IN THE SUPREME COURT OF MISSOURI

PEGGY GREEN, et al., INDIVIDUALLY and ON BEHALF OF THEMSELVES and ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs/Respondents,	)	SC88780
V.	)	
FRED WEBER, INC.	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of the
City of St. Louis, Missouri
Cause No. 042-09188
The Honorable Thomas C. Grady

Transferred to the Supreme Court of Missouri
By Order of September 25, 2007

SUBSTITUTE REPLY BRIEF OF APPELLANT

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Note: The designation **(LFA)** refers to the **Appendix** which was attached to the Supplemental Petition for Permission to Appeal which serves as the Legal File herein. A number following that designation will refer to the page number within that Appendix. The designation **(SAB)** and **(SRB)** followed by a number, refer to the **Substitute Brief of Appellant** and the **Substitute Brief of Respondent**, respectively, and the page number therein.

REPLY TO THE ARGUMENTS CONTAINED IN RESPONDENTS' STATEMENT OF FACTS

Respondents set forth in their Statement of Facts, and numerous times thereafter in their Brief, that defendant/appellant Fred Weber, Inc. presented no evidence to the trial court during the Motion for Approval of Class Certification. The defendant/appellant has no burden of proof. The burden of proof is left to the plaintiff. Cook v. Rockwood International Corp., 151 F.R.D. 378, 381 (D. Colo. 1993) Additionally, the standard of review before this Honorable Court is whether the trial judge abused his discretion in entering his ruling. (See the Standard of Review for Appeal of Class Certification (SAB 17-19)) The evidence which would be most relevant to that standard would be that which is most favorable to plaintiffs/respondents. Assuming appellant had put forth evidence, the respondents surely would have stated that such evidence should not be considered by this Court.

Respondents do state that "in addition to the testimony of the witnesses at the

evidentiary hearing, the Plaintiff/Respondent Class ("the class") presented **several** affidavits. . ." (emphasis added) (SRB 4) At the beginning of the hearing, respondents' attorney asked the trial court "to take judicial notice of its own file, 042-9188, including but not limited to the Motion to Certify this Action as a Class Action along with the attached Exhibits A through F". (LFA 65) However, at no time in the proceeding did respondents ever request that Exhibits A, B, C, D, E and F be admitted into evidence. Requesting that a Court take judicial notice of an item does not place it into evidence. See Randall v St. Albans Farms, Inc., 345 S.W.2d 220, 223 (Mo. 1961) which contains the following:

> Judicial Notice is a rule of evidence. Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 S.W. 565, 569; Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 169 S.W (2d) 359, 365. The facts of which a trial court does take judicial notice must be offered in evidence so as to become a part of the record in the case. Hume v. Wright, Mo, Sup., 274 S.W. 741, 744(3); Scheufler v. Continental Life Ins. Co., supra, 169 S.W. (2d) 359, 365(4);

The last of the "several affidavits" referred to in respondents' Statement of Facts appears to be trial Exhibit G, which was admitted into evidence over strenuous objection. (LFA 91- 94) It was however not admitted into evidence as expert testimony as to damages (LFA 94) but as stated by respondents' counsel, the "affidavit is simply additional evidence to support the proximity or the distance from the quarry in which this

class action would be included." (LFA 94) The trial court did not consider the content of **any** affidavit as verified in a footnote on page 4 of the Order of the Trial Court (LFA 4) which states: **"In reaching its decision regarding class certification the Court did not rely on the affidavits submitted by Plaintiffs in support of the motion."** (emphasis added) As a result this Honorable Court should not rely on the contents of the affidavits and must determine if the trial court abused its discretion in rendering its Order **without** considering the contents of the affidavits.

Additionally, respondents' Statement of Facts discusses "the map of the class" (SRB 4) and attaches same on page 1 of their Appendix. The map, which was marked as Exhibit H during the hearing (LFA 95) was never admitted into evidence.

