No. SC86363

IN THE SUPREME COURT OF MISSOURI
EN BANC

UTILITY SERVICE & MAINTENANCE, INC., et al.,	)
Plaintiffs/Respondents,	)
vs.	)
NORANDA ALUMINUM, INC., et al.,	)
Defendants/Appellants.	)

Appeal from the Circuit Court of St. Louis County
Hon. Carolyn Whittington

Substitute Reply Brief of Appellant Noranda Aluminum, Inc.

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Table of Contents

Table Of Cases And Other Authorities

Statement Of Facts

It is most ironic that plaintiff TIG Insurance Company (TIG) should assert that the statement of facts in the substitute brief by Noranda Aluminum, Inc. (Noranda) is neither fair nor complete. Br. at 9. Nowhere in TIG's statement of facts does it acknowledge the most critical piece of evidence in the whole case: that TIG **unconditionally** accepted Noranda's tender, and that the counsel TIG supplied promptly so notified Noranda.

TIG's statement of facts also spends a great deal of time discussing Exhibit C to Noranda's original proposal. Exhibit C is a complete red herring. The trial court found it was not part of the Utility/Noranda contract and Noranda no longer argues otherwise. Since TIG never saw it, Exhibit C was not the basis for its decision to accept, unconditionally, Noranda's tender. Exhibit C is completely irrelevant.

Argument

It is unfortunate that TIG has chosen to respond to Noranda's Points I and II as though they presented the same argument, as these two Points assert distinctly different theories. Point I argues that TIG's unconditional acceptance of the defense, and subsequent control over the defense, estop TIG from its subsequent effort to renege. Point II argues that, even if TIG could renege, it cannot do so on grounds of which it never timely advised Noranda. TIG's failure to recognize the difference in these theories does not lend itself to clarity.

In a footnote, TIG claims that Noranda has failed to challenge the judgment in favor of Utility. Br. at 42 n.1. There is no evidence that Utility paid one cent in settlement of the Murphy lawsuit or the costs of defending it. TIG paid the settlement with its own money, Tr. 119, and TIG paid the defense costs. L.F. 15-16 ¶ 30.

Because Utility has no interest in the outcome of this case, it lacks standing to file it. Wahl v. Braun, 980 S.W.2d 322, 325 (Mo. App. 1998). Lack of standing is jurisdictional and may be raised at any time. In re Ancillary Adversary Proceeding Questions, 89 S.W.3d 460, 463-64 (Mo. banc 2002).

In any event, having assumed control of the defense and paid the settlement, TIG stands in the shoes of Utility. Estate of Griffits, 938 S.W.2d 621, 624 (Mo. App. 1997). Thus, arguments directed to TIG are equally directed to Utility.

I. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Is Estopped From Contesting Coverage, In That It Unconditionally Accepted Tender Of Defense Without Reserving Its Rights.

The key to Point I is that, by unconditionally accepting Noranda's tender, TIG was able to and did control the disposition of the Murphy lawsuit. Had TIG rejected the tender, or even reserved rights, it would have lost that control. It is precisely for that reason that TIG is estopped from reneging on its unconditional acceptance.

TIG's Point A recites a laundry list of cases purporting to hold that an insurance company can never be estopped from contesting coverage if the policy does not in fact provide coverage. Br. at 44-46. In none of those cases, however, did the insurance company unconditionally accept coverage and thereafter control the underlying lawsuit.

In State Farm Mut. Auto. Ins. Co. v. Zumwalt, 825 S.W.2d 906 (Mo. App. 1992), for example, State Farm denied coverage from the outset. It did retain counsel to enter an appearance for the insured and avoid a default, but it made clear that it was not waiving the policy defense. 825 S.W.2d at 910. The insured refused to accept a defense under a reservation of rights and the insurance company's counsel promptly withdrew.

Similarly, in Martinelli v. Security Ins. Co., 490 S.W.2d 427 (Mo. App. 1972), the insurance company reserved rights at the outset and the insured

accepted the defense on that basis. While the court found no factual basis on which to apply estoppel, the court clearly recognized that the doctrine would lie in a proper case:

> The rule generally is stated to be that when a liability insurer conducts a defense of an action brought against the insured with knowledge of the facts and without giving notice of a reservation of rights, the insurer is thereafter precluded from setting up a defense of non-coverage.

