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JURISDICTIONAL STATEMENT¹

Respondent/Defendant City of Gladstone, Missouri ("Gladstone") accepts the JURISDICTIONAL STATEMENT presented by the Appellant/Plaintiffs Clay County Realty Company and Edith Investment Company (collectively "CCR").

¹ The two-volume legal file will be abbreviated "LF" and cited by volume and page number (e.g., II LF 254). Items contained in the appendix to this Brief will be cited parenthetically by page number, e.g. , (A2). The Appellants' Brief will be referred to as CCR Brief with page numbers, e.g. CCR Brief 4.)

STATEMENT OF FACTS

Gladstone does not accept CCR's STATEMENT OF FACTS. CCR bases its facts off the first amended petition which they claim Gladstone accepted as true. (CCR Brief, p. 9, footnote 2). This statement is patently disingenuous and will be discussed in detail later.

The lower Court, in granting the Respondent's Motion for Summary Judgment, relied on the following Uncontroverted Material Facts which provide the best Statement of Facts for this Court. (II LF 286).

A. Uncontroverted Material Facts.

1. Plaintiffs are corporations organized and existing pursuant to Missouri law. I LF 20.
2. City is a municipal corporation organized and existing under the laws of Missouri and located in Clay County, with all attendant powers of a municipality including the power of eminent domain. I LF 20.
3. Plaintiffs are the record owners of the following described real property (the "Property"), known as the Gladstone Plaza Shopping Center, located at 64th and North Oak Trafficway in Gladstone, Clay County, Missouri. I LF 20; 24-26.
4. The Property consists of three (3) buildings designed for retail use ("Buildings"). I LF 21.
5. Venue is proper in this County, as both the Property and City are located herein. I LF 21.

6. On or about May 12, 2003, City passed Ordinance No. 3.865, declaring that the Property is blighted and in need of redevelopment pursuant to Chapter 353 RSMo. I LF 21.

7. Following passage of Ordinance No. 3.865, City proceeded to solicit and receive bids for the urban development described in Ordinance No. 3.865. I LF 21.

8. Nearly one year after the Property was declared blighted, in May 2004, the City entered into a Memorandum of Understanding with WCP Gladstone Plaza ("WCP"), headed by Jeffrey Peterson ("Redevelopment Contract"). The Redevelopment Contract was intended to establish the obligations for a redevelopment plan for the Property and to confer on WCP the rights to redevelop the Property. I LF 21.

9. In August 2005, City withdrew designation of WCP as developer for the Property and declared the Redevelopment Contract no longer in effect. I LF 21.

10. City has never made an offer to plaintiffs to purchase the Property. I LF 21.

11. On August 23, 2005, City solicited proposals for a Tax Increment Financing ("TIF") Plan, pursuant to Sec. 99.800 et seq. RSMo. in conjunction with a proposed Transportation Development District Sec. 238.200 eq seq. RSMo. Responses for proposals were due by 6:00 p.m. September 26, 2005. I LF 21.

12. Following the adoption of Ordinance No. 3.865, the tenant and business occupancy rate in the Property dropped substantially, and has continued to drop substantially. I LF 21.

13. Substantial portions of the Buildings are unoccupied and plaintiffs receive no lease and/or rent payments therefrom. Plaintiffs are still required to continually maintain and to pay operating costs, including but not limited to insurance, taxes, utilities, repair, maintenance and general upkeep relating to the Property. I LF 21.

14. On or about October 24, 2005, the City adopted Ordinance No. 3.972 designating the Property blighted under Sections 99.800, et seq., RSMo and approving a TIF Plan for the Property. I LF 21.

15. The TIF Plan approved by the City provides for the use of eminent domain for economic development. I LF 21.

16. Bill No. 05-35 which proposed approval of the TIF Project for the Property was placed on first reading and not adopted. I LF 22.

17. Approval of the TIF Project requires separate action by the City after approval of the TIF Plan pursuant to Section 99.800 et seq. RSMo. I LF 22.

18. Section 99.800, et seq., RSMo, provides certain time limitations regarding the effective dates for development and acquisition within a TIF area, which dates are measured from the date of approval of the TIF Project. I LF 22.