As a result the sum total of the evidence which the trial court considered on the issue of whether a nuisance exists and whether any damages have been sustained by the respondents as a result of the actions of appellant is contained in the testimony of Peggy Green Gianino (LFA 66 – 90). The only evidence which is particularly germane to the issues of nuisance and damage (LFA 69 – 73) is summarized in Appellant's Brief (SAB 9) as follows:

> Ms. Gianino's home is directly across the highway from the quarry approximately one-third of a mile away from the quarry. (LFA 69) When Ms. Gianino first moved into her residence she was not aware of explosions that were occurring in the area because she worked full time during the day. (LFA 69) When she changed jobs which allowed her to be home more

during the day and early afternoon, she noted "something was going on". (LFA 69-70) She did not know what it was but at certain times of the day, she would feel her home shake and she could hear a noise. (LFA 70) She described this as happening at least once a day, sometimes twice. (LFA 70) She asked neighbors if they were aware of what was going on and they advised that there was a quarry across the highway where they blast for rock. (LFA 70) This was approximately October 1999. (LFA 70)

Ms. Gianino indicated that the blasting was very annoying. (LFA 72) It would cause her to lose her balance. (LFA 72) Once while taking a shower, she was thrown against the wall, and while being in her backyard, the ground would move underneath her feet. (LFA 72) She would notice the explosions once or twice a day. (LFA 73)

I. B.

APPELLANT'S REPLY TO RESPONDENTS' ARGUMENTS REGARDING STANDARDS FOR CLASS CERTIFICATION

Respondents state "that Weber never quarrels with the trial court's finding that

respondent met the requirements of Rule 52.08(a) in allowing the class action". (SRB 8) Such is certainly not the case. Appellant is merely not attempting to show that the trial court's findings relating to those requirements were reversible as an abuse of discretion.

Respondent claims that its Petition seeks relief under Rule 52.08(b)(3) because paragraph 8g uses the phrase "common questions of law and fact." (SRB 8) Rule 52.08(b)(3) relates to the issue of the **predominance** of common questions of law and fact. The existence of common questions of law and fact is a 52.08(b)(1) issue. Respondents' Petition never mentions or refers to predominance. (A. 12-15)

Respondents accuse appellant of misunderstanding the standard of review because appellant recites the phrase "rigorous analysis" repeatedly throughout its Substitute Brief. (SRB 9) At no time in Appellant's Substitute Brief was it stated or intimated that "rigorous analysis" is the standard for appellate review. As clearly indicated in Appellant's Substitute Brief the **trial court** is required to rigorously analyze the evidence to determine if the requirements of Rule 52.08 have been met. Kas v. Financial General Bancshares, Inc., 105 FRD 453, 463 (D.D.C. 1985) (SAB 19) This Honorable Court is being asked to determine whether the trial court did in fact perform a rigorous analysis, and if not, whether its failure to do so was an abuse of discretion.

I.C.

APPELLANT'S REPLY TO RESPONDENTS' ARGUMENT THAT THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FINDING THAT

THE COMMON QUESTIONS WERE SUFFICIENT TO CERTIFY THE CLASS

Respondents claim that Appellant's attempts to argue the underlying merits of the claim is inappropriate at this stage, however, it is necessary to analyze substantive claims and defenses and the essential elements of those claims in making certification decisions. Cook v. Rockwell International Corp., 151 F.R.D. 378, 381 (D. Colo. 1993); Hurwitz v. R. B. Jones Corp., 76 F.R.D. 149, 157 (W.D. Mo. 1977)

Respondents envision the first of two common issues as whether it "is reasonable for the defendant to set off blasts in the middle of a residential area". (SRB 10) There is in fact no evidence that the quarry is in the **middle** of a **residential area**. It is in the middle of the defined geographical area because the quarry is designated as the center of a circle. The only eviden**ce** as to the location of the residential homes in relation to the quarry is that approximately 410 homes are in the subdivision where the named plaintiffs live (LFA 68), 300 homes are adjacent to that subdivision (LFA 69), that those subdivisions are south of Interstate 70 (LFA 67) approximately 1/3 of a mile away from the quarry (LFA 69) and that the home of Frank Vlasaty is approximately 1.6 miles from the quarry. (SBA Appendix 12-13)

There is no evidence as to what comprises the remainder of the property located within the 12.56 square miles which makes up the defined geographical area. (The area of a circle is equal to the square of the radius multiplied by ∏, in this case 2 miles x 2 (squaring the radius) x 3.14 (∏) = 12.56 square miles.) It is however known that

Interstate 70 separates the quarry from the named plaintiffs' homes in this "residential area."

