IN THE MISSOURI SUPREME COURT

SUPREME COURT NO. SC95307

EASTERN DISTRICT NO.: ED101801
23rd CIRCUIT NO: 10JE-CC01193-01

RACHAL LAUT, *et al.*, APPELLANTS

v.

CITY OF ARNOLD, RESPONDENT

Appeal from the Circuit Court of the County of Jefferson
23rd Circuit, Division 2
Circuit Judge The Honorable Gary Kramer

APPELLANTS' SUBSTITUTE OPENING BRIEF

Respectfully Submitted,

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JURISDICTIONAL STATEMENT

Appellants Rachal D. Laut and John Michael Soellner filed a Sunshine Act request with Respondent City of Arnold. The City did not produce the requested documents and Appellants brought suit, Laut I L.F. 3[1] Venue was in Jefferson County, Missouri, in the Eastern District of Missouri Appellate District.

The trial court ruled for the City and Laut and Soellner appealed. Then in ED99424, *Laut v. City of Arnold*, 417 S.W.3d 315 (Mo. Ct. App. 2013), Laut II L.F. 3, the Court of Appeals for the Eastern District reversed and remanded, ordering the trial court to conduct an *in camera* review of the documents. On remand the trial court ordered the disclosure of a portion of those documents, Laut II L.F. 25, A3.

Appellants received the documents and then filed their Applications for Civil Penalty and Attorney's Fees. On June 24, 2014 the Trial Court issued a Judgment denying both those Applications and otherwise disposing of all remaining issues, Laut II L.F. 55, A1.

On August 1, 2014 Appellant filed this timely second appeal, Laut II L.F. 57, on the issue of the denial of a Civil Penalty and Attorney's Fees. On October 6, 2015 the Court of Appeals issued its opinion but simultaneously under Rule 83.02 ordered the case transferred to this Court. Therefore, this Court has jurisdiction.

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[1]In its order of March 13, 2015 the Court of Appeals for the Eastern District in ED99424, ordered that the Legal File from the first appeal be transferred to this second appeal. Appellants will therefore make references to the first Legal File as "Laut I L.F…" and will make references to the second Appellate Legal File as "Laut II L.F…".

STATEMENT OF FACTS

In the late summer of 2010, over five years ago, Appellants Rachal Laut f/k/a Govro and John Soellner developed a good faith belief that one or more City of Arnold, Missouri Police Department employees had accessed their confidential, official records in a government law enforcement database called the "Regional Justice Information System", ("REJIS"), Laut I L.F. 45 and 48 respectively[2].

"Unauthorized access of a law enforcement computer system is a federal crime under Title 18 U.S.C. Section 1030(a)(2)", *Laut v. City of Arnold*, 417 S.W.3d 315, 324 (Mo. Ct. App. 2013).

In September of 2010 Laut filed a formal complaint with the Arnold police Department and that Police Department then conducted a formal Internal Affairs investigation, *Laut*, 417 S.W.3d at 317, Laut II L.F. 4.

Soellner and Laut retained undersigned counsel, Hardy C. Menees and W. Bevis Schock, to consider whether to file a claim against the City for the improper accessing of the records. On October 11, 2010 Menees sent a letter to City of Arnold Police Chief Robert T. Shockey requesting documents related to the improper accessing of the records

[2] This is the second appeal in this matter. The first was in ED99424. In its order of March 13, 2015 the Court of Appeals for the Eastern District of Missouri ordered the Legal File from the first case transferred to this case. Appellants will therefore make references to the first Legal File as "Laut I L.F…" and will make references to the second Legal File as "Laut II L.F…".

pursuant to the Sunshine Act, RSMo. 610.010&c, A5, and particularly RSMo. 610.100.4, A8, Laut I L.F. 11. (There are no relevant issues in this case related to the identity of the custodian of the disputed records).

The opening sentence of the letter stated:

> This firm[, Menees Whitney, Burnet & Trog,] and Attorney W. Bevis Schock represent [Laut and Soellner] regarding civil claims against the Arnold Police Department and its agents and employees.

Thus at the very outset of this matter Appellants put the City on notice that the purpose of the document request was to investigate civil claims.

