

IN THE MISSOURI SUPREME COURT

SC92074

HARPAGON MO, LLC
Appellant,

vs.

EDWARD L. BOSCH & NANCY Z. BOSCH,
Respondents.

Original Proceeding
Harpagon MO, LLC v.
Edward L. Bosch & Nancy Z. Bosch,
7th Circuit Case No. 08CY-CV12913

RESPONDENTS' SUBSTITUTE BRIEF

Jerome E. Brant, MO Bar No. 22748
Robb A. Denney, MO Bar No. 56774
WITHERS, BRANT, IGOE & MULLENNIX, P.C.
Two South Main Street
Liberty, MO 64068
jbrant@withersbrant.com
rdenney@withersbrant.com
(816) 781-4788 - Phone
(816) 792-2807 - Facsimile

ATTORNEYS FOR DEFENDANTS/
RESPONDENTS EDWARD &
NANCY BOSCH

TABLE OF CONTENTS

<u>Item</u>	<u>Page</u>
Table of Contents	1
Table of Authorities	2
Jurisdictional Statement.....	4
Standard of Review	5
Statement of Facts	6
Points Relied On	8
Argument	9
I. The Trial Court Did Not Err In Granting Respondents’ Motion For Summary Judgment Because The “Notice Of Right To Redeem” Sent By Vesta Holdings Was Insufficient And Did Not Meet The Statutory Requirements Under § 140.405, RSMo In That It Was Not Timely And It Contained Insufficient And/Or Incorrect Information Regarding The Bosches’ Right To Redeem.	
(Response To Appellant’s Point Relied On I).....	
	9
II. The Trial Court Did Not Err In Denying Appellant’s Motion For Summary Judgment Because There Were Disputed Issues Of Material Fact In That Harpagon MO, LLC, Had Not Shown That It Received A Valid Transfer Of Any Legal Interest In The Subject Property.	
(Response To Appellant’s Point Relied On II).....	
	29
Conclusion.....	35

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

Bussen Realty Co. v. Benson, 349 Mo. 58, 159 S.W.2d 813 (Mo. banc 1942) 10

CedarBridge, LLC v. Eason, 293 S.W.3d 462 (Mo. App. E.D. 2009) 11, 12, 14

Costello v. City of St. Louis, 262 S.W.2d 591 (Mo. 1953)..... 26, 17

Drake Development & Const., LLC v. Jacob Holdings, Inc., 306 S.W.3d 171,
(Mo.App. S.D. 2010)..... 12, 18

Glasgow Enterprises, Inc. v. Brooks, 234 S.W.3d 407 (Mo. App. E.D. 2007)12

Hames v. Bellistri, 300 S.W.3d 235 (Mo. App. E.D. 2009) 12

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371,
380 (Mo. banc 1993) 5

Keylien Corp. v. Johnson, 284 S.W.3d 606 (Mo. App. E.D. 2009)12, 15, 16, 18

McCready v. Southard, 671 S.W.2d 385 (Mo.App. S.D. 1984) 5

Morton v. Reeds, 6 Mo. 64 (Mo. 1839)..... 10

Ndegwa v. KSSO, LLC, 2011 WL 4790633 (Mo.App. E.D. 2011) 13

Powell v. County of St. Louis, 559 S.W.2d 189, 196 (Mo. banc 1977).....10, 26

Stadium West Properties v. Johnson, 133 S.W.3d 128 (Mo. App. W.D. 2004)
..... 9, 20, 23, 27, 28

Thomas Berkeley Consulting Eng'r, Inc. v. Zerman, 911 S.W.2d 692
(Mo.App. E.D. 1995) 24

Transatlantic Ltd. v. Salva, 71 S.W.3d 670 (Mo. App. W.D. 2002) 5

United Asset Mgmt. Trust Co. v. Clark, 332 S.W.3d 159 (Mo. App. W.D. 2010)
 13, 14, 15, 18, 19, 20, 21

Valli v. Glasgow Enterpr., Inc., 204 S.W.3d 273 (Mo. App. E.D. 2006)..... 12

Victory Hills Ltd. Partnership I v. NationsBank, N.A. (Midwest), 28 S.W.3d 322
 (Mo. App. W.D. 2000) 24

Wates v. Carnes, 521 S.W.2d 389 (Mo. 1975) 9

Wetmore v. Berger, 188 S.W.2d 949 (Mo. 1945) 15

Zafft v. Eli Lilly & Co., 676 S.W.2d 241(Mo. banc. 1984) 24

STATUTES

§ 140.010, RSMo, *et seq.* 9

§ 140.190, RSMo 32, 33

§ 140.290, RSMo 26, 30, 33

§ 140.340, RSMo 12

§ 140.405, RSMo ...10, 12, 15, 16, 18, 19, 20, 21, 22, 24, 25, 26, 28, 30, 31, 32, 35

§ 140.410, RSMo 32, 33

§ 140.420, RSMo 10, 11, 12, 15, 16, 17

OTHER AUTHORITIES

Mo. Const. Art. V, § 3 4

Mo. Const. Art. V, § 10 4

Rule 74.04 *Missouri Rules of Civil Procedure* 30, 35

JURISDICTIONAL STATEMENT

This matter was originally brought as a quiet title action in the Circuit Court of Clay County, Missouri (7th Circuit), following a tax sale and the issuance of a Collector's Deed for Taxes for property located in Clay County, Missouri. This appeal follows a grant of Summary Judgment in favor of Defendants-Respondents Edward and Nancy Bosch (the "Bosches"), entered by the trial court on March 25, 2010.

A Motion for Reconsideration was filed by Plaintiff-Appellant Harpagon MO, LLC ("Harpagon") on April 23, 2010. After its motion was deemed overruled, Harpagon sought a special order permitting late filing of its Notice of Appeal via motion filed with the Missouri Court of Appeals, Western District, on August 17, 2010, and the Missouri Court of Appeals entered an Order permitting the late filing of Harpagon's Notice of Appeal on August 25, 2010. The Notice of Appeal was subsequently filed on September 1, 2010. Upon consideration of the briefs and arguments of the parties, the Missouri Court of Appeals, Western District, entered its Order on August 30, 2011, reversing the trial court's grant of Summary Judgment in favor of Defendants-Respondents Bosch and remanding this matter to the trial court for further proceedings.

The Missouri Court of Appeals, Western District, overruled and denied Defendants-Respondents Bosches' Motion for Rehearing or Transfer on October 4, 2011. On December 20, 2011, this Court granted Transfer After Opinion by the Missouri Court of Appeals pursuant to Rule 83.04. Jurisdiction of this matter is vested with this Court by virtue of Article V, §§ 3 and 10 of the Missouri Constitution.