490 S.W.2d at 433.

TIG's theory would create an exception that swallows the rule. Under that theory, if coverage exists, estoppel is irrelevant; if coverage does not exist, there could never be an estoppel against a liability insurance company. But this Court has quite clearly held that estoppel is the "preferred theory" for addressing an insurance company's liability beyond the four corners of its policy. Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 388 (Mo. banc 1989).

Even on its own terms, TIG's argument is wrong. There is no question that the TIG policy provided coverage to Utility "if Utility is legally liable to Noranda." Br. at 48. TIG's unconditional acceptance of Noranda's tender, and subsequent control of the defense, merely estops it from arguing that this condition was not fulfilled. "Estoppel may prevent an insurer from asserting a defense to coverage otherwise provided . . . ." Taylor v. Commercial Union Ins. Co., 614 F.2d 160, 164 n.5 (8th Cir. 1980) (McMillian, J.) (citations and internal punctuation omitted).

In the title to its point A, and at pp. 45-46 of its brief, TIG hints that estoppel will not lie in favor of Noranda because it was a contractual indemnitee of Utility rather than TIG's insured. TIG cites no authority for that proposition and never explains why it makes sense. If Noranda relied to its detriment on TIG's words and actions, as the record unquestionably establishes, it ought to be able to invoke estoppel.

TIG also claims that Parks v. Union Carbide Corp., 602 S.W.2d 188 (Mo. banc 1980), "implied" that estoppel could not shift liability to an employer which was immune from a direct action by the employee under the worker's compensation bar. Br. at 48. The only issue in Parks was whether the contract was sufficiently clear to require the employer to indemnify Union Carbide against its own negligence. The opinion does not even use the word "estoppel" or any of its derivatives.

In Points B and C, TIG claims that it effectively withdrew its unconditional acceptance of the defense by attempting to reserve rights in May 1997 and September 1998. It claims that Noranda waived its right to argue estoppel by not rejecting TIG's newly qualified defense and retaking control of the lawsuit. Br. at 49-53. TIG labels this conduct as "acquiesce[ing]" in TIG's continued defense based on the new conditions set forth in those letters. Br. at 52.

There are a variety of problems with this theory. For starters, the May 1997 letter's "belie[f]" that Noranda should take over the defense is hardly a clear demand that it do so. P. Ex. 8. More fundamentally, neither letter unconditionally

offered control of the defense to Noranda. Valid tender by an indemnitee requires both "notice of the lawsuit and an opportunity to defend." Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314, 318 (Mo. App. 1998). An indemnitor's attempt to renege on an unconditional acceptance of the defense should require no less.

Here, neither letter made an unconditional offer to restore to Noranda control of the lawsuit. On the contrary, the September 1998 letter advised that "TIG will expend every effort to defend, settle or successfully litigate the Murphy lawsuit." P. Ex. 11 at 2. TIG did not in fact surrender control. On the contrary, TIG and TIG alone decided whether to settle and on what terms. Tr. 118-19.

On this record, TIG wants it both ways. It wanted control of the lawsuit in the event it were ultimately liable for the costs of resolving it. But it also wanted to claim that Noranda was responsible for those costs:

> If Metropolitan has any risk, it is because it has refused to defend. Yet, it wants to avoid the risks inherent in such a refusal by obtaining a stay until coverage can be determined in the declaratory judgment action. . . . Missouri has long recognized that such risks properly rest on the insurer, not the insured.

Lodigensky v. American States Preferred Ins. Co., 898 S.W.2d 661, 667 (Mo. App. 1995).

Finally, the May 1997 letter (17 months after TIG accepted defense) and the September 1998 letter (33 months after TIG accepted defense) are simply too late, even if they otherwise passed muster. In Safeco Ins. Co. v. Stone & Sons,

Inc., 822 S.W.2d 565 (Mo. App. 1992), the insurance company supplied a defense, initially without reservation. Six months later it attempted to reserve rights based on late notice of the accident. A year after that, Safeco claimed that the policy had been canceled, but it still continued to control the defense through its assigned counsel. 882 S.W.2d at 567. The court of appeals held that, by preventing the insured "from undertaking its own defense and from attempting to negotiate an amicable settlement at the early stages of the litigation," Safeco was estopped from contesting coverage. Id. at 569.