The next few paragraphs of the letter described the material sought:

> Any and all incident reports, Internal Affairs investigative reports and records of any kind or type (including e-mail and text messages) compiled, completed or transmitted or received by the City of Arnold (including its Police Department and any other agent, employee, outside consultant or cooperating Police Department) regarding:
>
> 1. The use by any Arnold Police Department employee, including, but not limited to, Linda Darnell or Darren Rogers, of the Regional Justice Information System (REJIS) computer network, including any sub-category thereof (Mules, NCIC, NLETS) to access law enforcement information about Rachal D. Laut f/k/a Govro (DOB: 2/22/82) and/or John M. Soellner (DOB: 4/3/76).

2. The communication by any Arnold Police Department employee including, but not limited to, Linda Darnell or Darren Rogers, with any other law enforcement agency or employee regarding a background check or investigation of Rachal D. Laut f/k/a Govro and/or John M. Soellner.

3. The reasons for the employment termination of Linda Darnell from her position as Dispatcher for the City of Arnold Police Department and the reasons for any previous disciplinary suspension(s) from said position. This request is limited to documents which in any way refer or relate to Rachal D. Laut f/k/a Govro and/or John M. Soellner, and said document(s) may be redacted to delete any other reasons for termination.

4. The reasons for any employment disciplinary action of Darren Rogers as a Police Officer for the City of Arnold Police Department and the reasons for any disciplinary actions as same relate to Rachal D. Laut f/k/a Govro and/or John M. Soellner, and said document(s) may be redacted to delete any other reasons for any said disciplinary action.

Appellants highlight that the opening phrase of this list of materials is "incident reports and Internal Affairs investigative reports".

On October 14, 2010 Respondent's counsel sent a one paragraph response to Appellants' counsel, Laut I L.F. 14. The text of the letter stated:

> Chief Robert Shockey has asked me to respond to your Sunshine request dated October 11, 2010. After discussions with Chief Shockey, it turns out that there was no criminal investigation performed related to the employment of the employees referenced in your request. In short, there are no incident reports or arrest records. There was an Internal Affairs investigation. However, those documents are closed records and are exempt from your request pursuant to Section 610.021(3) RSMo. Specifically, the documentation you request contains personnel information about specific employees who have been subject to discipline. At this point, the Department is unaware of any other documentation that is responsive to your request.

The letter thus indicated that the City of Arnold had asked counsel for advice and, on the basis of that advice, counsel would not provide the requested documents to Appellants – all because the documents allegedly contained personnel information about discipline and allegedly did not relate to an investigation of a crime. Nevertheless the fact that the letter acknowledges that the employees were "subject to discipline" creates a reasonable inference that improper accessing of Appellants' records occurred.

It is reasonable to infer that the City denied conducting a criminal investigation because of the concern that inactive records related to criminal investigations are subject to disclosure. Specifically, RSMo. 610.100.1(5), A8, defines an "investigative report" as "a record, other than an arrest or incident report, prepared by personnel of a law enforcement agency, inquiring into a crime or suspected crime, either in response to an

incident report or in response to evidence developed by law enforcement officers in the course of their duties". As the Court of Appeals stated in its first opinion in this matter, *Laut* 417 S.W.3d at 321, the Court stated that "the key aspect of an investigative report is that it is directed to alleged criminal conduct, *Guyer v. Kirkwood*, 38 S.W.3d 412, 415 (Mo. 2001)". Further, RSMo. 610.100.2, A8, makes such investigative reports, once the investigation is "inactive", "open records" and therefore subject to disclosure pursuant to a Sunshine Act request.

On October 22, 2010 Appellants' counsel sent a follow-up letter disagreeing with Respondent's interpretation of the law, Laut I L.F. 15, and again demanding copies of the documents. The City did not respond.

Trial Court Round One

RSMo. 610.100.4, A8 provides for a 30 day period in which a City must respond to a Sunshine Act request. On December 2, 2010, approximately six weeks after sending their original letter, Appellants filed their Sunshine Act Petition, Laut I L.F. 3. The suit tracked the procedure described in RSMo. 610.100.4, A8, which relates to investigative reports.

In an Affidavit created in the course of the litigation Arnold Chief of Police Shockey wrote that he "ordered an internal affairs investigation to evaluate the fitness of the employees to perform their job duties", para. 5, Laut I L.F. 63. At para. 9 of his affidavit Chief Shockey took a defiant position:

> I have not and will not produce the personnel records or closed Internal Affairs Reports of my employees pursuant to City Ordinance.