STANDARD OF REVIEW

In this case, the trial court granted Summary Judgment in favor of Defendants-Respondents Bosch and denied a separate Motion for Summary Judgment filed by Plaintiff-Appellant Harpagon. Whether a motion for summary judgment should be granted is a question of law, and review is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). “Review of a summary judgment is equivalent to review of a court-tried or equity proceeding and if, as a matter of law, the judgment is sustainable on any theory, it must be affirmed.” *McCready v. Southard*, 671 S.W.2d 385, 387 (Mo.App. S.D. 1984) (internal citations omitted).

Ordinarily “the denial of a motion for summary judgment is interlocutory and, thus, is not a final appealable order.” *Id* at 389 (internal citations omitted). However, such rulings may be taken up if they “are completely intertwined with a grant of summary judgment in favor of an opposing party.” See *Transatlantic Ltd. v. Salva*, 71 S.W.3d 670, 675-76 (Mo. App. W.D. 2002). Though Defendants-Respondents Bosch agree that the facts necessary for the determination and grant of Summary Judgment in their favor are uncontested, Plaintiff-Appellant Harpagon’s separate Motion for Summary Judgment necessarily relied upon additional and further substantive facts that go beyond those necessary to the determination of Defendants-Respondents Bosches’ own Motion for Summary Judgment, and many of those additional facts remain contested.

RESPONSE TO APPELLANT’S STATEMENT OF FACTS AND
RESPONDENTS’ ADDITIONAL STATEMENT OF FACTS

Defendants-Respondents Edward and Nancy Bosch, husband and wife, (the “Bosches”) reside at 3535 NE 49th Terrace, Kansas City, Missouri and have done so since December of 1955. (LF 013). Around January 9, 2009 the Bosches were served with a Verified Petition to Quiet Title (LF 001-002) stating that their property was the subject of a tax sale held on August 27, 2007 (LF 053), and that a Collector’s Deed for Taxes was later issued for their property on November 3, 2008. (LF 011).

Plaintiff-Appellant Harpagon MO, L.L.C. (“Harpagon”) is a nonresident, limited liability company organized under the laws of Georgia. (LF 006). Harpagon itself was not the actual bidder nor Certificate of Purchase recipient at the underlying tax sale.¹ (LF 010). Rather, a separate entity named Sunrise Atlantic, L.L.C., a nonresident, Florida limited liability company, allegedly bid and was issued a Certificate of Purchase at the underlying tax sale held on August 27, 2007. (LF 007 & 010).

Harpagon itself did not send any notice to the Bosches regarding the tax sale and/or their right to redeem, contrary to Harpagon’s pleadings filed with the trial court. Rather, the “Notice of Right to Redeem” filed with the trial court was purportedly sent by “Vesta Holdings as agent for Sunrise Atlantic, LLC” (“Vesta Holdings”). (LF 031). The

¹ Respondents feel clarification on these facts is necessary, even if consistent with those in Appellant’s Brief, because in its Suggestions in Support of Plaintiff’s Motion for Summary Judgment, Harpagon repeatedly misidentified the actual business entities undertaking these various acts. (LF 020 & 021).

“Notice of Right to Redeem” sent by Vesta Holdings contains a different property description and inconsistent addition and/or subdivision than that contained in the Certificate of Purchase issued by the Clay County Collector. (LF 026 & 031).

Harpagon alleged in its Petition that Sunrise Atlantic was “Plaintiff’s predecessor in title.” (LF0007). However, Plaintiff Harpagon filed no Statement of Uncontroverted Facts in conjunction with its own Motion for Summary Judgment (noted by Defendants in paragraph 1 of Defendants’ Response to Plaintiff’s Motion for Summary Judgment, LF 042), and Harpagon presented no evidence regarding any actual assignment of interest or title from Sunrise Atlantic to Plaintiff. Defendants-Respondents Bosch first raised this defense in Defendants’ Affirmative Defenses (LF 015), again in Defendants’ Response to Plaintiff’s Motion for Summary Judgment (LF 046, paragraph 3), and during oral arguments before the trial court (TR 11:15-25).

Upon reviewing and hearing argument on competing Motions for Summary Judgment, the trial court entered Summary Judgment in favor of the Defendants-Respondents Bosch, finding that Sunrise Atlantic and/or Vesta Holdings did not comply with the requirements of § 140.405, RSMo resulting in the loss of all interest in the underlying property by Sunrise Atlantic. (LF 066-067).

POINTS RELIED ON

- I. The Trial Court Did Not Err In Granting Respondents' Motion For Summary Judgment Because The "Notice Of Right To Redeem" Sent By Vesta Holdings Was Insufficient And Did Not Meet The Statutory Requirements Under § 140.405, RSMo In That It Was Not Timely And It Contained Insufficient And/Or Incorrect Information Regarding The Bosches' Right To Redeem. (Response To Appellant's Point Relied On I).**

CedarBridge, LLC v. Eason, 293 S.W.3d 462 (Mo. App. E.D., 2009)

Keylien Corp. v. Johnson, 284 S.W.3d 606 (Mo. App. E.D. 2009)

United Asset Mgmt. Trust Co. v. Clark, 332 S.W.3d 159 (Mo. App. W.D. 2010).

Stadium West Properties v. Johnson, 133 S.W.3d 128 (Mo. App. W.D. 2004)

§140.405, RSMo

- II. The Trial Court Did Not Err In Denying Appellant's Motion For Summary Judgment Because There Were Disputed Issues Of Material Fact In That Harpagon MO, LLC, Had Not Shown That It Received A Valid Transfer Of Any Legal Interest In The Subject Property. (Response To Appellant's Point Relied On II).**

Rule 74.04 of the *Missouri Rules of Civil Procedure*

§ 140.410, RSMo

§ 140.190, RSMo

§ 140.290, RSMo

ARGUMENT

I. The Trial Court Did Not Err In Granting Respondents' Motion For Summary Judgment Because The "Notice Of Right To Redeem" Sent By Vesta Holdings Was Insufficient And Did Not Meet The Statutory Requirements Under § 140.405, RSMo In That It Was Not Timely And It Contained Insufficient And/Or Incorrect Information Regarding The Bosches' Right To Redeem. (Response To Appellant's Point Relied On I)

A. Overview

The acquisition of property through tax sales in Missouri is a process governed by statute, § 140.010, RSMo, *et seq.*², and, "(i)t has universally been the rule that statutory requirements in proceedings in rem for the sale of land for delinquent taxes must be complied with strictly." *Stadium West Properties v. Johnson*, 133 S.W.3d 128, 134 (Mo. App. W.D. 2004)(citing *Wates v. Carnes*, 521 S.W.2d 389, 390, (Mo. 1975)). This position by Missouri Courts has been consistent and longstanding. "Tax sales have always been carefully scrutinized by this court. More than one hundred years ago this court said a tax sale belonged with those proceedings which are summary and ex parte and that it 'is against common right and against the law.' It pointed out that tax sales must