19. There are no "plan timetables" for acquisition and development of the Plaintiffs' property contained in Gladstone City Ordinance No. 3.865. I LF 40; 47-52.

20. The City of Gladstone, Missouri has not executed a redevelopment contract and therefore there are no contractual terms that the City has failed to enforce with reference to timetables for acquisition or redevelopment of property. I LF 40-41; 53-56.

21. There is a proposed property acquisition date in the draft TIF documents which provides for the acquisition of the property as late as November 2006. I LF41; 53-56.

22. The City has been consistently moving forward with the redevelopment of the blighted area owned by the Plaintiffs since enactment of Ordinance No. 3.865 on May 12, 2003 and that the City has solicited developers and potential retail businesses and has in fact released approximately 20 acres from the blight designation so that the Plaintiffs could sell these portions of the site to developers for residential units and for retail pad sites. I LF 41.

23. The City has, from the very beginning, requested the cooperation of the Plaintiffs in the redevelopment of the property and has tendered incentives to the Plaintiffs to redevelop their own property from its blighted condition. I LF 41; 53-56.

24. The City has, since May 12, 2003, worked with three different redevelopers, all of whom had to establish adequate financial resources prior to their selection in order to be considered as a redeveloper. I LF 41; 53-56.

25. The City has not harassed the Plaintiffs by City-initiated building inspections, notice of municipal code violations, or property maintenance violations, as City action has been in response to citizen complaints, tenant requests and a fire on the premises, and the City has not prosecuted the Plaintiffs since 2003, and has always only sent courtesy notices to the Plaintiffs' local representative requesting that the identified problems be corrected. I LF 41; 53-56; 78; II LF 80-227.

26. The City believes that the inability on the part of the Plaintiffs to attract and keep tenants for a reasonable rate of return on the property is because of Plaintiffs' own inability to properly manage its property. I LF 42; II LF 228-229.

27. The City has in fact taken steps to proceed with actual redevelopment of the property owned by the Plaintiffs and declared blighted by Ordinance No. 3.865 and there was no redevelopment contract with WCP with reference to the property. I LF 42; 53-56.

28. Under the Missouri statutory guidelines found in § 99.820.1(3) RSMo, the City is still within its initial 5-year window of redevelopment and has already approved the redevelopment of approximately 20 acres of the blighted property leaving approximately 17.3 acres left to be redeveloped since May 2003. I LF 42; 53-56.

29. The City has not actively discouraged tenants or prospective tenants from entering into leases and/or renewing leases with customary terms and conditions. The City has in fact been supportive of Plaintiffs to existing and prospective tenants. I LF 42; 53-56; II LF 230-239.

The afore set-out Statement of Facts 1 through 29 the Uncontroverted Material Facts presented pursuant to Civil Rule 74.04(c)(1) for purposes of the summary judgment and were not factually disputed by Appellant CCR.

B. Procedural History

Appellants filed suit on October 20, 2005 and filed the First Amended Petition on November 7, 2005. I LF 1; 7. The Appellants' First Amended Petition plead only one cause of action which was an action pursuant to 42 U.S.C. § 1983. I LF 7-14.

Respondent filed its Answer on November 22, 2005. I LF 15-18. Respondent then, on March 15, 2006 filed a Motion for Judgment on the Pleadings or in the Alternative Summary Judgment. I LF 19-26. Under the Statement of Uncontroverted Material Facts, Respondent set out eighteen Uncontroverted Material Facts that were taken from the Plaintiffs' First Amended Petition, but did not, for purposes of the Motion for Summary Judgment, admit all facts contained in CCR's First Amended Petition. I LF 20-22. CCR, in its response, did not admit or deny each of the City's factual statements in numbered paragraphs that corresponded to the City's numbered paragraphs, as required in Civil Rule 74.04(c)(2). I LF 33-39. But, CCR did argue that there were material facts although no factual support of same were a part of the pleading.

The City, in its Reply in Support of Defendant City of its Motion for Judgment on the Pleadings or in the Alternative, Summary Judgment, did provide additional Uncontroverted Material Facts. I LF 40-42. This was as allowed under Civil Rule 74.04(c)(3). The additional Uncontroverted Material Facts were in response to CCR's argument in its response to the motion for summary judgment that there were still open issues of alleged "aggravated delay" and "untoward activity." I LF 35.