In a subsequent affidavit Chief Shockey slightly adjusted his position and wrote:

> After receiving the complaint [of the improper accessing of REJIS records], I ordered that an Internal Affairs investigation be commenced for the limited purpose to determine the fitness of the employees to perform their respective duties, Laut I L.F. 83, para. 5.

In their Petition Appellants' asserted that the City had committed a "purposeful", or in the alternative, "knowing", violation of the Sunshine Act, Laut I L.F. 7. The suit prayed for (a) an order that the City of Arnold provide the documents, and sought (b) civil penalties and attorney's fees, and (c) costs, Laut I, L.F. 9.

Appellants moved for Summary Judgment, Laut I, L.F. 24. In their Motion Appellants asked the trial court to delay ruling on attorney's fees, on the theory it would be more efficient to handle fees all at one time instead of piecemeal, Laut I, L.F. 28. At the beginning of the "Argument" section of their Memorandum in Support of their Motion for Summary Judgment, Laut I L.F. 32-33, Appellants cited G*uyer*, 38 S.W.3d at 413-414, (Mo. banc 2001) for the proposition that investigations into criminal activity, once completed, are open records. Appellants continued at Laut I L.F. 33&c that given the City's position and the facts as then known, the City's refusal to produce the records was a purposeful violation and so the court should award a $5,000.00 civil penalty and attorney's fees. Appellants also cited *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. 1998) for the proposition that for a purposeful violation of the Sunshine Act, the "public governmental body must exhibit a 'conscious design, intent, or plan' to violate the law and do so 'with awareness of the probable consequences'".

In its responsive pleadings the City of Arnold unequivocally asserted at Laut I L.F. 72 that:

> In the present matter, there was no criminal investigation. The investigative report was limited in scope to determine the fitness of the employees to perform their respective duties. Plaintiff fails to establish, or even allege that the investigative report was to investigate a crime, and therefore the City has no duty to disclose the Internal Affairs report under the Missouri Sunshine Act.

On December 16, 2011 the trial court summarily denied Appellants' Motion for Summary Judgment, Laut I, L.F. 77.

The City then took its turn and moved for Summary Judgment, Laut I L.F. 78. At Laut I L.F. 86 the City stated that it was entitled to Summary Judgment because:

> Plaintiffs cannot establish they are entitled to disclosure of the requested documents under the Missouri Sunshine Act [because] the Internal Affairs reports were not prepared to investigate criminal activity.

At Laut I L.F. 89 Respondent continued:

> There was no criminal investigation. The investigative report was limited in scope to determine the fitness of the employees to perform their respective duties. Plaintiffs cannot establish that the investigative reports requested were prepared to investigate a crime, and, therefore the City has no duty to disclose the Internal Affairs investigative report under the Missouri Sunshine Act.

In their responsive pleadings at Laut I L.F. 104 Appellants quoted *Guyer* and stated as follows:

> The Supreme Court nevertheless stated in its final paragraph [of *Guyer*] that the central issue was whether the complained of conduct:
>
> > *implicated* [the officer] in any criminal conduct. If Appellant was so *implicated*, it should be *presumed* that such alleged criminal conduct was the subject of the investigation, and the report generated by the investigation must be disclosed, (emphasis added).

At Laut I L.F. 105 Appellants noted that the conduct at issue is a federal crime.

After a hearing the trial court wrote a one page judgment, Laut I L.F. 115, which stated that the court had "reviewed the record and the oral argument of the parties… [and] the information sought is exempt from disclosure by [RSMo. 610.021.3 or RSMo. 610.021.3 and/or RSMo. 610.021.13]". The court granted Summary Judgment to Respondent, and dismissed the case with prejudice.

Court Of Appeals Round One

Appellants appealed, Laut I L.F. 116, ED99424. In that appeal the City continued to argue that the "Internal Affairs report was not an 'investigative report' under the statutory definition", *Laut*, 417 S.W.3d at 321, Laut II L.F. 9. (The definition is at RSMo. 610.100.1(5), A8).