² Respondents note that many of the statutes contained in §140.010, *et seq.*, were revised in 2010, in part to specifically exclude non-resident, foreign corporations from bidding on tax sales in Missouri, but unless stated otherwise, all references by Respondents to such statutes refer to the version in effect at the time of the underlying tax sale in this case, August of 2007.

be ‘strictly pursued, and also strictly proved’ because otherwise a man may be deprived of his property contrary to the constitution.” See *Bussen Realty Co. v. Benson*, 349 Mo. 58, 159 S.W.2d 813, 814 (Mo. banc 1942) (citing to *Morton v. Reeds*, 6 Mo. 64 (Mo. 1839))(*Bussen* overruled on other grounds by *Powell v. County of St. Louis*, 559 S.W.2d 189, 196 (Mo. banc 1977)). Though tax sales entail the requirements of both Missouri statutes and those of due process, neither is necessarily limited to the scope of the other, and tax sale purchaser must satisfy the requirements of both.

Section 140.405, RSMo requires tax sale purchasers to send notice to property owners of record, among others, notifying them of their right to redeem their property (“Notice of Right to Redeem”). § 140.405, in its entirety, states:

“140.405. Purchaser of property at delinquent land tax auction, deed issued to, when--loss of interest, when - Any person purchasing property at a delinquent land tax auction shall not acquire the deed to the real estate, as provided for in section 140.420, until the person meets with the following requirement or until such person makes affidavit that a title search has revealed no publicly recorded deed of trust, mortgage, lease, lien or claim on the real estate. At least ninety days prior to the date when a purchaser is authorized to acquire the deed, the purchaser shall notify any person who holds a publicly recorded deed of trust, mortgage, lease, lien or claim upon that real estate of the latter person's right to redeem such person's publicly recorded security or claim. Notice shall be sent by certified mail to any such person, including one who was

the publicly recorded owner of the property sold at the delinquent land tax auction previous to such sale, at such person's last known available address. Failure of the purchaser to comply with this provision shall result in such purchaser's loss of all interest in the real estate. If any real estate is purchased at a third-offering tax auction and has a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate, the purchaser of said property at a third-offering tax auction shall notify anyone with a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate pursuant to this section. Once the purchaser has notified the county collector by affidavit that proper notice has been given, anyone with a publicly recorded deed of trust, mortgage, lease, lien or claim upon the property shall have ninety days to redeem said property or be forever barred from redeeming said property. If the county collector chooses to have the title search done then the county collector must comply with all provisions of this section, and may charge the purchaser the cost of the title search before giving the purchaser a deed pursuant to section 140.420.”

“(T)he notice requirements of Section 140.405 use the term ‘shall.’ It is clear that when a statute mandates that something be done by providing that it *shall* occur, and it also provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed.” See *CedarBridge, LLC v. Eason*, 293 S.W.3d 462, 467 (Mo.App. E.D., 2009) (internal citations and quotations omitted). First and second offering tax

sales have a one-year statutory redemption period following the date of the sale for the underlying property owners to redeem their property. See § 140.340, RSMo. Legal title does not vest in the tax sale purchaser at a first or second offering tax sale until the one-year statutory period of redemption has lapsed and the purchaser consummates the sale by exercising the right to have legal title transferred. See §§ 140.420 and 140.405, RSMo. This case involves a one-year period for redemption because the underlying tax sale was a first or second tax sale. Third tax sales have a ninety day statutory period for redemption.

At the time of the trial court's Summary Judgment ruling in this case, the prevailing case law in Missouri interpreting the statutes in effect at that time held that in order to comply with § 140.405, RSMo, a tax sale purchaser must indicate the correct statutory period for redemption within the Notice of Right to Redeem, informing property owners in first and second tax sales that they have one year from the date of the tax sale to redeem their property and property owners in a third tax sale that they have 90 days to redeem. See *CedarBridge* at 465; see also *Keylien Corp. v. Johnson*, 284 S.W.3d 606, 612 (Mo. App. E.D. 2009); *Glasgow Enterprises, Inc. v. Brooks*, 234 S.W.3d 407, 411 (Mo. App. E.D. 2007); *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273, 277 (Mo. App. E.D. 2006); *Drake Development & Const., LLC v. Jacob Holdings, Inc.*, 306 S.W.3d 171, 174 (Mo. App. S.D. 2010); and *Hames v. Bellistri*, 300 S.W.3d 235 (Mo. App. E.D. 2009).

In November of 2010, after Summary Judgment had been entered in this case, the Missouri Court of Appeals, Western District, subsequently "split" from the Eastern and

Southern Districts and ruled contrary to the above statutory interpretation previously proffered by the other districts. See *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 175 (Mo. App. W.D. 2010). In *United Asset Management*, the Missouri Court of Appeals, Western District, held that § 140.405, RSMo does not require that *any* period of redemption be set out in a Notice of Right to Redeem in order to comply with the statute.

As set out in further detail below, the interpretation of the notice requirements under § 140.405, RSMo proffered by the Eastern and Southern Districts is more compelling in that it better accounts for the reasonable notice requirements of due process, the canons of statutory construction, and the fundamental principles of public policy and certainty in the law, as recently explained by the Eastern District itself in its opinion in *Ndegwa v. KSSO, LLC*, 2011 WL 4790633 (Mo.App. E.D. 2011). Moreover, even Appellant Harpagon agrees in its Substitute Brief filed with this Court that the interpretation proffered by the Western District in *United Asset Management* is misguided to the extent that it results in a Notice of Right to Redeem that does not satisfy the requirements of due process.³

³ “A portion of the holding in *Ndegwa* is correct, in that a notice must include a time component to communicate the ‘pendency’ of an action, as opposed to mere ‘existence’ of the right to redeem as *Clark* suggests.” Appellant Harpagon’s Substitute Brief at page 11-12 (contrasting the opinion in *Ndegwa v. KSSO, LLC*, 2011 WL 4790633 (Mo.App. E.D., 2011) to that in *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 175 (Mo. App. W.D. 2010)).

B. Timing and Content Requirements for a Notice of Right to Redeem

Though disagreements between the Eastern and Southern Districts and the Western District may go further, two significant points of disagreement involve ambiguities in the statute arising from the phrases “at least ninety days prior to the date when a purchaser is authorized to acquire the deed” and “shall notify (property owners)...of ..(their).. right to redeem.” Appellant and Respondents agree that these two phrases create both a “timing” and “content” requirement in regard to the Notice of Right to Redeem under the statute (Appellant refers to these requirements in its brief as “when a notice must be sent” and “what time component, if any, the notice must state”).