Whether the blasts shook the ground in any one of several residential areas in the general vicinity of the quarry would not in and of itself determine the reasonableness of appellant's use of its property in the present situation. A determination of the reasonableness of appellant's use of its property must also take into account the character of the **entire area** where the quarry is located, not just the residential areas. In order to determine the reasonableness of appellant's use of its property as it relates to any particular residence or residential area consideration would involve many individual issues including but not limited to the distance from the quarry, the medium through which the vibrations would travel in order to arrive at the location of the area or particular residence, and the amount of vibration experienced in the area or at the particular location. Additional individual issues which must be considered in order to determine reasonableness would be the nature of the construction of any particular residence, the duration of the individual plaintiff's knowledge of the existence of the quarry, and the duration of the individual plaintiff's knowledge of the vibrations. Without addressing such individual issues the question of reasonableness cannot be resolved.

Respondents attempt to refute appellant's argument regarding the four elements of a nuisance claim as set out in MAI 22.06. (SRB 10 - 15)

In analyzing the third element of a nuisance claim, whether each plaintiff must

prove that the alleged vibrations "substantially impairs the use of his property," respondents state that "the issue is not 'how much' blasting impairs the use of the property, which is an individual issue," and goes on to state, "but whether blasting substantially impairs the use of **the property** at all." (emphasis added) (SRB 11)

Because the class plaintiffs do not collectively own one single parcel of property, the predominant issue is "whether blasting substantially impairs the use of **each individual plaintiff's property**." This is clearly an individual issue. There can be no common finding as it relates to each individual plaintiff as to whether blasting substantially impairs the use of each individual plaintiff's property. This is imminently clear in that the defined geographical area as set forth by respondents radiates 2 miles in all directions from the quarry, thereby covering a total area of 12.56 square miles.

Respondents attempt to show the common nature of this issue by citing Sofka v. Thal, 662 S.W.2d 502 (Mo.banc 1983). The court therein stated:

> By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance, Restatement (Second) of Torts section 821F comment c (1977), determined by the standard of normal persons or property in the particular locality. Restatement (Second) of Torts section 821F comment d (1977). If normal persons living in the community would regard the invasion as definitely offensive, seriously annoying or intolerable, it is significant. Id. If normal persons in the locality would not be substantially annoyed or disturbed, the invasion is not

> significant, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him. Id. "Rights and privileges as to the use and enjoyment of land are based on the general standards of normal persons in the community and not on the standards of the individuals who happen to be there at the time." Id.

The alleged nuisance in Sofka was continual phone calls received by the plaintiff during normal working hours. (The plaintiff therein worked the night shift and was attempting to sleep during normal working hours.) The court held that repeated phone calls were not, as a matter of law, a nuisance.

The facts in Sofka are of course very different from those of the present case. However that difference illuminates why the issue of nuisance in the present case is an individual issue rather than a common issue. For the normal person in the community to determine if a class member was substantially annoyed or disturbed he must have a frame of reference. Members of the community at large could equate the nature of an offensive smell, or foreign particles falling onto their property, or a ringing phone to something in their common experience. The present case involves alleged vibrations traveling different distances, through different substances and causing differing impacts over 12.56 square miles. Assuming for the sake of this argument that the vibrations travel beyond the quarry grounds, would it not be reasonable to assume that a person living 100 feet from the location of the quarry would experience much different vibrations than one living 10,500 feet away? How would the normal person in the community determine if

the vibrations were "definitely offensive, seriously annoying or intolerable" on a global basis?

