of Trustee McCarter) that a sale to an outside third party

would be unlikely and that if there were any bids, they would be less than what either of the stockholders would be willing to pay. Therefore, the Custodian recommended that the Court order a purchase/sale process involving only the two stockholders. As in the case at bar, the Custodian's recommendation was a private sale between the shareholders. The issue presented was whether the Court was empowered under § 273 to approve a plan that involved a sale by one fifty percent (50%) shareholder of his stock interest to the other, on terms that were not mutually agreed to. The Court affirmed the sale plan holding specifically that the Court had the discretion and authority to approve the sale plan:

. . . The statute does not require the Court to dissolve the corporation. Rather, § 273 provides that the Court “may dissolve such corporation and may by appointment of 1 or more trustees or receivers . . . administer and wind up its affairs. Nothing in the statute requires that process to be contorted into a procedural straightjacket that limits the Court to only one structure for discontinuing a joint venture in the absence of an agreed-upon plan. To the contrary, the statute permits the Court flexibility in deciding how the joint venture should be discontinued. . . .

Second, nowhere does that statute require that a sale under § 273 must take the form of a piecemeal sale of the corporation's assets. Although § 273 permits such a sale, its language is equally consistent with a court-ordered sale of the entire business to a third party as a going concern. . . Long's conduct has led the Custodian to conclude (and this

Court to find) that in these unique circumstances, the only persons who would pay a fair market price are the two 50% owners, and that the best way to achieve that value is to require that one 50% owner buy out the other's interest. That structure is the economic equivalent of a sale of the entire business in an auction in which the two 50% owners are the only bidders. Because the statute empowers the Court to order such a sale, surely it would empower the Court to order a transaction that is the economic equivalent, differing only in form. *Fulk*, 2002 Del. Ch. LEXIS at 38.

The rationale of this Delaware Chancery Court is directly analogous to the issue before the Court. Under § 351.467, as in the related Delaware statute, the trustee is expressly empowered to sell the company as a going concern. § 351.467.2. The statutory goal is to maximize shareholder value. § 351.467.2. The facts present here mirror those in the *Fulk* case. There was evidence in the record that it would have been futile to sell the Companies to a third party. In fact, it was Defendant himself who argued in the case at bar that the market would not be kind to the parties. (L.F. 99-102). The Trustee, after study and consultation with his Deputy Trustee (Brent Baxter of Clayton Capital) recommended a private sale. The parties likewise concurred.

There is substantial evidence in the record to support what the Trustee recommended and the Trial Court approved. Defendant's argument that there was no evidence to support the Judgment is without merit. Point IV should be summarily denied.

V. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON HIS CLAIM UNDER § 351.467 FOR THE REASON THAT THE PARTIES STIPULATED TO THE PREDICATE FACTS NECESSARY FOR RELIEF UNDER THE STATUTE, AGREED TO THE ORIGINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (INCLUDING THE APPOINTMENT OF TRUSTEE MCCARTER), AND THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANT’S CLAIM UNDER § 351.494 AND ORDERING THE PRIVATE SALE BETWEEN THE PARTIES AS AN EQUITABLE REMEDY FOR THE DEADLOCK.

Under Point IV of Defendant’s Brief and Points Relied On, Defendant challenges the Judgment of the Court under § 351.467 because it is against the weight of the evidence. He also challenges the Judgment by claiming to have introduced substantial evidence to support his Counterclaim for relief under § 351.494. Plaintiff’s response to this Point is substantially similar to his response under Defendant’s Point III. Therefore, Plaintiff incorporates his argument under Point IV into and as part of his argument here under Point V. In sum, the evidence of the parties’ stipulation of fact, along with the agreement by the parties for the appointment of a Trustee (and the specific appointment of Trustee McCarter), provided the necessary support for the initial Findings of Fact and Conclusions of Law entered by Judge Hartenbach. Second, the Trial Court did not deny Defendant’s Counterclaim under § 351.494. In fact, the Judgment of the Court makes clear that the Trial Court found in favor of Defendant under his claim for relief pursuant

to § 351.494. There was substantial evidence of deadlock to support that finding. There was also substantial evidence to support relief under § 351.467. Therefore, the only issue is whether the equitable relief fashioned by the Trustee and the Court was within the Court's discretion and otherwise valid under the law. Defendant cites no case that even arguably stands for the proposition that the Trial Court abused its discretion in fashioning a private sale between the shareholders.

In his discussion under Point IV, Defendant makes a statement that the Trial Court concluded to approve the trustee-recommended remedy under § 351.467 because the litigants were fifty-fifty shareholders. Defendant is inaccurate in this characterization. In its Judgment (and supporting Findings), the Trial Court made clear that the private sale between the parties was an appropriate remedy under both § 351.467 and § 351.494. Defendant's argument that somehow the Trial Court approved the private sale remedy only under § 351.467 is not supported by the language of the Trial Court's Judgment and Findings.