1. Timing of Notice

The Eastern and Southern Districts of the Court of Appeals have interpreted these phrases and the resulting timing and content requirements differently than the Western District. In regard to timing, the Eastern and Southern Districts have held that the phrase “at least ninety days prior to the date when a purchaser is authorized to acquire the deed” is to be interpreted as requiring that a tax sale purchaser send the Notice of Right to Redeem at least ninety days prior to the end of the statutory one-year period for redemption. *Cedar Bridge v. Eason*, 293 S.W.3d at 465. The Western District has held that this same language requires a tax sale purchaser to send notice at least ninety days prior to an undetermined, variable date which is then determined by the tax sale purchaser’s own discretionary, future actions in satisfaction all other requirements precedent to its acquisition of a tax deed. *United Asset Mgmt. Trust Co. v. Clark*, 332

S.W.3d at 175. This disagreement seems to arise from a different interpretation of the phrase “authorized to acquire the deed.”

Appellant argues at great length in its Substitute Brief that property owners’ actual period for redemption may extend beyond the one-year statutory period for redemption, and on this point, Respondents do not disagree. Under Missouri law property owners’ right to redeem their property is extended up until the actual date that a tax deed is issued to a tax sale purchaser and recorded. See *Wetmore v. Berger*, 188 S.W.2d 949 (Mo. 1945). However, Respondents disagree that this final deadline for redemption necessarily coincides with the date described in §140.405, RSMo as “the date when a purchaser is authorized to acquire the deed.” In interpreting this language, the Western District applied the somewhat circular logic that since § 140.405, RSMo requires that a Notice of Right to Redeem be sent at least ninety days before the date the purchaser is authorized to acquire the deed, then the purchaser is not be authorized to acquire the deed until ninety days after sending the notice. See *United Asset Mgmt.*, 332 S.W.3d at 175.

While circular, Respondents do not argue that this line of argument is without some merit, but the Eastern District’s interpretation of the same language is more compelling. In the 2009 case of *Keylien Corporation v. Johnson*, the Eastern District stated that, “(i)f no one redeems the property during the one-year statutory redemption period, ‘at the expiration thereof, and on production of certificate of purchase,’ the county collector is *required* to execute to the purchaser a deed to the property, which vests in the grantee an absolute estate in fee simple.” *Keylien Corp. v. Johnson*, 284 S.W.3d at 610(citing § 140.420, RSMo; emphasis added). “Therefore, for a notice in a first or

second tax sale to accurately inform the recipient of the right to redeem, the notice must indicate that the recipient has one year from the date of the tax sale to redeem.” *Id* at 613.

Section 140.420, RSMo states, “(i)f no person shall redeem the lands sold for taxes within *one year* from the sale, *at the expiration thereof*, and on production of certificate of purchase, the collector of the county in which the sale of such lands took place *shall* execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however, to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold.”(emphasis added). Nowhere in § 140.420, RSMo is the county collector granted the authority to investigate the purchaser’s degree of statutory compliance and then issue a discretionary ruling granting or denying the issuance of the tax deed at that time. Regardless of the degree to which that tax deed may be susceptible to being set aside should it later be properly challenged in court, under § 140.420, a county collector is instructed to issue a tax deed upon the expiration of one year from the date of the tax sale should the tax sale purchaser present its tax sale certificate.

Therefore, the Eastern District Court of Appeals is correct in interpreting the language in § 140.405, RSMo, requiring that notice be sent “at least ninety days prior to the date when a purchaser is authorized to acquire the deed,” as requiring that notice should be sent ninety days from the end of the one-year statutory period following the tax

sale. The end of the one-year statutory period represents a known, fixed deadline before which a tax deed certainly will not be issued but after which a county collector may issue a tax deed under § 140.420, RSMo if the tax sale purchaser so requests, perhaps even prematurely so and perhaps depending upon the individual circumstances surround each tax sale.

Moreover, within the context of tax sale procedures, basic public policy should support earlier, uniform notification of property owners regarding the risk of a permanent taking of their property by a private party who is seeking to acquire the property at a small fraction of its value, especially when the mechanism for notification of that right to redeem is entrusted to a tax sale purchaser who is neither unbiased nor disinterested. Any additional period for redemption following the one-year statutory period for redemption will be variable, uncertain, and subject to arbitrary and discriminatory determination, lending further credence to the Eastern and Southern Districts' interpretation of the timing requirements. Leaving the timing and content of such a notice up to the discretion of the tax sale purchaser, as opposed to securing the timing and content requirements to the one-year statutory period for redemption, unnecessarily promotes a process in which the potential for error, uncertainty, and deception is increased at the expense, risk, and peril of the property owner. Basic public policy should dictate that the rights of the property owner take precedent over the convenience with which of a tax sale purchaser may acquire property at a small fraction of its worth, especially when the State's collection of any taxes owed is already secured following the issuance of a Certificate of Purchase (be it from the tax sale purchaser or a property owner who subsequently

exercises the right to redeem) and tax sale purchasers are repaid the amount of their investment plus interest in the event a property owner exercises the right to redeem.

Therefore, the interpretation of timing requirements for a Notice of Right to Redeem under § 140.405, RSMo proffered by the Missouri Court of Appeals, Eastern District, is more compelling than that of the Western District because it better reconciles the statutory duties of the county collector versus those of the tax sale purchaser, better addresses the fundamental principles of public policy at issue, and better promotes certainty in the law underlying tax sales and property owners' right to redeem.

2. Content of Notice

In regard to the "content" of the Notice of Right to Redeem, the Eastern and South Districts have held that a Notice of Right to Redeem must contain a statement indicating the time period in which the right to redeem will expire. See *Keylien Corp. v. Johnson*, 284 S.W.3d at 612; *Drake Development & Const., LLC v. Jacob Holdings, Inc.*, 306 S.W.3d at 174. The Western District has held that no such statement need be included. See *United Asset Mgmt.*, 332 S.W.3d at 175. In its Substitute Brief filed with this Court, Appellant agrees with Respondents that the Western District's interpretation of the statute in *United Asset Management* would likely fall short of the requirements of due process, but Appellant argues that the Notice of Right to Redeem in this case should nonetheless suffice under a degree of "practical flexibility" hereto unrecognized by Missouri Courts and contrary to the long-standing position of Missouri's Courts regarding strict adherence and enforcement of tax sale statutes and requirements.