CCR filed its Sur-Reply to the City's Reply in which they responded to the City's additional Uncontroverted Material Facts by argument only. II LF 232-236. Gladstone then moved to strike the CCR's response to the Uncontroverted Material Facts because of CCR's failure to comply with Civil Rule 74.04(c)(2) which mandates a response to the Uncontroverted Material Facts to be a specific denial that includes specific reference to discovery, exhibits or affidavits that demonstrate specific facts showing that there is a

genuine issue for trial. II LF 243. The City, in addition, asked that the Court then take the Uncontroverted Material Facts presented by the City as admitted or an admission of the truth of the numbered paragraphs, as provided in Civil Rule 74.04(c)(2). II LF 243. The Circuit Court granted the City's Motion to Strike the CCR response to the City's Motion for Summary and then entered summary judgment against Plaintiffs and in favor of Defendant on July 16, 2006. II LF 254 (A2). There was no indication in the docket entry or elsewhere in the record that the Court made any ruling on the City's Motion for Judgment on the Pleadings. On July 27, 2006, CCR moved to set aside the docket entry granting the summary judgment and striking the responses or in the alternative seeking clarification. On September 20, 2006, the Circuit Court denied CCR's Motion to Set Aside the Summary Judgment. II LF 276. CCR filed its Notice of Appeal on September 29, 2006. II LF 277-285.

ARGUMENT

A. Introduction

There are four questions pending: First, whether Gladstone was entitled to judgment as a matter of law. Second, whether Gladstone followed the Missouri Rules of Civil Procedure. Third, whether the “exhaustion” requirement is applicable. Fourth, whether the Missouri Court of Appeals correctly applied the “ripeness doctrine.” Each question is resolved in the affirmative.

B. Standard of Review

The criteria on appeal for testing the propriety of Judge Gabbert's entry of summary judgment are no different from those which should be employed by trial courts to determine the propriety of sustaining the motion initially. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 SW2d 371, 376 (Mo. banc 1993). The propriety of summary judgment is purely an issue of law. *Id.* The review is essentially de novo. *Id.*

Gladstone was a defending party and could therefore establish a right to judgment as a matter of law by showing (1) facts that negated any one of CCR's element facts; (2) that CCR, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of Appellant CCR's elements; or (3) no genuine dispute as to the existence of each of the facts necessary to support Respondent Gladstone's properly-pleaded affirmative defense. *ITT* at 381.

I. Gladstone was Entitled to Judgment as a Matter of Law because the Declaration of Blight is Not Considered a Constitutional Taking and Gladstone Followed the Missouri Rules of Civil Procedure (Response to CCR's First Point Relied On).

A. Gladstone Was Entitled to Judgment as a Matter of Law

Appellant CCR filed suit under 42 U.S.C. § 1983 (“1983”). By choosing this theory, CCR was required to show it was deprived of its civil rights. See generally, 42 U.S.C. § 1983. To that extent, CCR relied on MO. CONST. Art. I, § 26. The pertinent section states that “private property shall not be taken or damaged for public use without just compensation.”

A taking under Article I, Section 26 of the Missouri Constitution occurs when (1) property is physically taken; or (2) property rights are damaged in a constitutional sense. See *Hamer*, 304 S.W.2d 869 (1957). Damaging in a constitutional sense means an invasion or appropriation of some valuable right to a legal and proper use of its property to its injury. *Id.*

CCR never alleged its property was physically taken. Rather, CCR simply relied on Gladstone’s “blight” designation to form the basis of its takings claim. This approach is foreclosed.

Under Missouri law, a declaration of blight is not considered a taking. *State ex rel. Washington Univ. Medical Ctr. Redevelopment Corp. v. Gaerner*, 626 S.W.2d 373 (Mo. banc 1982) (A “declaration of blight is treated much the same as the threat of condemnation proceedings, the initiation of condemnation proceedings, and negotiation by the condemnor with property owners for the purchase of their property, all of which are considered neither *taking* nor *damaging* within the meaning of Mo. Const. Art. I, § 26”) (emphasis in original); *Tierney v. Planned Industrial Expansion Authority*, 742

S.W.2d 146, 154 (Mo. 1987) (“The bare declaration of conditions found to exist in an area does not meet any accepted definition of “taking””).