The Court of Appeals issued its opinion on December 3, 2013 and ordered the Trial Court to conduct an *in camera* review of the documents to determine "whether the Internal Affairs report qualifies as an investigative report [in which case it would be disclosed] or a personnel record [in which case it would not be disclosed]." *Laut*, 417 S.W.3d at 327, Laut II L.F. 19. The Court of Appeals thus did not accept the City's theory that the City could determine whether a document should be disclosed by the City's own description of its investigation instead of by the objective nature of the investigation.

The opinion noted that under RSMo. 610.027.2, A15 the remedies statute, the burden of persuasion was on the City to prove that the documents were not subject to disclosure, and not the other way around, *Laut*, 417 S.W.3d at 320-321, Laut II L.F. 10.

The court also noted, *Laut*, 417 S.W.3d at 324, Laut II L.F. 13:

> It is reasonable to infer that Chief Shockey's determination of the employees' fitness to perform their job duties was based, at least in part, on an evaluation of whether they had abused their access to REJIS. If true, that investigation into alleged criminal conduct would classify the resulting Internal Affairs report as an investigative report, an open record.

Trial Court Round Two

Thereafter, pursuant to the remand, the parties returned to the Trial Court. On May 7, 2014 that Court held a hearing for the purpose of receiving the long sought Internal Affairs report for an *in camera* examination, Laut II L.F. 25, Tr. 4. Counsel for

the City of Arnold produced the documents and represented that the documents were complete, Tr. 11.

Starting at Tr. 7 counsel for Respondent City of Arnold continued to argue against disclosure of the documents despite the Court of Appeals ruling. Counsel said:

> I would object to making a copy of the Internal Affairs investigation. This Internal Affairs investigation is geared towards disciplinary action taken by the city regarding its employee. It's even under the case that came down, in the footnote they discuss that there is a balance between protecting the privacy of the employee and discoverable document.

The trial court then said at Tr. 9:

> There is another way of looking at this. You knowingly and purposefully refused to grant the documents. Whether you did so under color of some reason which the Court of Appeals has now told us is inaccurate, you still did it knowingly and purposefully.

The trial court then took possession of the records for *in camera* review, Tr. 12, delayed the issues of civil penalty and attorney's fees for another day, Tr. 10, and ended the hearing Tr. 13.

Later that day the trial court issued a "Memorandum", L.F. 25, A3. The court found that the Internal Affairs report into the investigation of the improper accessing of official records was discoverable and the other records were not discoverable.

The court wrote:

> The Defendant City of Arnold's contention that the Internal Affairs report is in whole or in part a personnel record is wholly inaccurate. The Court finds that the Internal Affairs report is an "Investigative report" as defined in §610.100.1(5) and that it is "Inactive" as defined in §610.100.1(3). The Internal Affairs investigation was ordered By Police Chief Shockey upon the formal complaint by the Plaintiff herein. The complaint alleged criminal violations by City employee Linda Darnell, while working as a Police Department dispatcher. Thereafter, the investigation became inactive when Linda Darnell resigned her position, and no further action was taken. Therefore, at this point in time Plaintiffs are entitled to disclosure of said report.

(The order stated that the court would allow time for Respondent to apply to the Court of Appeals for a stay, but Respondent made no such application).

Appellants then filed in the Trial Court an Application for a Civil Penalty, Laut II L.F. 52 and for Attorney's Fees, Laut II L.F. 27, all pursuant to RSMo. 610.027, A15, the remedies statute, Laut II L.F. 28. The first sentence of subsection 1 of that statute states: "The remedies provided by this section against public governmental bodies shall be in addition to those provided by any other provision of law."

In their Application for Civil Penalty Appellants stated at paragraph 6 that the City "stonewalled against this Sunshine Act request in an attempt to forestall Plaintiffs from getting enough information to file [a Title 42 U.S.C. Section 1983 suit], Laut II L.F. 53. At para. 7 Appellants stated that "such stonewalling meets the standard "purposeful",

Laut II L.F. 53. At para. 9 Appellants stated that "Arnold is a large, prosperous and growing jurisdiction. It has the funds to pay competent counsel," Laut II L.F. 53.

In their Application for Attorney's Fees Appellants traced the course of the litigation to prove both the violation and purposeful and knowing, cited RSMo. 610.027.3 and 610.027.4, A15, and stated that the reasonable fees (and costs), through that point were $25,882.16. Counsel submitted affidavits outlining their qualifications and their time records, Laut II L.F. 33&c.