In this case, the notice sent by Vest Holdings would clearly fail to satisfy the requirements of § 140.405, RSMo as previously interpreted by the Missouri Court of Appeals, Eastern and Southern Districts. The notice was not sent at least ninety days prior to the end of the one-year statutory period for redemption, and it did not correctly describe a period for redemption (one-year or otherwise). Under the Western District's interpretation of the requirements of § 140.405, RSMo, as proffered in *United Asset Management*, Vesta Holding's notice likely would have been sufficient in regard to timing, and it is possible that Vesta Holding's notice would have been sufficient in regard to content under that ruling had it merely stated *nothing* in regards to the period for redemption.

However, Appellant and Respondents agree that the Western District's position likely falls short of the requirements of due process and that a Notice of Right to Redeem should indeed indicate the pendency of the matter, including the existence of some period for redemption. Indeed, Vesta Holdings' Notice of Right to Redeem was not silent as to the period for redemption, but Vesta Holding's notice contained an incorrect period for redemption. *Even if* § 140.450, RSMo were to be interpreted as allowing for the Notice of Right to Redeem to be sent *after* the ninetieth day preceding the end of the one-year statutory period for redemption (consistent with the interpretation of the Western District but contrary to the interpretation of the Eastern and Southern Districts), the notice sent by Vest Holdings would still be insufficient under § 140.405, RSMo because it does not state the *correct* period for redemption and in fact contained incorrect and misleading information.

C. Incorrect and Misleading Information Regarding the Right to Redeem Cannot Satisfy the Requirement under § 140.405, RSMo that a Tax Sale Purchaser “Shall Notify” Property Owners of Their “Right to Redeem.”

Regardless of the inconsistencies among recent rulings, *all* Missouri Courts have repeatedly sought to enforce the provisions of § 140.405, RSMo and held that a failure of the tax sale purchaser to comply with the provisions of the statute results in the tax sale purchaser’s loss of all interest in the real estate. Indeed, the statute specifically states as much, and, “ ‘(t)ax sales have always been carefully scrutinized by this court.’ ” *Stadium West Properties*, 133 S.W.3d at 141(citing the Missouri Supreme Court in *Bussen*). Therefore, *even if* the Missouri Court of Appeals, Western District, was correct in finding that the “shall notify” language in § 140.405, RSMo does not require that *any period* for redemption need be stated in a Notice of Right to Redeem (a position that even the Appellant rejects in its brief), it would still be insufficient under § 140.405, RSMo to provide *incorrect* and *misleading* information regarding the “right to redeem” and any redemption period stated in the notice.

Indeed, in *United Asset Management* the Western District reasoned that the “one-year” language required by the Eastern and Southern districts is undesirable because it may be misleading in regard to the *additional* time for redemption that a property owner may have even *after* the expiration of the one-year period running up until the actual acquisition of the tax deed by the tax sale purchaser. See *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d at 171, footnote 9. Thus, even when interpreting § 140.405, RSMo as requiring *no* period for redemption be stated in a Notice of Right to Redeem, the

Western District still expressed a distaste for including incorrect or misleading information regarding the right to redeem within the notice.

In this case, Vesta Holdings failed to send notice to Defendants at least 90 days prior to the end of the one-year redemption period, *and* Vesta Holdings stated an *incorrect* redemption period within its notice to Defendants. Such a notice should fail under *any* interpretation of § 140.405, RSMo. The notice sent out by Vesta Holdings was purportedly not sent until, July 25, 2008, 33 days before the end of the one-year redemption period, and it incorrectly stated “you will have 90 days to redeem said property. If you fail to redeem the property by said date you will be forever foreclosed and barred from redemption.” In fact, the Bosches would have until November 3, 2008 (101 days later) to redeem, and the notice was therefore incorrect and misleading to the extent that it did not account for any additional time for redemption that the property owners would have *after* the expiration of the stated 90-day period, running up until the actual acquisition of the tax deed by the tax sale purchaser.

Under the very same logic put forward by the Western District in *United Asset Management* in justifying its rejection of the “one-year” statutory redemption language required by the Eastern and Southern Districts (i.e. that it is potentially misleading for a Notice of Right to Redeem to disregard the *additional* time property owners may have to exercise their right to redeem should the actual tax deed not be issued until sometime *after* the redemption period stated in the notice), *the notice in this case should also be deemed incorrect and misleading.*

Though the specific issue remains unaddressed by Missouri Courts⁴, the effects of over-stating the period for redemption (in which a tax deed is obtained *before* a specific date indicated) and under-stating the period for redemption (in which a tax deed is obtained *after* a specific date indicated) have the same potential to interfere with property owners' exercise of their right to redeem by misinforming the property owners that they have either *more* or *less* time to redeem than they actually have under the law. Either type of misinformation can undermine the property owner's exercise of their right to redeem, and the burden should be on tax sale purchasers to provide correct information, or at least not provide *incorrect* information, rather than on the property owners to prove to what extent the misinformation provided by the tax sale purchaser interfered with the exercise of their right to redeem. As previously stated by the Missouri Court of Appeals, Western District, in analyzing the inclusion of an incorrect property description within a tax sale notice, "(i)n light of our Supreme Court's repeated and emphatic commands that county collectors and tax sale purchasers follow the strict letter of Missouri law governing such sales, we seriously doubt that it intended...to impose an actual knowledge/detrimental reliance requirement on delinquent taxpayer-

⁴ The nature of the differing interpretations of § 140.405, RSMo by Missouri's appellate courts has thus far preempted discussion on how to best address within a notice the possible additional period for redemption that may follow the guaranteed one-year statutory period for redemption, if needed. However, Respondents advocate that tax sale purchasers take their lead from the statutory language itself and notify property owners that the applicable period for redemption will be "at least" one-year from the date of the tax sale or "at least" 90 days from receipt of the Notice of Right to Redeem, as discussed in further detail below.

landowners divested of their legal title thereby.” *Stadium West Properties, L.L.C. v. Johnson*, 133 S.W.3d at 134-135 (internal citations omitted).

In its Brief, Appellant argues in favor of a “practical flexibility” in regard to tax sale purchasers and their compliance with the statutory requirements for tax sales due to the difficulty in complying with the statutes (especially after having waited more than 275 days after the tax sale to send a Notice of Right to Redeem) and predicting or controlling the exact date upon which a county collector will issue a tax deed. First, proper planning, organization and aforethought by the tax sale purchaser could address most of Appellant’s concerns without resorting to the requested type of “practical flexibility” which subjugates the property and due process rights of property owners to the convenience of tax sale purchasers. Second, and more importantly, none of these limitations *need* prevent a tax sale purchaser from making true and accurate statements notifying property owners of their Right to Redeem. Even if a tax sale purchaser cannot predict the exact date upon which a county collector will issue a tax deed, a tax sale purchaser can correctly and accurately state that the period for exercising the right to redeem will extend for “at least” one-year following the date of the tax sale, or if necessary, “at least” 90 days following the notice. Alternatively, a tax sale purchaser could correctly and accurately state that the period for redemption extends until a tax deed is issued and recorded by the county collector and that the tax sale purchaser may request the tax deed after one year following the date of the tax sale, or if necessary, 90 days following the notice.