The authorities TIG cites in this portion of its brief are not in point. They all rely on the fountainhead case of Brooner & Associates Constr. Co. v. Western Cas. & Surety Co., 760 S.W.2d 445 (Mo. App. 1988). And Brooner makes it clear that a "timely disclaimer of liability," together with a "clear reservation of its right to assert non-liability," is essential in order to avoid a waiver. 760 S.W.2d at 447. TIG's attempted reservation was neither clear nor timely.

TIG's Point D is a muddled and largely repetitive reprise of its arguments in Points B and C, to which Noranda has already responded. The first new argument in Point D is that there can be no prejudice when the insured has its own lawyer. Br. at 54, citing Shahan v. Shahan, 988 S.W.2d 529 (Mo. banc 1999).

Shahan in fact supports Noranda's appeal. There, the insurance company took the position that a household exclusion in its policy limited its liability to $25,000. It tendered the $25,000 into court and moved to withdraw as counsel for the insured. This Court held that such action did not prejudice the insured because

he was represented by his own attorney throughout; his attorney got a continuance; and there was no evidence that his attorney "did not have opportunity to prepare and to present an adequate defense." 988 S.W.2d at 534 n.1.

In short, the insurance company in Shahan did precisely what TIG refused to do: it surrendered control of the lawsuit back to the insured. Mr. Rost may have **participated** in the defense of the lawsuit. But neither he nor Noranda **controlled** it. The only evidence in the record about control is that, after TIG unconditionally accepted the defense:

- Mr. Swift had "total control of the defense," Tr. 304; and
- At the mediation, TIG "took over negotiations" and wanted advice from no one, including Mr. Swift. Tr. 118-19.

Under Stone & Sons, that loss of control is sufficient prejudice to warrant an estoppel. 822 S.W.2d at 569.

TIG claims that no estoppel will lie when both parties know the facts and the issue is purely one of law. Br. at 55. Noranda is not claiming that TIG is estopped because it rendered a legal opinion that ¶ 19 was enforceable. TIG is estopped because it told Noranda that it would unconditionally assume the defense and because it retained control of the defense to the very end of the Murphy case.

TIG also resorts to its favorite red herring: Exhibit C, about which it claims Noranda knew more than TIG. Br. at 55; 57-58. There is no evidence that Exhibit C played any part in TIG's decision to accept the defense. Mr. Buttner decided to accept the tender based on the language of ¶ 19, the terms of the CGL

policy, and the advice from Mr. Swift that Utility owed Noranda a defense. Tr. 176. He never testified that Exhibit C led him to that conclusion and, since he never saw Exhibit C, Tr. 152, he "did not know whether Exhibit C was part of the contract," or for that matter, whether it "provided for indemnity for Noranda's own negligence." P. Ex. 61 ¶ 6.

TIG's final salvo on Point I is that Noranda has been unjustly enriched by TIG's settlement of the Murphy lawsuit because TIG's policy allegedly did not cover that accident. Br. at 56-57. But that argument begs the question. The issue in Point I is not whether there was coverage but whether TIG's unconditional acceptance of the defense estops it from denying coverage.

TIG's various appeals to equity are thoroughly misplaced. TIG wanted both total control over the lawsuit and the opportunity to recoup its losses from Noranda. Missouri law does not give the right to have it both ways. TIG's unconditional acceptance of the defense and its resulting complete control over the lawsuit estop it from denying coverage.

II. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Is Estopped From Contesting Coverage Based On The Language Of ¶ 19, In That It Never Questioned The Validity Of ¶ 19 Before Settling The Underlying Lawsuit.

As noted, the basis for TIG's decision to accept coverage was ¶ 19 of Noranda's standard terms and conditions. But TIG never challenged the validity

or enforceability of ¶ 19 before it settled the Murphy lawsuit. As a matter of law, an insurance company may not disclaim coverage on grounds other than those on which it reserved its rights.

