

IN THE SUPREME COURT OF MISSOURI  
EN BANC

EMERSON ELECTRIC CO.,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	No. SC92026
	)	
MARSH & McLENNAN COMPANIES,	)	
et al.,	)	
	)	
Defendants/Respondents.	)	

Appeal From The Circuit Court Of St. Louis City, Missouri

The Honorable Robert H. Dierker, Circuit Judge

**Appellant's Substitute Reply Brief**

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### Statement of Facts

Rule 84.04(c) requires a “fair and concise statement of the facts . . . without argument.” The purpose of the Rule is to afford the Court “an immediate, accurate, complete and unbiased understanding of the facts of the case.” Moreland v. Division of Employment Security, 273 S.W.3d 39, 41 (Mo. App. 2008).

This appeal is from an order granting a motion for judgment on the pleadings, so the “relevant facts” are those set forth in the petition, and all reasonable inferences therefrom, taken in the light most favorable to Emerson. Twehaus Excavating Co. v. L.L. Lewis Investments, LLC, 295 S.W.3d 542, 546 (Mo. App. 2009).

Marsh’s brief does not even try to comply with the Rule. The statement cites much legal authority, which “even when correct is improper in the statement of facts.” Carlisle v. Rainbow Connection, Inc., 300 S.W.3d 583, 585 (Mo. App. 2009). The statement of facts is replete with argument and a lengthy discussion of the now superseded opinion of the court of appeals.

Much of that argument is devoted to an improper effort to persuade the Court that Emerson was aware of the secret kickbacks that Marsh received from the insurance companies and hence has no claim. The petition alleges otherwise: “[u]nbeknownst to plaintiff,” Marsh agreed to accept kickbacks, and “[a]t no time” did Marsh disclose to Emerson “the nature or extent of kickbacks” Marsh was receiving.

Emerson respectfully submits that the Court should ignore Marsh's statement of facts.

### Argument

Marsh's brief repeatedly and improperly refers to the opinion of the court of appeals. As Emerson stated in its opening brief, after transfer, this Court reviews the judgment of the trial court as though on an original appeal. The opinion of the court of appeals is neither precedential, Philmon v. Baum, 865 S.W.2d 771, 774 (Mo. App. 1993), nor relevant.

I. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Kickback Claim, Because Marsh Owed Emerson A Duty To Refrain From Self-Dealing, In That Marsh Was Acting As Emerson's Agent.

For whatever reason, Marsh has chosen to respond to Emerson's arguments in a different sequence than Emerson presented them, a choice that does not lend itself to clarity. Emerson will discuss the respondent's brief in the same order as Emerson's original brief.

A. Marsh Breached Its Duty Of Loyalty By Accepting Secret Commissions.

Marsh does not seriously dispute that, as an agent, it owes a fiduciary duty to Emerson. Br. at 32. As the Restatement (Second) of Agency recognizes, an

agent owes two complementary, but quite distinct, kinds of fiduciary duties to the principal:

- A. It owes a duty of skill and care in executing the tasks it agreed to undertake (Restatement Chapter 13 Title B).
- B. It owes a duty of loyalty (Restatement Chapter 13 Title C).

Marsh simply refuses to recognize the two distinct kinds of duties that agents owe to their principals.

For example, Marsh argues that a number of Missouri cases have held that a broker's fiduciary duties are "limited to using reasonable skill, care and diligence to procure the requested coverage." Br. at 32-33. All of these cases, however, involve the duty of skill and care, and Emerson agrees that those duties may be limited by the parties' agreement. None of Marsh's cases addresses the fiduciary's duty of loyalty.

Emerson's opening brief established that the fiduciary duty of loyalty is absolute and it necessarily includes the obligation to refrain from self-dealing. Missouri courts have squarely so held in the context of stockbrokers and real estate brokers, even when their duties of skill and care are limited, and there is no logical reason to treat insurance brokers any differently. Marsh does not supply one.

Marsh next argues that creating "new and expansive common law duties" is unwarranted when extensive state regulation exists. Br. at 34, citing Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82 (Mo. App. 1994). McCarthy is easily

distinguishable. First, McCarthy did not plead “any facts sufficient to support a characterization of Smith as her agent.” 871 S.W.2d at 84 (emphasis original). Second, the case dealt with the agent’s alleged duty to recommend additional kinds of insurance – i.e., the agent’s duty of skill and care. It has nothing to do with the duty of loyalty.