W. Bevis Schock sought $350.00 per hour, Hardy Menees sought $290.00 per hour, and Gerry McManama IV sought $150.00 per hour. The Affidavits, in the record here, described the attorneys' credentials, asserted that after reasonable inquiry the hourly rates were reasonable in the market, and that all the time worked was necessary under the circumstances, Menees, Laut II L.F. 36, Schock, Laut II L.F. 44. (McManama worked under the supervision of Menees).

On June 24, 2014 the court held a hearing (a) to hand deliver the Internal Affairs documents to Appellants' counsel, and (b) for argument on Appellants' Applications for Civil Penalty and Attorney's Fees, Tr. 14.

The court indicated it had redacted from the Internal Affairs report all material which was not subject to disclosure and delivered the documents to undersigned counsel, Tr. 15.

The court then allowed the parties to be heard on the issues of the Applications for Civil Penalty and for Attorney's Fees. At Tr. 17 counsel for Appellants, Mr. Schock, noted that the court had found in its May 7, 2014 Order that Defendant's contention that

"the Internal Affairs report was in whole or in part a personnel record is quote, wholly inaccurate". (By Interrogatory Answer and to the satisfaction of Appellants the City established that there had been no prior violations of the Sunshine Act, Tr. 18).

Counsel for the City stated: "There wasn't an intent to deprive them. We didn't intentionally stonewall…. It's just the judicial system", Tr. 19.

On the issue of attorney's fees the Court stated that the Jefferson County rates were not as high as those sought by Appellants' counsel. Mr. Schock responded that for a case of this nature with "involved points of law", the market "is the whole metropolitan region," Tr. 23.

Finally, counsel for Appellants argued that the first issue was whether Appellants had established a violation, Tr. 24, which is exactly what Appellants did do, albeit with the assistance of the Court of Appeals and then an in camera review by the court.

At the conclusion of the hearing the court took the issue under advisement, Tr. 25.

Later that day the court issued its Judgment on the Application for Civil Penalty and the Application for Attorney's Fees, L.F. 55. The court wrote:

> This court cannot on this record find that the Defendant City of Arnold either knowingly or purposefully violated the provisions of RSMo. §§ 610.010-610.035.

The court therefore denied both the civil penalty and the attorney's fees.

Appellants filed their timely appeal of those denials, L.F. 57 and the parties filed their briefs.

Before submission and as required by the Court of Appeals Eastern District Local Rule 400 Appellants stated their attorney's fees to that date, (presumably in the record transmitted to this Court).

On October 6, 2015 the Court of Appeals issued a 2-1 opinion affirming the Trial Court but pursuant to Rule 83.02 simultaneously transferring the case to this Court.

Appellant will update their attorney's fees application before oral argument.

POINT RELIED ON

(UNCHANGED FROM THE COURT OF APPEALS BRIEFING)

In this Sunshine Act case the trial court erred in denying a civil penalty and attorney's fees, because a party requesting records under the Act is entitled both to a civil penalty and attorney's fees when the government body has purposefully (or knowingly) violated the Act, in that the City contended in its very first response (and has continued to contend throughout the litigation) that the documents were only personnel records and did not involve a criminal investigation, but the trial judge himself described that contention as "wholly inaccurate", and the city made that wholly inaccurate contention in an attempt to thwart disclosure of the documents and thereby avoid a civil claim against the City.

RSMo. 610.027

Laut v. City of Arnold, 417 S.W.3d 315 (Mo. Ct. App. 2013)

Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. banc 1998)

Strake v. Robinwood, SC94842, November 10, 2015

ARGUMENT

Standard of Review

This is a Sunshine Act civil penalty and attorney's fees case. The Trial Court found the City's characterization of the sought after documents to be "wholly inaccurate" but then found the violation of the Act to be neither "knowing" nor "purposeful". Appellants appeal that finding and seek from this court both a civil penalty and attorney's fees.

The Standard of Review is not wholly straightforward. (In *Strake v. Robinwood*, SC94842, the court concluded that it was reviewing a grant of Summary Judgment, and so the review was *de novo*, p. 4.)