In discussing the fourth element of a nuisance claim respondents state that appellant's argument with regard to whether blasting constitutes an unreasonable use exemplifies a misunderstanding of a nuisance claim. (SRB 12) It appears to be respondents who misunderstand a nuisance claim. Respondents state "(T)he issue here is not one of causation, nor of whether the use is unreasonable on the class member's property, as alleged by Weber. Instead, the issue is whether it is unreasonable on Weber's property." (SRB 12)

The use of Weber's property without consideration of the property owners around the quarry cannot be reasonable or unreasonable to anyone other than Weber. If the use of appellant's property as a quarry was an unreasonable use, with no consideration as to the neighboring properties, one could presume that a government authority would have previously stopped the activity. **The issue is whether the use of Weber's property is reasonable as it relates to each plaintiff and his residence.**

Respondents refer to Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876 (Mo. banc 1985) with some degree of enthusiasm. (SRB 12-13) Respondents state "it is without question the seminal case in Missouri on nuisance law." (SRB 12) Respondents states "this Court proclaimed for the first time in Missouri, the 'crux of a nuisance case is unreasonable land use,'" as if to state that substantial impairment of another to peacefully enjoy his property is no longer an issue to

determined. In fact, just the opposite is the case. The Frank case states:

> Nuisance is the unreasonable, unusual or unnatural use of one's property so that it substantially impairs the right of another to peaceably enjoy his property. Crutcher v. Taystee Bread Company, 174 S.W.2d 801 (Mo. 1943) The focus is defendant's unreasonable interference with the use and enjoyment of plaintiff's land. Rebel v. Big Tarkio Drainage District, 602 S.W.2d 787, 791 (Mo. App. 1980) . . . "the law of nuisance recognizes two conflicting rights: Property owners have a right to control their land and use it to benefit their best interests. The public and neighboring land owners have a right to prevent unreasonable use that substantially impairs the peaceful use and enjoyment of their land. Clinic & Hospital v. McConnell, 241 Mo. App. 223, 236 S.W.2d 384 (1951) The unreasonable use element of nuisance balances the rights of adjoining property owners. Looney v. Handeman, 647 S.W.2d 207 (Mo. Banc 1983).

Respondents further interpret Frank as if the Supreme Court had declared that there are now two categories of nuisance, nuisance per se and nuisance in fact. (SRB 13) It is clear from a complete reading of the case that the Court was setting out many categories of nuisance which also included nuisance resting upon a continuing known invasion, Id. at 881, nuisance constituted by an intentional act and nuisance caused by negligence. Id. at 882

Respondents state that the dissent in Frank "highlights why the parties here are

struggling with the elements of a nuisance claim". (SRB 12) The dissent by Judge Welliver relates to the fact that Judge Welliver believed that a defendant's conduct should be an element of liability in a claim of nuisance. Because the defendant's conduct is not alluded to in MAI 22.06, he felt that the instruction was given in error. That issue has no relation to the issues presently before this Honorable Court. What the dissent actually highlights is the reason why a claim purely for private nuisance will not generally meet the predominance requirement.

From a review of cases, where the Courts have held that common questions of law and fact predominate there is none where the **only claim** against the defendant was for a private nuisance. In each case, there were additional claims based upon such theories as negligence, strict liability, outrageous conduct, etc. In those cases, the Court determined the common issues related to the conduct of the defendant. In the present case, the defendant's conduct is not an issue that needs to be examined in great depth. What does need to be examined is the impact of defendant's conduct on each individual claimant. The impact would be a separate determination for each claimant.

Respondents state that Frank holds that considering the effect on each class member's property is too narrow an interpretation of nuisance law in Missouri. (SRB 13) There is no such statement or even inference to that effect in Frank. Frank is not a class action case. The court therein approved the use of MAI 22.06 and stated that "MAI 22.06 requires the necessary finding of unreasonable land use." Id. at 882 That statement was no where qualified as argued by respondents.

Respondents state that the Court in Doyle v. Fluor Corporation, 199 S.W.3d 784 (Mo. App. 2006) "discussed, and in footnote 1 of the opinion specifically rejected, the argument that issues such as are presented here are, as a matter of law, individual issues." (SRB 14) Footnote 1 in that case merely sets forth that the defendant in the Doyle case misinterpreted a case it relied upon in presenting its argument. The Court made no blanket pronouncement as alleged by respondents that issues such as are presented here, are as a matter of law, not individual issues.