Faced with fatal precedent, CCR claimed it “expressly” alleged “undue delay” and “untoward acts.” (CCR Brief, p. 29, emphasis added). See also: (“CCR pointed to the allegations of “aggravated delay” and untoward activity” ...) (CCR Brief, p. 27).

CCR is reaching. First, CCR never used either term in its Petition. Although Gladstone recognizes this is not dispositive of the issue, it certainly underscores the extent to which CCR’s argument is manufactured. Second, even if CCR’s factual allegations are accepted as true, they fall woefully short of that which is required under Missouri law.

In Missouri, a 10-year threat of condemnation did not rise to aggravated delay or untoward activity. *State ex rel. Missouri Highway & Transp. Comm’n v. Edelen*, 872 S.W.2d 551, 558 (Mo. Ct. App. 1994) (“There was a [10 year] delay in the condemnation of Select’s land. However the excluded evidence does not reveal any specific evidence demonstrating aggravated delay, bad faith or untoward activity”).

In *Roth v. State Highway Comm’n*, 688 S.W.2d 775 (Mo. App. 1984), heavily relied upon by Appellant CCR, “aggravated delay” or “untoward activity” existed because the Missouri Highway Commission (“Commission”) pressured two villages into not issuing any building permits to the plaintiff; the Commission requested the villages refuse to re-zone Plaintiff’s tract of land; and the Commission essentially threatened Plaintiff, an attorney, that “unless plaintiff settled a totally different case with [the Commission],” condemnation would be filed.

Quite simply put, Respondent Gladstone has done nothing rising to the level of bad faith, aggravated delay or untoward activity.

More to the point, Appellant CCR did not allege facts even remotely similar to those in *Roth*. Appellant CCR merely argued, *inter alia*, that the Respondent Gladstone “failed to enforce the plan timetables for acquisition and redevelopment of the Property.” ¶ 14(a). It is totally inappropriate, not to mention disingenuous, to somehow draw a comparison between the Commission’s coercion in *Roth* and Respondent Gladstone’s reasoned and prudent deliberation.

In this instance, Appellant CCR cannot make the requisite “takings” showing. The property was neither physically taken nor damaged in a constitutional sense. Thus, Appellant CCR could not meet the essential element of its claim and summary judgment in favor of the Respondent Gladstone was in fact correct as a matter of law.

B. Gladstone Properly Presented its Motion for Summary Judgment

Appellant CCR represents to this Court that Gladstone accepted CCR’s first amended petition as true for purposes of motion for summary judgment. (CCR Brief, p. 9, footnote 2). This statement is patently disingenuous.

CCR continues representing to the Court that Gladstone admitted CCR’s pleaded facts *in its entirety*. (“In conformance with these unqualified admissions, Gladstone nowhere asserted in its initial motion that it was disputing any facts alleged by CCR ...”) (CCR Brief, p. 25); (“Having accepted as true CCR’s pleaded facts, Gladstone in the same motion could not have negated CCR’s elements or facts as contemplated ...”) (CCR

Brief, p. 26). (“For purposes of its motion, Gladstone accepted as uncontroverted the facts alleged by CCR ...”) (CCR Brief, p. 17) (“Gladstone twice accepted as true the facts alleged by CCR) (CCR Brief, p. 25).² The record indicates otherwise.

Respondent Gladstone only accepted as true, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 12, 13, 18, 19, 20, 22 and 23. A cursory review of Gladstone’s numbered paragraphs verifies this analysis. (LF 20-22). Thus, Appellant CCR’s premise is inherently flawed. This court should therefore review Appellant CCR’s entire arguments with a healthy dose of skepticism.

Appellant CCR also accuses Gladstone of procedural manipulation and sandbagging. (CCR Brief, p. 30). These accusations are unwarranted and rather questionable. Unfortunately, they form the basis for CCR’s procedural argument: (1) Gladstone improperly offered new facts for the first time in its reply; and (2) Gladstone changed its theory on reply. The upshot, according to CCR, is that it was deprived of its “one and only opportunity” to set forth contrary evidence.