Defendant also criticizes the Trial Court's Judgment because of deposition testimony from the Plaintiff in which he "affirmed that his objectives were to discontinue, dissolve and liquidate the business". The record does not contain any deposition testimony. Therefore, there is nothing in the record which preserves this argument. Nonetheless, Plaintiff will respond. It appears to be Defendant's position that because Plaintiff initiated the Petition under §351.467, somehow the statute disqualifies him from participating in a court-ordered private sale between the parties. Defendant's position is unsupported by case law or statutory construction. That issue was presented to the

Circuit Court of the City of St. Louis in *Larson v. Bradburn School Supply, Inc.*, Cause No. 014-01643, Circuit Court of the City of St. Louis, Division 3, 22d Cir., Hon. Robert H. Dierker (December 18, 2001) (unpublished opinion). That case was analyzed and discussed in the article published in the Journal of Missouri Bar, cited on page 180. In that article, the authors discussed the *Larson* case and articulated the holding of Judge Dierker that: “once the statute is properly invoked, it is the Court’s Trustee who will decide how to dispose of the business, unless the shareholders can agree. Thus, a Plaintiff invoking § 351.467 is not precluded from bidding on or purchasing the company. Indeed, in the absence of permitting a Plaintiff to participate in the bidding process, there may be no viable competition to insure that true market value is achieved”. The commentators’ discussion and Judge Dierker’s analysis are clear, cogent and logical. In this case (as presumably, in all cases under § 351.467), in the absence of an agreement between the parties to the contrary, it is the court-appointed Trustee who determines the method and manner in which the statutory mandate of maximizing shareholder value should be realized. There is nothing in the statute, or case law interpreting this statute, or any other similar or comparable statute from another jurisdiction, which suggests that by filing a Petition under § 351.467, Plaintiff would be precluded, as a matter of law, from participating in the remedial orders of the Court.

Finally, Defendant appears to take the position that his testimony concerning fair value should have been accepted by the Court and that his opinion should have been substituted for the value received by virtue of the Trustee-recommended and Court-approved private sale. Once again, Defendant cites no legal authority for his proposition

that his testimony, and his testimony alone, as to fair value must be accepted by the Court. To the contrary, the Trial Court expressed its concerns about the credibility of Defendant and his testimony, particularly with respect to his participation in the Court-ordered private sale. On the one hand, Defendant held the opinion that the business was valued at \$1.191 million (Tr. 41). However, he admitted that he came to the private sale auction with financial wherewithal to bid as high as \$1.7 million. (Tr. 27). He indeed submitted a bid of \$1,735,00.00. (L.F. 215). (Tr. 47). He testified that after his bid of one million dollars, he was no longer in good faith. (Tr. 49). The implication of this testimony is that after the bidding went above \$1,000,000.00, Defendant participated just as a hedge against his possibly losing the court case. Should the Court affirm the Trial Court, Defendant stands to reap in excess of his opinion on fair value. Every bid Defendant made over \$1,000,000.00 was disingenuous. However, even contrary to that testimony, Defendant submitted an offer of \$1.3 million with a stipulation that he would drop all litigation and appeals. (Tr. 196, 197). The Trial Court made a specific finding with respect to this inconsistency of Defendant's evidence in ¶24 of its Findings of Fact. (L.F. 261). Therefore, Defendant's Points Relied On IV is of no merit and should be denied by this Court.

VI. THE TRIAL COURT'S JUDGMENT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S PETITION AND DEFENDANT ON DEFENDANT'S COUNTERCLAIM WAS SUPPORTED BY THE SUBSTANTIAL WEIGHT OF THE EVIDENCE IN THIS CASE.

Under Point V of his Points Relied On, Defendant repeats his early Points Relied On and does not provide any further briefing. Therefore, Plaintiff will simply incorporate herein by reference his response to Defendant's Points III and IV as and for his response to Point V of Defendant Points Relied On. There was substantial evidence to support the Court's Judgment in this case and absolutely no evidence of any abuse of discretion in that regard. The Court's Judgment should be affirmed in all respects.

CONCLUSION

For the foregoing reasons and authorities in support thereof, the Judgment of the Trial Court should be affirmed in all respects.

Respectfully submitted,

By: _____

Gary A. Growe, #26151
The Growe Law Firm
7733 Forsyth, Ste. 325
St. Louis, MO 63105
(314) 725-1912 / (314) 261-7326 (fax)
Attorney for Plaintiff/Respondent

CERTIFICATE OF COMPLIANCE

Counsel for Respondent hereby certifies that this brief consists of 13,014 words (excluding the cover, Certificate of Service, Signature Block, and this Certificate of Compliance) and was prepared using Microsoft Word 2007 for Windows, utilizing Times New Roman Font, 13-point type, in full compliance with the limitations and guidelines established under Rules 55.03, Rule 84.06(c), and Local Rule 360.

The undersigned further certifies that the computer diskettes provided herewith to the Court and to opposing counsel have been scanned for viruses as required by Missouri Supreme Court Rule 84.06(g) and that the floppy disks are virus free.

By: _____
Gary A. Growe, #26151
The Growe Law Firm
7733 Forsyth, Ste. 325
St. Louis, MO 63105
(314) 725-1912 / (314) 261-7326 (fax)
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of the above and foregoing together with a copy of a floppy disk containing same were delivered via United States Mail, postage pre-paid this _____ day of May, 2008 to:

Francis E. Pennington, III
Laura A. Shea
Pennington Shea, LC
7733 Forsyth Blvd, Ste, 680
St. Louis, MO 63105
(314) 863-4080 / (314) 862-3080 fax
fep@penningtonshea.com
las@penningtonshea.com

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8 Del.C. § 273A-1

Not Reported in A.2d, 2002 WL 1402273 (Del.Ch.)A-5