When addressing the issue of damages, respondents state:

> While there will be individual issues of damage concerning vibration-induced cracking to some of the homes in the neighborhood, these are special damages. The general damages – those just of tolerating the nuisance – are not individual claims. (SRB 15)

It is most interesting to note that there was **no evidence whatsoever presented at the hearing of any special damages**. The **only evidence** which relates to damages came from Ms. Green Gianino, who stated she would feel her home shake and she could hear a noise. (LFA 70) **In the event that this Honorable Court allows this matter to proceed as a class action based upon the evidence which the trial court indicated it considered**, the testimony of a single lay person, (Peggy Green Gianino, LFA 66 – 91), the testimony of the attorney representing the plaintiffs (David Knieriem, LFA 94 – 102), no expert testimony regarding damage and no indication of physical injury either to person or property, **certification of a class action could never be refused.** As an

example, a class could be certified in a lawsuit against any private airport upon the testimony of a single person who lives in "close proximity" to the airport with only testimony that when planes take off, land or fly overhead that witness feels her home shake and she can hear a noise. This would, of course, create a very dangerous precedent. Certifying the class, based upon the evidence which the trial court indicated it considered in this case is truly a breach of discretion.

Respondent argues that "The bottom line is that, as opposed to resolving the question of whether the land use is reasonable fifteen hundred times, it would be much easier to resolve it once." (SRB 15) This presumes that fifteen hundred claimants have an interest in this claim, which once again raises the question regarding Respondents failure to present sufficient evidence to support their claim. There is no evidence to support such an assertion. In fact there is no evidence that anyone other than the named plaintiffs and Frank Vlasaty who executed the Affidavit, plaintiffs' Exhibit G, have any interest in proceeding with this claim. There was also no evidence presented to indicate that other lawsuits had been filed over the course of the many years which the quarry has been in existence, claiming damages due to appellant's operation of the quarry, (See Rule 52.08 (b)(3)(B)) which might give some indication as to the reasonableness of appellant's use, and respondents' alleged damages.

II.

APPELLANT'S REPLY TO RESPONDENTS' ARGUMENT THAT

THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FINDING THAT THE CLASS WOULD PROMOTE ECONOMY AND EFFICIENCY

Appellant's argument relating to its position that because there is no predominance issue which will be resolved herein, the class will not promote any economy and efficiency, as set out in various other places within this Brief, will not be reargued at this time.

III.

APPELLANT'S REPLY TO RESPONDENTS' ARGUMENT THAT THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FINDING THE REQUIREMENTS OF RULE 52.08(b)(1) WERE SATISFIED

Respondents state "(t)he whole point of this nuisance claim is that the blasting is an unreasonable use of the property by Weber. Suppose 1500 lawsuits were filed, with half finding that blasting at the quarry was a reasonable use of the property, and half finding it was not. This supposition alone satisfies the (b)(1) requirement." (SRB 18) That the respondents could even consider this supposition adds credence to the appellants' position. If the fact finder in half of the cases determined that blasting at the quarry was a reasonable use of the property, and half determined it was not a reasonable use, this would clearly indicate that the issue was not common but rather individual. Because there are so many individual questions to be considered with regard to each

residence and its owner a finding of reasonableness relating to one piece of property would have no value as a precedent as related to any other piece of property. A finding regarding any particular piece of property would not be inconsistent or varying as related to any other piece of property and as a result the requirement of Rule 52.08(b)(A) would not be satisfied. A finding that those requirements were satisfied would be an abuse of discretion.

IIII.

APPELLANT'S REPLY TO RESPONDENTS' ARGUMENT THAT THERE IS A LOGICAL BASIS FOR THE CLASS GEOGRAPHIC AREA

Respondents state that appellant "misunderstands the evidence needed to certify a class action." (SRB 19) Respondents then goes on to state that "(A)n evidentiary hearing is not even necessary; the trial court could have, if it so chose, certified the class simply on the pleadings and affidavits submitted." (SRB 19) The relevance of this is unknown in light of the fact that the trial court did not chose to certify the class without an evidentiary hearing. Possibly, respondents are implying that following a hearing a trial court, if it so chooses, can refuse to perform a "rigorous analysis" of the evidence and make a determination based solely on the pleadings. Appellant believes that such would clearly be an abuse of discretion.

Respondents state that "the inquiry in defining the class is not to establish liability, but to determine whether it can be properly identified." (SRB 19) Obviously,

respondents have oversimplified the issue by making such a statement. **ANY** clearly defined geographical area can be properly identified. The issue is whether there is any evidence herein that the owners of residential property within that clearly defined area have incurred substantial impairment of their property due to the actions of appellant. As a result there is clearly a component of liability built into the determination of the definition of the class and its geographical area.