Appellant CCR cannot have it both ways. If CCR did not properly plead facts showing “aggravated delay” and “untoward activity” it cannot argue Gladstone was not entitled to judgment as a matter of law. On the other hand, if CCR did plead facts showing “aggravated delay” and “untoward activity,” it cannot thereafter claim Gladstone “changed its theory” by responding to CCR’s argument. In either case, Gladstone was, and continues to be, entitled to summary judgment. The Missouri Rules of Civil Procedure, case law, and logic support this assertion.

² The list is non-exhaustive.

Second, Gladstone has never concealed or misrepresented its position. Gladstone has maintained from the outset a taking never occurred. More specifically, Gladstone has argued that the declaration of blight was not a physical taking and inverse condemnation is inapplicable.

Third, the Missouri Rules of Civil Procedure provide Gladstone with the opportunity to file a statement of additional material facts in its reply.

Under MO. R. CIV. PRO. 74.04, a party may file a motion for summary judgment. The adverse party, or in this case Appellant CCR, may file a response within 30-days. MO. R. CIV. PRO 74.04(c)(2). After a response is filed, Gladstone may file a reply. Gladstone may also “file a statement of additional material facts as to which movant claims there is no genuine issue.” MO. R. CIV. PRO. 74.04(c)(3).

If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court *shall* enter summary judgment forthwith. MO. R. CIV. PRO. 74.04(c)(6) (emphasis added).

Fourth, Appellant CCR’s procedural manipulation claim wrongly hangs on the hook of *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 636-37 (Mo. App. 2000). *Cross* was distinguished by *City of Harrisonville v. Public Water Supply District No. 9*, 129 S.W.3d 37 (Mo. Ct. App. 2004).

The Appellant in *Harrisonville*, like Appellant CCR, relied on *Cross*. There, like here, the Appellant argued the submission of new arguments and materials subsequent to

briefing on the summary judgment was flawed, and that the trial court must therefore start the entire summary judgment process over. The court unequivocally stated:

The Water District responds that no error was committed here because any supplemental submission did not change the issue before the court. We agree. The issue before the court at all times was the meaning in this context of the phrase "law passed." There was one issue, and the court could consider whatever legal arguments and authorities it wished on that issue. The trial court did considerable scholarly research on its own, and in its judgment, it cited cases that neither party relied upon in the trial court. Point II is without merit.

City of Harrisonville v. Public Water Supply Dist. No. 9, 129 S.W.3d 37, 41 (Mo. Ct. App. 2004) (emphasis added).

In *Harrisonville*, like here, the supplemental submission did not change the issue before the court. To reiterate, the issue before Judge Gabbert was *whether a constitutional taking occurred*. Gladstone merely responded to that extent concluding a taking did not occur. Gladstone properly followed the Missouri Rules of Civil Procedure, case law, and logic.

C. The Trial Court Properly Granted Respondent Gladstone’s Motion to Strike

1. Standard of Review³

An appellate court reviews a trial court’s exclusion of evidence in a summary judgment motion for abuse of discretion. *Yates v. Rexton, Inc.*, 267 F.3d 793, 802 (8th Cir. 2001); See *Whelan v. Mo. Pub. Serv.*, 163 S.W.3d 459, 461 (Mo. Ct. App. 2005). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration. *Whelan v. Mo. Pub. Serv.*, supra.

2. Analysis

Appellant CCR argues CCR “was not even obligated” to respond to Gladstone’s motion for summary judgment. (Appellant Brief, p. 31). CCR is partially correct. However, once CCR responded to Respondent Gladstone’s motion for summary judgment, Appellant CCR must follow the rules and procedures outlined in MO. R. CIV. PRO. 74.04. MO. R. CIV. PRO. 74.04(c)(2) required CCR to specifically deny Gladstone’s recitation of facts. Appellant CCR failed to adhere to the Rules. By failing to adhere to

³ Appellant CCR argues the standard of review is de novo. CCR Brief, p. 19. Appellant CCR overlooks the difference between an appeals court’s review of the motion for summary judgment itself, and the motion to strike.

the Rules, it was certainly with Judge Gabbert’s discretion to strike Appellant CCR’s inadequate motion.