The relevant statute is RSMo. 610.027, A15. Subsection 3 states that upon a finding of a *knowing* violation of the Sunshine Act the court *may* award a civil penalty and attorney's fees. Subsection 4 states that upon a finding of a *purposeful* violation of the Sunshine Act the court *shall* award a civil penalty and attorney's fees (emphasis added).

Appellants believe the Standard of Review should be *de novo* for determining whether the violation was knowing or purposeful and for an abuse of discretion regarding the amount of any civil penalty and attorney's fees.

Appellants concede that in the past the Court of Appeals have not found it exactly so.

In *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988), a Sunshine Act affirming a purposeful violation where Plaintiffs sought attorney billing records to the City, the Court stated:

> The evidence in this case supports a finding of a purposeful violation of the Open Meetings Act, and an award of attorneys' fees.

Appellants read that review as pursuant to *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976), and see Rule 84.13(d).

In *Chasnoff v. Mokwa*, 466 S.W.3d 571, 584 (Mo. Ct. App. 2015) the unfortunate and long running World Series ticket scandal Sunshine Act litigation, the Eastern District wrote extensively to affirm a knowing violation of the Sunshine Act and the reasonableness of the fee award but at the last seemed to imply that *whether* to award fees was discretionary:

> The trial court did not abuse its discretion in awarding attorneys' fees under section 610.027.3,

In *Chasnoff* the Court of Appeals thus seemed to apply an abuse of discretion standard to both issues stated above (i.e. whether the violation was knowing or purposeful and whether an award of civil penalties and attorney's fees was proper).

Let us further examine the first phase. The issue of whether a violation was knowing or purposeful appears to Appellants to be one which is wholly that of law, because it is a question of whether certain facts meet a specific legal standard.

In *Franklin Bank v. St. Louis Car Co.*, 9 S.W.2d 901, 904 (1928), for example, the court wrote:

> The question of what is an unreasonable length of time with respect to a demand note is a mixed question of law and fact. Whether the circumstances show an unreasonable length of time is question of fact to be found by the jury. Whether, if true, such circumstances amount to an unreasonable length of time is a question of law to be determined by the court.

Appellants believe that the determination of knowing or purposeful in a Sunshine Act case is akin to the determination of an unreasonable length of time with respect to a demand note in *Franklin Bank* (stating the facts in the case is for the Trial Court, but the legal implications of what happened is for the Appellate Court). Thus the initial determination of purposeful or knowing should be by *de novo* review.

If the Court rejects the *de novo* review suggested by Appellants for the first question Appellants believe the Court should apply *Murphy*.

Let us now turn to the second phase, review of the *amount* of any award of civil penalty and attorney's fees. Appellants believe that is subject to an abuse of discretion standard. For example, in *Klinkerfuss v. Cronin,* 289 S.W.3d 607, 613 (Mo.App.E.D.2009) the court stated that the trial court is considered an expert on attorney's fees, and the court has discretion to determine the fee award. The court said: "A court abuses its discretion when it awards an amount so arbitrarily arrived at, or so unreasonable, as to indicate indifference and a lack of proper consideration."

The Civil penalty should logically fall under the same standard.

Appellants note further that if this Court finds in this case that the City's violation was either knowing or purposeful, then this Court will then be faced with the problem that while the Trial Court was presented with evidence in support of a specific amount of fees, (and that evidence is in the record here), the Trial Court found the conduct not knowing or purposeful and so made no findings about such fees. At the end of this brief Appellants will ask this Court – hopefully not wholly quixotically - to short circuit the process and under Rule 84.14 and applicable case law to make a ruling on the fees.

The burden is always on the appealing party to demonstrate error, *State ex rel. Ashcroft, ex rel. Plaza Properties, Inc. v. City of Kansas City*, 687 S.W.2d 875, 876 (Mo. 1985).

Point Relied On

(UNCHANGED FROM THE COURT OF APPEALS BRIEFING)

In this Sunshine Act case the trial court erred in denying a civil penalty and attorney's fees, because a party requesting records under the Act is entitled both to a civil penalty and attorney's fees when the government body has purposefully (or knowingly) violated the Act, in that the City contended in its very first response (and has continued to contend throughout the litigation) that the documents were only personnel records and did not involve a criminal investigation, but the trial judge himself described that contention as "wholly inaccurate", and the city made that wholly inaccurate contention in an attempt to thwart disclosure of the documents and thereby avoid a civil claim against the City.