TIG's first response is that Noranda has waived this argument by failing to present it to the trial court or the court of appeals. Br. at 58. Missouri courts apply a "liberal construction" to the preservation requirement. Baldridge v. Lacks, 883 S.W.2d 947, 953 (Mo. App. 1994). Noranda easily satisfied that requirement.

In the oral motion for directed verdict, Noranda's trial counsel argued that the presence or absence of Exhibit C was "immaterial and irrelevant," because the basis for TIG's acceptance of coverage was ¶ 19 and "it's never been taken away up until the time of settlement." Tr. 229-30. In closing argument, counsel twice advised the court that TIG "never said to anyone, Oh, paragraph 19, that was a mistake." Tr. 413; 416. The motion for new trial argued that there was "no evidence" that TIG had ever revoked the unconditional acceptance of the tender "based upon" ¶ 19. L.F. 154.

Point II of Noranda's brief in the court of appeals asserted error in that TIG "did not ever properly reserve rights." App. Br. at 53. The argument under Point II explained that "TIG relied upon Paragraph 19 in deciding to defend and indemnify Noranda," instead of Exhibit C, so the May 1997 letter was "clearly not a valid reservation of rights." Id. at 55. The brief in the court of appeals also argued that, once "an insurance company denies coverage by asserting a specific

defense, it cannot later deny liability on a different ground." Id. at 58. The argument that Noranda did not properly preserve this issue is frivolous.

TIG's argument on the merits is equally frivolous. For example, TIG claims that it "repeatedly contested the validity of Paragraph 19 **during the trial**." Br. at 59 (emphasis added). But it **never** questioned the validity of ¶ 19 before it settled the Murphy lawsuit – i.e., in time to give Noranda a reasonable opportunity to assess its options.

TIG also claims that the trial court "explicitly found" that TIG relied on Noranda's assertions about Exhibit C in deciding to accept coverage. Br. at 59. What the trial court actually found was that TIG's counsel had written some letters **asserting** that TIG had so relied. App. A3-4. The trial court did **not** find that those assertions were true and there is no evidence that they were. On the contrary, as previously explained, Mr. Buttner accepted the defense based solely on ¶ 19, Mr. Swift's advice that ¶ 19 probably required TIG to accept, and the terms of TIG's policy. Tr. 176.

TIG argues at length that it did not have a copy of Exhibit C until May 1997 (18 months before it settled the Murphy lawsuit). It then claims that its efforts to obtain Exhibit C should have put Noranda on notice that TIG did not believe that ¶ 19 was enforceable and that Noranda was willing to accept a defense based on the conditions that TIG established. Br. at 60-61.

These arguments confirm, rather than deny, that TIG is estopped from denying coverage. TIG's letters may have told Noranda that TIG wanted to

renege on its unconditional acceptance of the defense. But those letters never told Noranda that TIG thought ¶ 19 was unenforceable. If TIG "clearly did not believe Paragraph 19 to be an enforceable indemnity agreement" as TIG contends, Br. at 60, it should have said so in so many words.

Instead, as TIG admits, Br. at 61, as soon as TIG tried to renege, Noranda specifically advised TIG that Noranda had indemnity rights under ¶ 19. TIG never challenged the validity of that paragraph until after it had settled the Murphy lawsuit. The presence or absence of Exhibit C in the contract was therefore completely irrelevant to Noranda.

TIG complains that Noranda's argument would mean that "an insurance company could never deny coverage for any reason other than those contained in a specific reservation of rights letter." Br. at 62. That is precisely what this Court has held the law to be: "an insurer, having denied liability on a specified ground, may not thereafter deny liability on a different ground." Brown, 776 S.W.2d at 386 (citations and internal punctuation omitted).

TIG's argument that "facts change," Br. at 62, is completely irrelevant. At all times, TIG knew precisely what ¶ 19 said. It accepted the defense based on ¶ 19 and its own lawyer's advice that ¶ 19 required TIG to accept the tender. TIG never challenged the validity of ¶ 19 until it filed its petition in the instant action and that is simply too late. TIG's failure to challenge ¶ 19 before it settled the Murphy lawsuit estops it from challenging it now.