Moreover, there is nothing new or expansive about imposing a duty of loyalty on an agent; it is black letter law in § 387 of the Restatement. Missouri heavily regulates real estate brokers (chapter 339, R.S.Mo.) and stockbrokers (chapter 409, R.S.Mo.). It is uncontested that these kinds of agents owe a duty of loyalty to their principals. Why should an insurance broker be any different? American Mortgage Investment Co. v. Hardin-Stockton Corp., 671 S.W.2d 283, 289 (Mo. App. 1984) (“no reason to draw any distinction between the agency relationship of an insurance broker-insured and a real estate broker-customer”).

Marsh claims that imposing “unlimited” duties of loyalty on insurance brokers would effectively turn them into trustees. It claims that its relationship with Emerson is more like a workaday world, arm’s length transaction, in which there is no duty of loyalty. Br. at 34.

As Emerson explained in its opening brief, comment b to § 387 of the Restatement provides that an agent’s duty of loyalty is the same as a trustee’s duty of loyalty. The “broker’s obligations are as exacting as those imposed on a trustee in favor of his beneficiary.” Roth v. Roth, 571 S.W.2d 659, 668 (Mo. App. 1978), and cases there cited.

There is nothing particularly onerous about such a duty, just the obligation to act in good faith and not adversely to the insured's interests. That includes a duty to refrain from self-dealing. Emerson's opening brief explained why that prophylactic rule is essential in order to avoid any temptation to undermine the insured's best interests and, as usual, Marsh does not have a counter.

The interaction between an investor with a self-directed account and a stockbroker are no less at arm's length than the dealings between Marsh and Emerson. The stockbroker nonetheless owes a duty "to refrain from self-dealing" and to "disclose any personal interest in the transaction." Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746, 752 (Mo. App. 1990).

Marsh's final argument is that imposing duties of loyalty on insurance brokers is inconsistent with their alleged status as dual agents. Br. at 35-36.<sup>1</sup> Merely because Marsh **could have** acted as an agent of the insurers in receiving contingent commissions does not mean that it **did** act as an agent of the insurers.

No argument could more clearly establish the impropriety of a judgment on the pleadings without access to the facts. In that procedural posture, Emerson did not have an opportunity to introduce evidence of the actual terms of the kickback agreements. Counsel has reviewed some of the contracts obtained during a New

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<sup>1</sup> Marsh did not even hint at this argument in the court of appeals. Under Rule 83.08(b), it may not raise the issue in its substitute brief. Blackstone v. Kohn, 994 S.W.2d 947, 993 (Mo. banc 1999).

York State investigation of contingent commissions, and none of those contracts provides that Marsh is acting as an agent of the insurer in receiving contingent commissions. Several contracts provide exactly to the contrary.

Moreover, Marsh cannot properly occupy the status of a dual agent unless it has made “full disclosure of all the facts.” 12 C.J.S. Brokers § 124 at 146 (2004):

A broker generally cannot act as the agent of both parties throughout the same transaction without the full and free consent of both. It is the broker’s duty to disclose the dual agency to both parties in a definite and unambiguous manner.

Id. Accord, Adams v. Kerr, 655 S.W.2d 49, 53 (Mo. App. 1983) (there is “scarcely a rule of law which has received more uniform approval than that an agent cannot serve the opposing party without the knowledge and consent of his principal”); Whittlesey v. Spence, 439 S.W.2d 195, 199 (Mo. App. 1969) (broker was “the dual agent of the parties with their knowledge and consent”).

Here, the petition specifically alleged that Marsh never did disclose “the nature or extent of kickbacks” Marsh was receiving. L.F. 19 ¶ 9. It alleged that Marsh breached its fiduciary duty “by receiving kickbacks . . . without disclosing the nature or extent of such payments.” L.F. 21 ¶ 17.

Marsh does not dispute that stockbrokers and real estate brokers must refrain from self-dealing, even though their duties of skill and care are limited and it does not explain why insurance brokers should be any different. The duty of loyalty is an inherent part of any fiduciary relationship. As Emerson’s agent,

Marsh owed Emerson a duty to refrain from self-dealing and it breached that duty when it accepted commissions from the insurance companies.