The Civil Penalty and Attorney's Fees Statute Sections

RSMo. 610.027, A15, provides remedies for violations of the Sunshine Act. The first sentence of the first subsection of that sentence makes it available in all cases, and reads:

> The remedies provided by this section against public governmental bodies shall be in addition to those provided by any other provision of law. Any aggrieved person, taxpayer to, or citizen of, this state, or the attorney general or prosecuting attorney, may seek judicial enforcement of the requirements of sections 610.010 to 610.026.

Subsections 3 and 4 addresses civil penalties and attorney's fees. Those sections read:

> 3. Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has *knowingly violated* sections 610.010 to 610.026, the public governmental body or the member *shall* be subject to a civil penalty in an amount up to one thousand dollars. If the court finds that there is a *knowing violation* of sections 610.010 to 610.026, the court *may* order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing a violation. The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or

member of a public governmental body has violated sections 610.010 to 610.026 previously.

4. Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has *purposely* violated sections 610.010 to 610.026, the public governmental body or the member *shall* be subject to a civil penalty in an amount up to five thousand dollars. If the court finds that there was a purposeful violation of sections 610.010 to 610.026, then the court *shall* order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing such a violation. The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of a public governmental body has violated sections 610.010 to 610.026 previously. (Emphasis added).

Differences between the two sections are first that under subsection 3 if the government body's conduct is "knowing" then the court "shall" award a civil penalty of up to $1,000.00 and "may" award attorney's fees, but under subsection 4 if that conduct is "purposeful" then the court "shall" award a civil penalty of up to $5,000.00 and "shall" award attorney's fees. The civil penalty maximums are different, and in the latter situation the civil penalty and attorney's fees are mandatory.

In all cases the court is to consider the size of the jurisdiction, the seriousness of the offense and any prior violations. (There are no prior violations).

Relationship of Penalty Provisions of 610.100 and 610.027

The statutory sections which outline whether investigative reports such as the one at issue here are to be disclosed are RSMo. 610.100, A8 and RSMo. 610.021, A11. RSMo. 610.100, A8 relates to, among other things, disclosure of investigative reports, and RSMo. 610.021, A11 relates to, among other things, personnel records (subsections 3 and 13). The interplay of those sections were the focus of the first appeal, pursuant to the outcome of which Appellants finally obtained the records.

At the end of subsection 5 RSMo. 610.100, A8, there is an attorney's fee provision:

> The court may find that the party seeking disclosure of the investigative report shall bear the reasonable and necessary costs and attorneys' fees of both parties, unless the court finds that the decision of the law enforcement agency not to open the investigative report was substantially unjustified under all relevant circumstances, and in that event, the court may assess such reasonable and necessary costs and attorneys' fees to the law enforcement agency.

The section under which Appellants proceeded to seek attorney's fees, however, is not that section. As stated above, Appellants sought their fees under RSMo. 610.027, A15, Laut II L.F. 27 and 52.

The first sentence of that section reads:

> The remedies provided by this section against public governmental bodies *shall be in addition to those provided by any other provision of law.* (Emphasis added).

In short, RSMo. 610.027, A15, appears to be always available as an option. Further the attorney's fees and civil penalties provisions are better for prevailing parties in RSMo. 610.027, A15, than in RSMo. 610.100, A8. The attorney's fees and civil penalty provision are better in RSMo. 610.027, A15, because that provision provides a civil penalty for the client and RSMo. 610.100, A8, does not. Further, under RSMo. 610.100, A8, even if the court finds the City's position to be "substantially unjustified" the costs and fees are still only discretionary to the court, just as under the "knowingly" rubric of RSMo. 610.027.3, A15, but under RSMo. 610.027.4 if the court finds the violation of the City to have been purposeful, the awarding of reasonable attorney fees is mandatory.

RSMo. 610.027, A15, appears to be the better option for those who have successfully sought records, and it is the one Appellants have chosen to pursue here.