III. The Trial Court Erred In Entering Judgment In Favor Of TIG For Indemnification, Because TIG Was A Volunteer, In That It Assumed The Defense And Paid The Settlement With Full Knowledge Of The Facts.

Noranda's Point III explained that the voluntary payment doctrine bars TIG's claims. TIG had full knowledge of the terms of ¶ 19 when it settled the Murphy lawsuit. If it wanted to challenge the enforceability of that paragraph, it was obliged to do so then. Instead, it chose to settle the Murphy lawsuit.

TIG's first response is that it had advised Noranda in 1997 that TIG's acceptance of the defense was no longer unconditional. Br. at 63; 67. That protest is completely irrelevant to the voluntary payment doctrine. As Noranda explained in its opening brief, a voluntary payor cannot recover, even "though the payment is made . . . under protest." American Motorists Ins. Co. v. Shrock, 447 S.W.2d 809, 812 (Mo. App. 1969) (citations and internal punctuation omitted).

TIG also complains that it did not have full knowledge of the facts about Exhibit C. Br. at 64; 67-68. Once again, that is a complete red herring. To repeat, TIG accepted the tender based on ¶ 19, not on Exhibit C. If TIG wanted to challenge ¶ 19, it was obliged to do so "in the first instance – not later, after paying the money and biding the course of uncertain future events." Shrock, 447 S.W.2d at 812.

TIG claims that there were disputed questions of law and fact about the enforceability of ¶ 19 at the time of its settlement. Br. at 65. To the extent that

this argument relies on ambiguity in the law, it is irrelevant: The whole basis of the voluntary payment doctrine is that the payment "cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying." Shrock, 447 S.W.2d at 811.

TIG's disputed issue of fact – whether Noranda and Utility were of equal bargaining power and whether ¶ 19 was negotiated – is irrelevant; the law does not require either to make ¶ 19 enforceable. Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505, 509 (Mo. banc 2001). And in any event, the law does not require that TIG have actual knowledge of the facts, merely the "unlimited opportunity to so inform itself." Shrock, 447 S.W.2d at 811 (emphasis deleted). TIG could certainly have asked its insured to advise it of the facts had TIG really wanted to do so.

The balance of TIG's response to Point III is, once again, a series of irrelevant distractions:

- The settlement was reasonable and did not prejudice Noranda. Br. at 65-67. TIG cites no authority that either proposition has any relevance to the voluntary payment doctrine for the excellent reason that none exists.
- TIG had reason to believe that it would be reimbursed if Exhibit C were not a part of the contract. Br. at 68. No such belief could have been reasonable. TIG accepted the defense based on ¶ 19, not on Exhibit C. When TIG first suggested it might renege based on the

absence of Exhibit C, Noranda promptly reminded it that Utility had agreed to indemnify Noranda "by dint of Paragraph 19." P. Ex. 9 at 1. TIG never responded to that claim.

- TIG's misunderstanding was the consequence of Noranda's inequitable conduct. Br. at 68-71. This is just another variation on TIG's favorite red herring: Exhibit C. Nothing that Noranda said or did could possibly have affected TIG's understanding of ¶ 19.

If TIG really had wanted a definitive ruling on its obligations under ¶ 19, it needed only to file a declaratory judgment action against Noranda. Such an action, however, would have deprived TIG of control over the defense of the Murphy lawsuit. In seeking to have it both ways, it is TIG, and not Noranda, that was acting inequitably.

IV. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Was Obliged To Defend And Indemnify Noranda, In That ¶ 19 Of The Terms And Conditions Unambiguously Required Utility To Indemnify Noranda For Noranda's Own Negligence.

Noranda's opening brief explained that, under the modern approach taken by this Court, an indemnity against one's own negligence is enforceable without the magic word "negligence," when it involves sophisticated corporations. The terms of ¶ 19 require Utility to indemnify Noranda for "any" and "all" claims

"connected with" Utility's performance of the subcontract. Between corporations, such language is sufficient under the modern approach.