**B. Section 375.116, R.S.MO., Does Not Authorize Secret Commissions.**

Emerson's opening brief established that § 375.116 regulates relations between brokers and insurance carriers and is entirely silent about relations between brokers and their principals. Since there is no conflict whatever between the statute and the common law action that Emerson seeks to pursue, Emerson is entitled to pursue it.

Marsh claims that requiring Emerson's informed consent to the payment of kickbacks would render § 375.116 meaningless. Br. at 14. Not so. As even a casual glance at chapter 375 will indicate, the insurance business is a heavily regulated one, with lots of "do's" and "don'ts." Section 375.116 merely provides that, in general, an insurer may pay commissions to a broker. The same is true for § 379.500 (another theory making its debut in this Court). Neither statute addresses the circumstances under which the broker may retain such commissions.

Marsh also claims that, if the legislature intended to continue the common law rule requiring informed consent by the insured, it would have specifically included such requirements. Br. at 14. That has the law exactly backwards: if the legislature wants to preempt a common law right, "it must do so clearly." Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 69 (Mo. banc 2000).

Marsh claims that Emerson's cases are distinguishable, because they happened to involve situations in which the conduct alleged violated both the common law and the statute. Br. at 15. Here, Marsh argues, § 375.116 allows the commissions.

As previously explained, the premise of this argument is false: § 375.116 says absolutely nothing about the relations between insured and broker. Moreover, the distinction is meaningless. Marsh is arguing that the statute repealed Emerson's common law right to sue a broker for breach of the duty of loyalty. Missouri courts construe such statutes strictly in favor of preserving the common law right.

The clearest illustration is the provision of the Workers' Compensation statute that repeals the employee's common law right to sue his or her employer for negligence:

The issue is the common law liability of respondent, and the law must be strictly construed when existing common law rights are affected. . . . If there is a close question, as there is here, the decision should be weighted in favor of retention of the common law right of action.

Huff v Union Elec. Co., 598 S.W.2d 503, 511 (Mo. App. 1980). Accord, Harryman v. L&N Buick-Pontiac, 431 S.W.2d 193, 196 (Mo. banc 1968) (“[c]ommon law rights and remedies should not be taken from an employee unless they are abolished by clear and unambiguous terms”). Nothing in § 375.116

purports to abolish Emerson's common law rights, let alone does so clearly and unambiguously.

Marsh cites § 1.010, R.S.Mo., for the proposition that, when a statute and a common law right directly conflict, the statute prevails. Br. at 15-16. In determining the existence of such a conflict, however, Missouri courts "strictly construe a statute" and, "if a close question exists, we weigh our decision in favor of retaining the common law." In re Estate of Parker, 25 S.W.3d 611, 614-15 (Mo. App. 2000). In short, Missouri courts strive to find no conflict between the statute and the common law and there is none here.

Marsh's final argument, also making its debut in this brief, is that the relief Emerson seeks is a "rebate" prohibited by § 375.936. Br. at 16. Marsh does not bother to quote the statute, for the excellent reason that its plain language has no application to this case.

Section 375.936(9) prohibits the payment of "rebate of premiums payable on the contract of insurance" as "**inducement to such insurance or annuity**" (emphasis added). In other words, the statute prohibits a broker from using the prospect of rebates as a means to attract business from insureds.

Emerson is not suing Marsh because Marsh breached a contract to pay rebates to Emerson in exchange for its business. Emerson is suing Marsh for breaching its fiduciary duty to Emerson by accepting secret commissions without disclosing them to Emerson or seeking Emerson's consent. Nothing in § 375.936 prohibits Emerson from seeking such damages.

II. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Kickback Claim, Because The Petition Pleaded Facts Establishing That Marsh Breached A Fiduciary Duty To Emerson, In That Marsh Was Supposed To Recommend Suitable Insurance At The Lowest Price And, Through Its Self-Dealing, Caused Emerson To Pay Inflated Prices.

Emerson's opening brief established that Marsh, at minimum, owed a fiduciary obligation to Emerson to obtain suitable insurance at the lowest possible price, as Emerson requested. Marsh violated that obligation by accepting the kickbacks, causing Emerson to pay inflated premiums. Wholly apart from the duty of loyalty, those allegations state a cause of action for failing to act with appropriate skill and care to fulfill the insured's requests.