There are certainly additional ways in which a tax sale purchaser may correctly and accurately indicate the period for redemption (one-year or otherwise), but it will suffice to say that there is no need for the kind of “practical flexibility” sought by Appellant on behalf of tax sale purchasers because there is no *need* for a tax sale purchaser to resort to stating incorrect or misleading information regarding the right to redeem. Indeed, stating incorrect or misleading information regarding the right to redeem under the guise of “practical flexibility” is contrary to the statutory requirements requirements under § 140.405, RSMo that a tax sale purchaser “shall notify” property owners of their “right to redeem,” contrary to the fundamental purpose of due process, and contrary to the long-standing position of Missouri’s Courts that tax sale purchasers shall strictly comply with the statutes governing tax sales.

D. Other Grounds for Upholding Summary Judgment

On appeal, appellate courts “are to affirm the trial court's grant of summary judgment for the respondent if the same is correct under any theory supported by the record developed below and presented on appeal.” *Victory Hills Ltd. Partnership I v. NationsBank, N.A. (Midwest)*, 28 S.W.3d 322, 327 (Mo. App. W.D., 2000) (citing *Thomas Berkeley Consulting Eng'r, Inc. v. Zerman*, 911 S.W.2d 692, 696 (Mo.App. E.D., 1995) and *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. banc 1984)).

In this case, the entry of Summary Judgment by the trial court should also be upheld on the additional grounds that the Notice of the Right to Redeem sent by Vesta Holdings contained a legal description that was incorrect and/or inconsistent with the legal description used by Clay County Collector, resulting in a failure to comply with the

provisions of § 140.405, RSMo and a loss of all interest in the real estate on behalf of Vesta Holdings and/or Sunrise Atlantic. Specifically, the Certificate of Purchase and Tax Deed issued by the Clay County Collector lists a different property description and an inconsistent addition/subdivision than that listed in the “Notice of Right to Redeem” filed with the trial court by Plaintiff Harpagon. (LF 026, 031, & 033).

In this case, the Clay County Collector conducted a tax sale and issued a Certificate of Purchase to Sunrise Atlantic for property described as:

SHERWOOD ESTATES 3RD PLAT LT 32

BLK 10 003535 NE 49th TERR

The Clay County Collector then issued a Tax Deed providing the legal description as:

31/51/32

SHERWOOD ESTATES 3rd PLAT LT 32 BLK 10

Yet, the Notice of Right to Redeem filed with the trial court by Plaintiff listed the addition/subdivision as SHERWOOD ESTATES, rather than SHERWOOD ESTATES 3RD PLAT. In addition, the Certificate of Purchase sets out a section, township and range, but does not designate any city for the subject real estate itself. The Notice of Right to Redeem sent out by Vesta Holdings omits any reference to section, township or range, and includes only a reference to “City of Kansas City North.”⁵ (LF026 & 031). Plaintiff Harpagon then listed the same incorrect and/or inconsistent property description

⁵ The uncontested facts in this case were that the underlying property is located in Kansas City, Missouri and not the municipality of North Kansas City, Missouri. (LF 0053).

in its Petition to Quiet Title filed with the trial court, describing the underlying property as:

ALL OF LOT THIRTY-TWO (32), BLOCK TEN (10),
SHERWOOD ESTATES, AN ADDITION IN THE CITY OF
KANSAS CITY NORTH, CLAY COUNTY, MISSOURI,
ACCORDING TO THE RECORDED PLAT THEREOF.

Section 140.290, RSMo requires that after receiving payment following a tax sale, the County Collector shall give the purchaser a Certificate of Purchase which shall describe the land purchased at the tax sale. Section 140.405, RSMo requires a tax sale purchaser to send a Notice of the Right to Redeem to any publicly recorded owner of the property purchased at the tax sale. In this case, the record before the trial court revealed that the Notice of Right to Redeem sent by Vesta Holdings contained a different property description than the Certificate of Purchase and subsequent Tax Deed issued by the Clay County Collector.

This Court previously held that the use of an incorrect addition or subdivision within a property description was sufficient grounds for voiding a subsequent tax deed. See *Costello v. City of St. Louis*, 262 S.W.2d 591 (Mo.1953) (overruled on other grounds in *Powell v. County of St. Louis*, 559 S.W.2d 189, 196 (Mo. banc 1977)). In *Costello*, this Court described the use of an incorrect subdivision within the property description as a “glaring and fatal instance of midescription...apparent upon the record before us,” and voided the subsequent Tax Deed issued by the county collector. *Id* at 595. More recently, the Missouri Court of Appeals, Western District, cited approvingly to this Court’s

opinion in *Costello* when assessing the statutory requirements for tax sale conveyances in *Stadium West Properties v. Johnson*, 133 S.W.3d 128. In *Stadium West Properties*, the Western District first recounted that, “it has universally been the rule that statutory requirements in proceedings in rem for the sale of land for delinquent taxes must be complied with strictly.” *Id* at 134. The Western District went on to reaffirm that a property description used for tax sale purposes needed to not only describe the property with reasonable certainty but that the county collector and tax sale purchaser are subject to additional statutory requirements that should be strictly enforced. *Id* at 134-135 (“In light of our Supreme Court’s repeated and emphatic commands that county collectors and tax sale purchasers follow the strict letter of Missouri law governing such sales, we seriously doubt that it intended...to impose an actual knowledge or detrimental reliance requirement..” (internal citations omitted)).

In this case, it is clear upon the record that Vesta Holdings’ Notice of Right to Redeem did not contain the same property description as the Certificate of Purchase issued by the Clay County Collector, and instead, listed a different addition/subdivision, omitted the section/township/range, and inserted a reference to the “City of Kansas City North” where the county collector had not. Missouri Courts have previously held that such discrepancies within tax sale notices rendered the subsequent tax deed void, and the statutory obligations for county collectors and tax sale purchasers must be complied with

strictly. *Id* at 134⁶. In this instance, Vesta Holdings' use of a different property description and inconsistent addition and/or subdivision than that listed in the Certificate of Purchase (and indeed, the subsequent Tax Deed itself) was a failure to comply with notice requirements set out in § 140.405, RSMo and resulted in the loss of all interest in the real estate by Vesta Holdings and/or Sunrise Atlantic. Upon this evidence, the trial court was correct to find that Vesta Holdings and/or Sunrise Atlantic lost all interest in the underlying property by failing to comply with § 140.405, RSMo, and thus was correct in entering its Summary Judgment, quieting title in favor of the Bosches.