The following statement made by respondents highlights the difference between this claim which is **only** for private nuisance, and all other cases sited in the Briefs. Respondents state that "it is not important that all, or even most, of the class member have claims." (SRB 19) Respondent attributes this point to Doyle. In Doyle the class representatives were seeking recovery under theories of negligence, negligence per se, absolute or strict liability, private nuisance and trespass. Where multiple theories of recover are sought and negligence and/or strict liability are the basis of the claims it is possible to have a class where all class members do not have a claim. However, if the theory of recovery is private nuisance as in the present case, in the event a private nuisance is proven damages are presumed. As stated in Smiths v. McConathy, 11 Mo. 517, 522 (1848)

> In an action for a private nuisance it is not necessary to allege or prove any special damages. . . But if a private nuisance be alleged and proved, the plaintiff is allowed to recover nominal damages at least, whatever amount of inconvenience or injury have been occasioned by it.

As a result, in the event the issue of nuisance is tried on a class wide basis, the definition of the class takes on much greater importance. To allow the class to be defined by such arbitrary evidence that Ms. Gianino "received phone calls from as far away as two miles" (A. 82) and "because Fizey Road is two miles away" (A. 82) leads to the eventual outcome that either no class member receives damages or every residential homeowner, including condominium owner, who owned homes within two miles of Defendant's quarry for five years preceding the date of the petition was filed would be entitled to at the least, nominal damages.

Respondents state that evidence was "submitted to the court by testimony and **numerous** affidavits as to why two miles was chosen." (emphasis added) (SRB 19) In fact, only one Affidavit (Exhibit G) was admitted into evidence and that was over strenuous objection. (LFA 91- 94) As stated by respondents' counsel at the hearing, that "affidavit is simply additional evidence to support the proximity of the distance from the quarry in which this class actions would be included." (LFA 94) Therein the affiant stated he lives 1.6 miles from the quarry. The remaining Affidavits were not admitted into evidence, nor considered by the trial court (LFA 4) as previously explained herein in the Reply to Respondents' Statement of Facts. Respondents complain that additional evidence regarding the content of phone calls which may have further supported their definition of the class geographical area was not heard by the trial court because the trial court ruled the evidence was not admissible. This again exemplifies respondents lack of understanding as to their burden of proof.

Respondents state "Weber complains that there was little evidence concerning those areas to the north of the quarry". (SRB 20) In fact, Weber's complaint is not that there was little evidence concerning the areas to the north of the quarry but rather that there was **NO EVIDENCE** with regard to areas north of the quarry, which once again addresses the issue of respondents complete failure of proof.

Respondents must identify a logical reason relating to the appellant's activity for drawing the boundary where they did in identifying the class. Daigle v. Shell Oil Co., 133 F.R.D. 60 (D. Colo. 1990) The class must consist of a discreet geographical group, readily identifiable and reasonably related to the evidence of record. Harvell v. Goodyear Tire & Rubber Co., 164 P.3d 1028 2006 OK 24; Daigle, Id. The Court's finding that the respondents met their burden in this regard is an abuse of discretion.

CONCLUSION

For the foregoing reasons, appellant requests that this Honorable Court reverse the trial court's Order granting class certification. Appellant further requests such other relief as this Honorable Court deems proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this Supplemental Appellant's Brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5887 words, exclusive of the Sections exempted by Rule 84.06(b)(2) of the Missouri Rules of Civil Procedure based on the word count that is part of Microsoft Word. In addition, the undersigned also certifies that this Supplemental Appellant's Brief complies with the page limits of Special Rule 360. Finally, the undersigned certifies that the diskette accompanying the brief has been scanned and is free of viruses.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Supplemental Appellant's Brief and one diskette were mailed, postage prepaid, this 21st day of November, 2007 to: Mr. Dave Knieriem, Mr. Christian J. Goeke and Mr. Richard Fischer, Attorneys for Respondents, 7711 Bonhomme Avenue, Suite 850, St. Louis, Missouri 63105.

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