D. Alternative Procedural Argument

Even assuming Gladstone improperly advanced additional facts and arguments, summary judgment was appropriate because a taking never occurred. As a matter of law, the declaration of blight was not a taking and Appellant CCR was not the victim of aggravated delay or untoward activity.

II. The lower Court did not err in granting Summary Judgment for Gladstone because Gladstone had established a right to Judgment as a Matter of Law, and the admitted Uncontroverted Material Facts demonstrated no genuine issue of material fact so the lower Court could enter a Summary Judgment as a Matter of Law. (Response to Appellants' Point II.)

CCR’s second point claims Gladstone was not entitled to judgment as a matter of law due to Gladstone’s self-contradiction regarding “aggravated delay” and “untoward delay.” CCR argues Gladstone “flip-flop[ped]” regarding the facts.

Gladstone fails to see how this “point relied on” differs from Appellant CCR’s “sandbagging” point. In fact, Appellant CCR re-hashes arguments already made in Point

CCR’s red-herring argument woefully misses the mark. A physical taking did not occur. See arguments supra. Neither “untoward activity” nor “aggravated delay” occurred. See arguments supra. Gladstone never conceded it participated in “untoward

activity” or “aggravated delay.” See arguments supra. In fact, even though Gladstone accepted as true *some* of CCR’s allegations, Gladstone did not accept as true *all* of CCR’s allegations. See arguments supra. Notably, Gladstone did not accept as true CCR’s supposed allegations of “untoward activity” and “aggravated delay.” Based upon the forgoing analysis, Gladstone was, and still is, entitled to judgment as a matter of law. See Arguments, supra.

III. The lower Court did not err in granting Summary Judgment on CCR's cause of action pursuant to 42 U.S.C. § 1983 as there had been no taking and CCR did not state a claim for Inverse Condemnation (Response to CCR’s Third Point Relied On).

CCR chose only to plead a 42 U.S.C. § 1983 claim in its First Amended Petition. The Eastern District Missouri Appellate Court, using the holding in *Williamson County Rep'l Planing Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 2d 126 (1985) held that if an entity like CCR "had asserted a Fifth Amendment taking claim in the Federal lawsuit, it would not have been ripe in that CIS (like CCR) had not yet sought just compensation through a state inverse condemnation claim." *CIS Communications, LLC v. County of Jefferson*, 177 S.W.3d 848, 850 (Mo.App. E.D. 2005) (In order to pursue a Fifth Amendment Taking Clause claim, a plaintiff must first exhaust his state remedies. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040 (8th Cir. 2003).

CCR chose one claim, i.e. a constitutional taking, and did not plead or exhaust its state remedies and therefore the lower Court's grant of summary judgment is again correct even on this theory.

IV. The Missouri Court of Appeals correctly decided CCR failed to establish the occurrence of a taking by Gladstone.

Gladstone does not take issue with the Western District's analysis, especially with regard to whether a taking occurred. In fact, the Court correctly decided that CCR's facts do not rise to the level required for a takings claim.

CONCLUSION

Since as early as 1982, the act of designating an area as "blighted" has not been considered a taking in the State of Missouri. There is nothing new or different about this Appellants' claim as presented to the lower Court which supports a claim for a constitutional taking. The law states there is no taking and because of the admission by Appellants as to the truth of the Uncontroverted material Facts, the lower Court correctly found no issue of material fact and therefore correctly followed the law and granted summary judgment. We ask that you uphold this proper holding by the lower Court.

Respectfully submitted,
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CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that this Brief was prepared on a computer, using Microsoft Word 2003. A CD-ROM containing the full text of the Brief is provided herewith, and has been scanned for viruses and is believed to be virus-free.

ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief herein includes the information required by Rule 55.03 and is in compliance with Rule 84.06(b). According to the word count of the word processing system used to prepare the Brief, the Brief contains 4,285 words, 372 lines.

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

Counsel for Respondent certifies that two copies of the foregoing BRIEF OF RESPONDENT was mailed, *via* United States Mail, postage prepaid, the 24th day of January, 2008 to:

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