Marsh's suggestion that Emerson made this argument "for the first time on appeal," Br. at 22, is ridiculous. The petition specifically pleaded that Emerson paid inflated prices "[a]s a result of defendant's breach of their fiduciary duties." L.F. 20 ¶ 9. Its brief opposing the motion for judgment on the pleadings argued:

Marsh acted as Emerson's agent-fiduciary for purposes of procuring appropriate insurance coverage for various aspects of Emerson's business "*at the lowest possible price.*" . . . Marsh's receipt of the undisclosed payments from third party insurers constituted a breach of Marsh's

fiduciary duty because Marsh was rewarded for breaching its duty to obtain appropriate policies for Emerson at the lowest possible price.

S.L.F. 129 (emphasis original).

The only conceivable basis for Marsh's waiver theory is that Emerson did not cite Zeff Dist. Co. v. Aetna Cas. & Surety Co., 389 S.W.2d 789 (Mo. 1965), in its brief to the trial court. But Emerson made very clear that "Marsh cannot have fulfilled its duty to obtain the insurance Emerson requested (i.e., policies that met its needs at the lowest possible price) if, as a result of kickbacks, Emerson ended up paying more than it otherwise would have." S.L.F. 135. Emerson is aware of no rule of law prohibiting it from citing additional authority in support of that theory in the appellate court.

Marsh next claims that Emerson is attempting to turn a contract dispute into a breach of fiduciary duty claim. Br. at 23. In A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386 (Mo. App. 1998), the insured recovered on both breach of contract and breach of fiduciary duty claims. Judge Russell's opinion for the court of appeals held that an insurance broker has a "fiduciary duty with respect to procuring an insurance policy according to AGE's wishes," 978 S.W.2d at 395, and affirmed the breach of fiduciary duty judgment.

Marsh argues that Emerson has failed to cite "a single authority" supporting its argument that the failure to obtain suitable insurance at the lowest possible cost

is a breach of fiduciary duty. Br. at 23. This argument not only ignores Zeff and the other authorities Emerson cited in its opening brief; it ignores common sense.

Drew squarely holds that the fiduciary obligation is to “procur[e] an insurance policy according to [the client’s] wishes.” 978 S.W.2d at 395. Marsh does not explain why the client’s wishes with respect to price are any less important than its wishes with respect to coverage, and the proposition is not intuitively obvious.

Suppose the client instructs the broker to obtain a \$1,000,000 liability policy at the lowest reasonable price. If the broker procures only \$100,000 worth of coverage, even Marsh would concede there is a breach of its fiduciary duty. Why should the result be any different if the broker procures the proper coverage at twice the premium it could have and pockets the difference?

Marsh chastises Emerson for citing general agency principles concerning the agent’s duty to obey the principal’s instructions. Br. at 23-24. Marsh cannot dispute that it was Emerson’s agent and it has yet to offer a principled reason why general agency principles should apply to every other kind of agent, including stockbrokers and real estate brokers, but not to insurance brokers. In any event, to repeat, Drew does involve an insurance broker and it does hold that such brokers have a fiduciary duty to obey their clients’ wishes.

Nothing prevents an insurance broker from agreeing to do more than the minimum the law requires. As noted, the general rule is that agency and any associated fiduciary duties “ceases on execution and delivery of the policy.”

Hecker v. Missouri Property Ins. Placement Facility, 891 S.W.2d 813, 816 (Mo. 1995). If the broker “agreed to keep [the client] insured,” and failed to do so, it has failed “to exercise reasonable skill, care and diligence” and is liable accordingly. Zeff, 389 S.W.2d at 795. Here, the allegation was that Marsh’s assignment was more than just finding coverage.

Marsh derides as mere dicta Zeff’s statement that an insurance broker must obtain insurance on the “best terms he can obtain.” 389 S.W.2d at 795. Br. at 26. This argument misses the point. Emerson’s theory in Point II is that its direction to Marsh to obtain suitable insurance at the lowest possible price imposed a fiduciary obligation on Marsh to attempt to do so. Marsh failed in that duty precisely because it accepted secret kickbacks – i.e., profited at the expense of its client. When Marsh and the trial court pretend that this is an unheard-of expansion of its duties – Missouri cases “say nothing of a duty to obtain insurance at a particular price,” Br. at 24 – it is more than fair to cite an opinion of this Court, quoting a leading legal encyclopedia, that does “say something” about that topic.