⁶ Respondents note that these past cases dealt with the statutory requirements for notices sent by the county collector, rather than the tax sale purchaser, but argue that the failure by either to meet statutory requirements is sufficient to render a subsequent tax deed void, especially since § 140.405, RSMo specifically provides that "failure of the purchaser to comply with this provision shall result in such purchaser's loss of all interest in the real estate."

II. The Trial Court Did Not Err In Denying Appellant's Motion For Summary Judgment Because There Were Disputed Issues Of Material Fact In That Harpagon MO, LLC, Had Not Shown That It Received A Valid Transfer Of Any Legal Interest In The Subject Property.

(Response To Appellant's Point Relied On II)

A. Overview

Ordinarily an Order denying Summary Judgment is not a final Order ripe for Appellate Review. However, such rulings may be taken up if they are co-extensive of a separate Order or Judgment that is otherwise properly before an appellate court. In this case, Defendants-Respondents Bosch contend that the Appellant Harpagon's Point II on appeal (seeking reconsideration of the trial court's denial of Plaintiff-Appellant Harpagon's separate Motion for Summary Judgment) is not a proper issue to bring before this Court. Harpagon's Motion for Summary Judgment necessarily relied upon additional and further substantive facts that go beyond those underlying and necessary to the determination of Defendants-Respondents Bosches' own Motion for Summary Judgment. Many of these additional and further facts necessary to Harpagon's separate Motion for Summary Judgment were never properly established by Harpagon and remain contested, including the nature of the relationship between Harpagon and Sunrise Atlantic, the nature of any transfer of legal interest in the underlying property from Sunrise Atlantic to Harpagon, and whether Harpagon and/or Sunrise Atlantic complied with additional requirements under Missouri's statutes regarding the bidding on, acquisition of, and/or transfer of Certificates of Purchase by non-resident corporations.

B. Plaintiff Harpagon's Motion for Summary Judgment Did Not Contain a Separate Statement of Uncontroverted Facts.

Plaintiff-Appellant's Motion for Summary Judgment contained *NO* separate statement of uncontroverted facts and thereby failed to comply with Rule 74.04. As pointed out in Paragraph 1 of Defendants' Response to Plaintiff's Motion for Summary Judgment, "Plaintiff's Motion for Summary Judgment does not comply with the minimum requirements of Rule 74.04 in that Plaintiff did not include, or identify, a Statement of Uncontroverted Facts, and the various facts alleged within Plaintiff's Suggestions in Support are intertwined with legal argument." (LF 013). This deficiency alone provided adequate grounds for the trial court to deny Plaintiff-Appellant's Motion for Summary Judgment because it did not provide the trial court with a clear uncontroverted factual basis upon which it could consider or grant Plaintiff's Motion.

Moreover, Plaintiff's failure to include a clear statement of uncontroverted facts deprived the Defendants of the opportunity to directly respond to and challenge the facts necessarily underlying Plaintiff's claim. Defendants stated as much in their Response to Plaintiff's Motion for Summary Judgment, Paragraph 3, "(m)any of the alleged facts upon which Plaintiff relies in its motion are unsupported and/or are contradicted by Defendants, including but not limited to the nature of Plaintiff's own actions regarding the underlying property, the lack of compliance with the requirements under § 140.405, RSMo by Plaintiff or Sunrise Atlantic, and the nature of any assignment from Sunrise Atlantic to Harpagon MO (which would likely have been subject to the requirements of § 140.290, RSMo)." (LF046).

Further, many of the facts intertwined within Plaintiff's Suggestions In Support of its Motion for Summary Judgment were clearly erroneous, were contradicted by Plaintiff's own prior pleadings, and/or are contrary to the facts presented to this Court in its Substitute Brief. Most notably, in its Suggestions in Support, Plaintiff disregarded the roles, and even existence, of Sunrise Atlantic and Vesta Holdings altogether, and mistakenly attributed the actions and legal status of either to Harpagon itself⁷. (LF 020-021). Therefore, the trial court was correct to deny Plaintiff Harpagon's Motion for Summary Judgment due to Plaintiff's failure to include a clear, separate Statement of Uncontroverted Facts.

C. Plaintiff Did Not Show That It Received A Valid Transfer Of Any Interest In The Underlying Property.

Plaintiff-Appellant Harpagon claims some form of derivative interest in the underlying property based on the previous tax sale purchase by Sunrise Atlantic. The nature of this relationship and manner in which any interest in the underlying property was transferred has never been explained. Upon considering competing Summary Judgment motions, the trial court ruled that Sunrise Atlantic lost all interest in the subject real estate by failing to comply with the provisions § 140.405, RSMo, and therefore

⁷ Respondents have no reason to believe that these three companies are indeed one and the same as that they are incorporated in different states, and they appear to have identified themselves as separate companies in the past. However, to the extent that they are one and the same, no evidence in support of this contention was presented to the trial court. Indeed all evidence was to the contrary.

Harpagon itself could not have any derivative legal interest in the underlying property, regardless of the nature of the relationship or the manner in which any interest in the property was purportedly transferred. However, even assuming *in arguendo* that Sunrise Atlantic *did not* lose all interest in the subject real estate by failing to comply with § 140.405, RSMo, Sunrise Atlantic's interest in the subject real estate could still fail on other grounds, and Harpagon must still show that it legally received a valid assignment of interest or title from Sunrise Atlantic in regard to the underlying property in order to prevail, which it failed to do. Defendants have argued that Sunrise Atlantic and Harpagon *both* failed to satisfy the requirements of various Missouri Statutes *in addition to* §140.405, RSMo in relation to the underlying tax sale and subsequent Certificate of Purchase and Tax Deed. (LF 015, 046, & TR 11-12). Indeed, § 140.410, RSMo clearly and unequivocally states that, "Certificates of purchase cannot be assigned to nonresidents or delinquent tax payers." Yet, Harpagon, a nonresident, foreign company, claims it nonetheless received such an assignment from Sunrise Atlantic, itself a nonresident, foreign company.

Missouri has specific statutory requirements governing bids by nonresidents at tax sales, the issuance of Certificates of Purchase to nonresidents following tax sales, and the assignment of Certificates of Purchase. See § 140.190.2, RSMo. In this case, Defendants have maintained that Sunrise Atlantic and/or Harpagon, both non-resident companies, did not comply with these statutory requirements in regard to the bidding and obtaining of the Certificate or Purchase as well as subsequent efforts to assign the Certificate of Purchase from one entity to another. (LF 015, 046, & TR 11-12).