TIG never even tries to respond to the distinction between consumers and corporations. It does cite a string of cases that refuse to enforce indemnity clauses absent the magic word "negligence." Br. at 74-76. Those cases are no longer good law in light of this Court's decisions in Purcell and Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330 (Mo. banc 1996). All but two of them pre-date Alack and none pre-date Purcell.[1]

TIG also makes a half-hearted argument that the meaning of ¶ 19 is a fact question for the trial court. Br. at 76. TIG cites no authority for that proposition, which this Court explicitly rejected in Purcell: "[t]he validity of a liability limitation is a question of law for the court." 59 S.W.3d at 508.

TIG claims that ¶ 19 was not conspicuous and the parties did not bargain over its terms. Br. at 76-77, citing Economy Forms v. J.S. Alberici Constr. Co., 53 S.W.3d 552 (Mo. App. 2000). As Noranda explained in its opening brief, Purcell squarely rejected that requirement for commercial entities. The exculpatory language in Purcell appeared in 11-point type on a three-page form contract.

[1] Landsmen v. Lowe-Guido, 35 S.W.3d 917 (Mo. App. 2001) is irrelevant for the additional reason that it involved a consumer transaction, not a commercial one.

59 S.W.3d at 507. This Court enforced the clause and overruled two earlier cases to the extent they required separate negotiation. Id. at 509.

TIG claims that Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo. App. 1998), is distinguishable, because the whole purpose of that contract was to indemnify Monsanto; whereas the purpose of this subcontract was to repaint some equipment. Br. at 76-77. Again, Purcell flatly rejects the theory: the exculpatory clause in Purcell was enforceable, and supported by consideration, precisely because it was "part of the original agreement." 59 S.W.3d at 509.

TIG's final essay is that ¶ 19 is unenforceable because it allegedly violates the public policy behind the worker's compensation grant of immunity to employers. Br. at 78-79. As TIG candidly concedes, this Court expressly rejected that argument in McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959), a case that bears a striking resemblance to the instant one.

McDonnell hired Hartman to paint some of McDonnell's equipment. The contract recited that McDonnell had advised Hartman of certain hazardous electrical conditions in the plant and Hartman had agreed to "perform all necessary instructions and precautions" to ensure the "safety and protection" of Hartman's employees. 323 S.W.2d at 792.

A Hartman employee was electrocuted and badly injured in the course of the work, and sued McDonnell. McDonnell settled the case and then sought to recover from Hartman on the theory that the contract "obligations expressly

assumed" by Hartman gave rise to "an implied promise of indemnity." Id. Hartman claimed that the worker's compensation bar also barred the contract claim.

This Court rejected the claim. It first observed that there was "no contention" that the worker's compensation bar "would prevent the enforcement of an express contract of indemnity." 323 S.W.2d at 796. As a result:

> in the situation alleged in this case, of an express agreement by Hartman to perform the duty of McDonnell to warn and protect Hartman's employees, we think it reasonable to rule that the Act does not prevent holding Hartman liable to indemnify McDonnell for losses caused to McDonnell by the breach of its duty to McDonnell.

Id.

TIG's alternative argument – that Parks requires such waivers to be "exceptionally definite and explicit," Br. at 79 – is just wrong. In Hartman, this Court found an implied obligation to indemnify sufficient to avoid the worker's compensation bar. Parks does not even hint that the worker's compensation law requires a different standard than any other contract of indemnity, and its requirement of clear and unambiguous language is no different than any other case of its era. E.g., Bonenberger v. Associated Dry Goods Co., 738 S.W.2d 598, 600 (Mo. App. 1987).

TIG simply refuses to acknowledge that Purcell and Alack have relaxed the standards of clarity required for commercial transactions between corporations.

And for good reason: sophisticated corporations are in a much better position than consumers to assess the risks associated with indemnification clauses and to insure against them. Utility has worked under contracts that contain similar provisions, Tr. 64, and the insurance policies it bought from TIG specifically insured Utility from liability for such indemnification. Tr. 155.

Since ¶ 19 is enforceable against Utility, TIG is not in any event entitled to recover.

Conclusion

For these reasons, Noranda respectfully prays that the Court reverse the trial court's judgment and remand with instructions to enter judgment in favor of Noranda.

Respectfully Submitted,

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Certificate Of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,056 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

Mark G. Arnold

Certificate Of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on February 14, 2005:

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