Moreover, Emerson cited four other authorities, including a leading treatise on insurance law, that stand for exactly the same proposition, and Marsh has nothing to say about them. Those authorities are not controlling but they are surely persuasive that the theory advanced in Point II fits comfortably within the mainstream of insurance broker law.

Marsh claims that the insurance broker in Zeff had more control than Marsh did and that Emerson “conveniently omitted” language that qualifies its duty. Br. at 27. Emerson omitted nothing relevant; Zeff plainly says that an “insurance broker” has to procure insurance “on the best terms he can obtain.” 389 S.W.2d at 795. It does not make the slightest difference that this principle is “particularly” applicable to a broker that undertakes more duties than the minimum; it is still a generally applicable duty.

Third, Marsh claims that “best terms” do not necessarily include the lowest possible price, “regardless of the other terms of the policy” and the “financial stability of the insurer.” Br. at 27. It also claims that there is no “absolute duty” to obtain the lowest possible rates. Br. at 28 n.7.

These arguments are simply irrelevant. The petition alleges that Emerson wanted “insurance policies that met the plaintiff’s needs at the lowest possible price.” L.F. 19. The other terms of the policies would surely be relevant to whether they met Emerson’s needs. But the price is also an important term and the reason Emerson did not get the lowest possible price is because Marsh was accepting secret kickbacks. That is a clear violation of its fiduciary duty to provide an “insurance policy in accordance with [the client’s] wishes.” Drew, 978 S.W.2d at 395.

Busey Truck Equipment, Inc. v. Am. Family Mut. Ins. Co., 299 S.W.3d 735 (Mo. App. 2009), remains in point. Busey asked its broker to provide insurance with particular terms: fire coverage on the contents of its facilities. Relying on

the same cases that Marsh cites, the trial court dismissed. The court of appeals reversed:

The cases upon which agent relies for this proposition are inapposite because the plaintiffs in those cases did not allege that the insurance agents with whom they dealt failed to provide the insurance coverage they requested. . . . Agent would have us expand this holding so that once an insurance agent provides any policy to the insured, she has fulfilled her duty to the insured. We decline to do so.

299 S.W.3d at 739 (emphasis added).

That is exactly Marsh's argument: it supplied insurance policies, albeit not the **low cost** inexpensive ones Emerson requested, so it has fulfilled its fiduciary obligations to Emerson. That is precisely the argument Busey rejected and Marsh has nothing to say about it.

**III. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Interest Claim, Because Marsh Had A Duty To Pay That Interest To Emerson, In That Marsh Was Acting As A Fiduciary Of Emerson.**

Emerson's opening brief established that the petition stated a cause of action for the interest that Marsh earned on the premiums it received from Emerson. Marsh obtained those premium payments solely in connection with and because of a transaction conducted for its principal: the purchase of insurance.

Under the plain terms of § 388 of the Restatement (Second), Marsh must account to Emerson for that interest.

Marsh's first salvo is that the petition concedes that Marsh publicly disclosed the practice in its 2003 Annual Report, which admission is allegedly "fatal to its claim." Br. at 16-17; 20-21. The petition in fact pleads that Marsh's practices were "[u]nbeknownst to plaintiff." L.F. 20 ¶ 10. Since the 2003 Annual Report is not part of the record, it is impossible to know what disclosure it made or whether that disclosure was adequate. In any event, disclosure in 2003 says nothing about Marsh's disclosure in earlier years.

Marsh's principal argument is that it held the premiums in trust for the insurance companies. Br. at 17-18, citing § 375.051.1, R.S.Mo. Once again, Marsh has misrepresented the meaning of the relevant statutes.

Section 375.051.1 applies to any "insurance producer who shall be appointed or who shall act **on behalf of any insurance company**, (emphasis added) – i.e., who is an agent for the insurer. Such an agent does indeed hold premiums in trust for the insurer.

Section 375.051.2 applies to any "insurance provider who shall act on behalf of any applicant for insurance or insured" – i.e., who is an agent for the insured. Such an agent holds the premiums "in a trust or fiduciary capacity **to the applicant for insurance or insured**" (emphasis added). The petition alleges that Marsh held itself out as a fiduciary on behalf of its insured, L.F. 3 ¶ 7, so it held the premiums in trust for Emerson.