Section 140.290.1-2, RSMo sets out several additional requirements governing the content of a Certificate of Purchase (including a description of the land), and § 140.290.3-5, RSMo sets out several further requirements governing any assignment of a Certificate of Purchase following a tax sale. § 140.290.3 specifically states that, “(s)uch certificate shall be assignable, but no assignment thereof shall be valid unless endorsed on such certificate and acknowledged before some officer authorized to take acknowledgment of deeds and an entry of such assignment entered in the record of said certificate of purchase in the office of the county collector.” § 140.290.5 specifically states that, “(n)o collector shall be authorized to issue a certificate of purchase to any nonresident of the state of Missouri or to enter a recital of any assignment of such certificate upon his record to a nonresident of the state, until such purchaser or assignee of such purchaser, as the case may be, shall have complied with the provisions of section 140.190 pertaining to nonresident purchasers.”⁸

In this case, Defendants challenged that any valid assignment from Sunrise Atlantic to Harpagon occurred in compliance with the statutory provisions, and Defendants stood prepared to refute any claims otherwise prior to the trial court granting Summary Judgment in favor of the Defendants on other grounds. In this regard,

⁸ Respondents concede that it is difficult for one to reconcile the statutory provisions of § 140.290.5, RSMo with the provision of § 140.410, RSMo which clearly states that, “(c)ertificates of purchase cannot be assigned to nonresidents or delinquent tax payers,” other than to note that the former only allows for the collector to enter a “recital” of an assignment but does not state that such assignment shall be deemed valid if later challenged.

Plaintiff's clearly erroneous statements contained within its Suggestions in Support purporting that Harpagon *itself* undertook various acts now attributed to Sunrise Atlantic and Vesta Holdings limited the extent to which debate could be heard on these matters in relation to Harpagon's Motion for Summary Judgment, prior to Summary Judgment being entered in favor of the Defendants on other grounds.

D. Claims of Unclean Hands Raised by Defendants Would Render the Notice of Right to Redeem Sent by Vesta Holdings Moot.

At the trial court level, Respondents raised arguments concerning the acts of and interactions among Harpagon, Sunrise Atlantic, and Vesta Holdings not only because the nature of these relationships effect the validity of the Appellant's claims regarding its alleged compliance with the statutory requirements but also because such information is relevant to the affirmative defenses previously raised and plead by Defendants- Respondents Bosch in their Answer and Suggestions in Opposition to Plaintiff's Motion for Summary Judgment. (LF 046 &047).

In their Affirmative Defenses, the Bosches raised the issue of "unclean hands" regarding additional actions undertaken by Plaintiff and/or Sunrise Atlantic, but Harpagon did not address these affirmative defenses in its Motion for Summary Judgment. Even if Summary Judgment in favor of the Defendants-Respondents were to be reversed, the trial court was still correct to deny Plaintiff-Appellant's prior Motion for Summary Judgment since these factual issues remained unanswered and unaddressed.

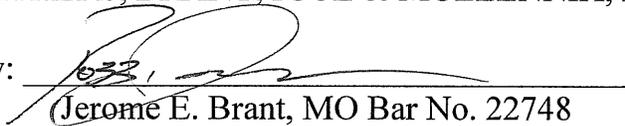
CONCLUSION

The trial court was correct to grant Defendants-Respondents Bosches' Motion for Summary Judgment. The "Notice of Right to Redeem" sent by Vesta Holdings and filed with the trial court below was insufficient and not in compliance with the provisions of § 140.405, RSMo requiring tax sale purchasers "shall notify" property owners of their "right to redeem." The notice sent by Vesta Holdings was not sent at least 90 days prior to the end of the one-year statutory period for redemption, contained *incorrect* information related to the period for redemption, and contained a *different* legal description and addition/subdivision than that which was included in the Certificate of Purchase issued by the Clay County Collector. These deficiencies resulted in a notice that did not comply with the provisions of § 140.405, RSMo, and thus Sunrise Atlantic lost all interest in the underlying property. Therefore, the trial court was correct in granting Summary Judgment in favor of Defendants-Respondents Bosch.

The trial court was further correct in denying Plaintiff Harpagon's Motion for Summary Judgment in that Harpagon failed to comply with Rule 74.04 by not providing the trial court with a clear, separate Statement of Uncontroverted Facts, and there remained several unresolved issues of material fact underlying both the claims of Harpagon as well as the affirmative defenses raised by the Defendants at the time Summary Judgment was entered in favor of the Bosches.

Respectfully submitted,

WITHERS, BRANT, IGOE & MULLENNIX, P.C.

By:  _____

(Jerome E. Brant, MO Bar No. 22748

Robb A. Denney, MO Bar No. 56774

Two South Main Street

Liberty, MO 64068

(816) 781-4788 - Phone

(816) 792-2807 – Facsimile

jbrant@withersbrant.com

rdenney@withersbrant.com

Attorneys for Respondents

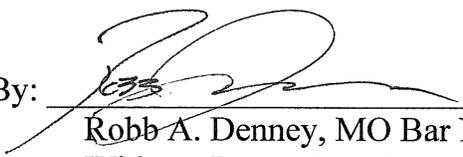
Edward and Nancy Bosch

CERTIFICATE REQUIRED BY RULE 84.06(c)

I hereby certify that Appellant's Substitute Brief complies with the word limitation contained in Mo.R.Civ.Proc. 84.06(b), because the Brief contains 9,266 words. I further certify that all distributed electronic files containing this brief have been scanned for viruses and are virus-free.

Respectfully submitted,

WITHERS, BRANT, IGOE & MULLENNIX, P.C.

By: 
Robb A. Denney, MO Bar No. 56774
Withers, Brant, Igoe & Mullennix, .P.C.
Two South Main Street
Liberty, MO 64068
(816) 781-4788 - Phone
(816) 792-2807 – Facsimile
rdenney@withersbrant.com

CERTIFICATE OF SERVICE

I hereby certify that two copies, and an electronic copy, of the foregoing Respondents' Substitute Brief were mailed via U.S. first class mail on this 27th day of January, 2012, to:

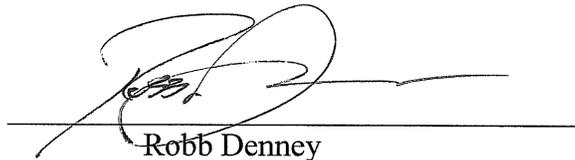
Scott F. Walterbach
300 NE Brooktree Lane, Suite 100
Gladstone, Missouri 64118
Fax: 816-436-2574

ATTORNEY FOR APPELLANT

Arnold Day, Esq.
9800 NW Polo Dr., Suite 100
Kansas City, Missouri 64153
Fax: 816-454-3678

GUARDIAN AD LITEM FOR UNKNOWN DEFENDANTS

Terence G. Lord, Clerk
Missouri Court of Appeals, Western District
1300 Oak Street
Kansas City, Missouri 64106


Robb Denney