Moreover, for most of the relevant period, 20 CSR 700-1.090 provided that the “fiduciary duty imposed by law upon an insurance broker shall run from the broker to the insured and not to the insurer.” App. A1. Under that regulation, Marsh had to hold the premiums in trust for Emerson. That regulation was in effect until January 30, 2003, just two years before Emerson filed suit. L.F. 16.

Both of the cases Marsh cites on this point involved agents for the insurer, not agents for the insured like Marsh. Graue v. Missouri Property Ins. Placement Facility, 847 S.W.2d 779, 784 (Mo. banc 1993) (“Bond & Associates was acting as an insurance agent for Facility”); Monia v. Melahn, 876 S.W.2d 709, 713 (Mo. App. 1994) (“[a]s an agent of United American, Tammy held the money paid for the premium in trust for United American”). Marsh’s suggestion that the agents in these cases “were not insurers’ agents,” Br. at 18 n.4, ignores the plain language of each opinion.

Marsh’s attempts to distinguish Missouri Highway & Transportation Com’n v. Sample, 702 S.W.2d 535 (Mo. App. 1985), border on the frivolous. It claims that “breach of fiduciary duty is not one of the claims asserted . . . and the issue is not discussed in the opinion.” Br. at 20 n.5. That is true only in the most technical, hair-splitting sense.

The opinion does not use the word “fiduciary.” But it repeatedly discusses the consequences of an agent’s “violation of a duty of loyalty,” 702 S.W.2d at 537-38, which is one kind of fiduciary duty that an agent owes. The opinion concludes that the “stipulated facts were sufficient to show that plaintiff was

entitled to recover as a matter of law, because of defendant's breach of duty to his principal." Id. at 538 n.2.

Second, Marsh claims that the secret fees came at the cost to the Highway Commission of an unqualified appraiser. Br. at 20 n.5. That is an outright misrepresentation of the holding. The Highway Commission may have alleged that the appraiser was unqualified. 702 S.W.2d at 536. But it stipulated that there were no "questions concerning the competency of the appraisals" and that "[n]o problems have been experienced based on any alleged incompetency." Id.

Marsh also claims that § 403, comment e, of the Restatement provides that the agent need not account to the principal when it "receives something of value as a result of violating a duty of loyalty to a principal 'where [there is] no breach of fiduciary duty.'" Br. at 21

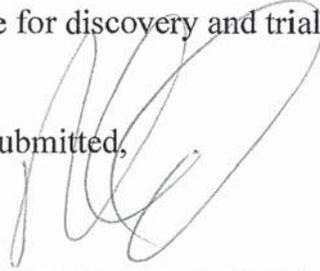
Since a violation of the duty of loyalty is a breach of fiduciary duty, this argument makes no sense and the comment does not come close to supporting it. What the comment actually says is that the "rule stated in this suggestion does not apply to situations involving merely violations of a contractual duty." Marsh's retention of the interest violates a fiduciary duty of loyalty, not a contract.

Once again, Marsh wants to occupy that strangest of places: one in which an admitted fiduciary owes no duty of loyalty to the principal. The duty of loyalty is inherent in any fiduciary relationship, and Marsh violated it by retaining interest on the premiums that Emerson paid and which were held in trust for Emerson's benefit.

**Conclusion**

For these reasons, Emerson respectfully prays that the Court reverse the judgment of dismissal and remand the case for discovery and trial.

Respectfully Submitted,



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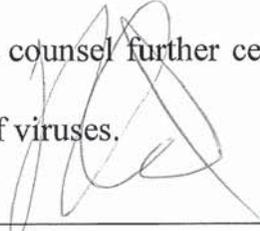
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**Certificate Of Compliance**

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4,457 words, exclusive of the sections exempted by Rule 84.06(b)(2), based on the word count that is part of Microsoft Office Word 2003 SP3. The undersigned counsel further certifies that the accompanying CD has been scanned and is free of viruses.



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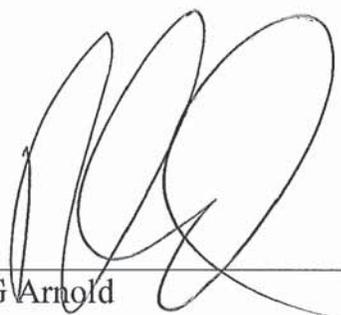
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing brief and a CD containing a virus-free electronic version of the brief were forwarded on November 18, 2011, by first class mail, postage prepaid, to:

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