Interpreting RSMo. 610.027

Two years ago in *White v. City of Ladue*, 422 S.W.3d 439, 451-52 (Mo. Ct. App. 2013) the Court of Appeals summarized the law about how far the government body's conduct must go to be "purposeful" or "knowing" as those terms are used in RSMo. 610.027.3-4, A15:

> To purposely violate the Sunshine Law, a "public governmental body must exhibit a conscious design, intent, or plan to violate the law and do so with

awareness of the probable consequences." *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998) (internal quotations omitted). Furthermore, "[e]ngaging in conduct reasonably believed to be authorized by statute does not amount to a purposeful violation." *R.L. Polk & Co. v. Missouri Dept. of Revenue*, 309 S.W.3d 881, 886 (Mo.App. W.D.2010) (internal quotations omitted). A federal district court interpreting Missouri law has held that to establish a "knowing" violation of the Sunshine Law, a plaintiff must show that the defendant had "actual knowledge that the conduct violated a statutory provision." *Wright v. City of Salisbury, Mo.*, No. 2:07CV00056, 2010 WL 2947709, at *5 (E.D.Mo. July 22, 2010) (emphasis omitted).

In *Strake v. Robinwood*, SC94842, November 10, 2015, the court reiterated the same standard for a purposeful violation: "a conscious design, intent, or plan to violate the law and do so with awareness of the probable consequences", citing *Spradlin*; and the same standard for a knowing violation: "actual knowledge that [a public governmental body's] conduct violated a statutory provision," citing *White*.

When the Violation Occurred

Before discussing "knowingly" and "purposefully" Appellants suggest that an initial relevant question is when the City "violated" the Sunshine Act?

As described in this Brief, on October 11, 2010 Appellants wrote the City demanding the disputed records and correctly citing RSMo. 610.100.4, A8, Laut I L.F. 11. On October 14, 2010, the City wrote back and stated that they would not produce the

record, Laut I L.F. 14. (Appellants wrote one more letter eight days later on October 22, 2010, Laut I L.F. 15, but received no response). Appellants then filed suit a few weeks later on December 22, 2010, Laut I L.F. 3.

Appellants here assert that when the City wrote back on October 14, 2010, three days into what is now a five-year-plus saga, the City "violated" the Act. The rest of the story, that is, the suit, the Motions for Summary Judgment, the first appeal, *in camera* review, (with subsequent delivery of the documents), and this appeal first to the Court of Appeals and now to this Court are all events which occurred in the course of Appellants establishing a violation and may have provided factual insights into the violation at the time of the City's initial denial of the records, but were not the violation itself.

The interpretation that the violation occurred on day three of the journey makes common sense in terms of the statutory availability of a Civil Penalty and attorney's fees under RSMo. 610.027, A15.

RSMo. 610.100, A8, for example, directs the party seeking the record to file suit and litigate. Appellants submit that once the case reaches the point of suit, the City is "playing for" not only disclosure but also civil penalties and attorney's fees. This interpretation is consistent with the case law, particularly *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. Ct. App. 1995) where the court stated:

> We agree, however, with Buckner's notion that Chapter 610 would be a hollow law if it permitted a custodian intentionally to forestall production of public records until the requester sued.
>
> …

> A public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation of Chapter 610 and would be subject to a fine and reasonable attorney fees.

This Court favorably cited this holding from *Burnett* in note 10 of *Spradlin v. City of Fulton*, 982 S.W.2d 255, 269 (Mo. 1998).

To the extent that *Chasnoff v. Mokwa*, 2015 WL 1743088 *11 (Mo. App. E.D. 2015) can be read to suggest that a governmental body's conduct throughout the course of the litigation is relevant in determining whether a violation was knowing or purposeful, such holding is limited to the unique situation in that case where violations of the Sunshine Act occur or are discovered after the filing of a lawsuit. In the typical Sunshine Act case, such inquiries into litigation conduct are only relevant to the extent that the factual determinations gleaned through the litigation shed light on the initial violation at the time of denial of the records. To hold otherwise would eviscerate the purpose of the Sunshine Act. For example, assume that a governmental body intentionally and purposefully denies records to avoid release of documents that might subject the governmental body to civil liability and a plaintiff sues. The governmental body's conduct after being sued has no relevance to whether the governmental body purposefully or knowingly violated the Sunshine Act in the first instance. Such inquiry may be relevant to the amount of a civil penalty and attorney's fees assessed by the court, but certainly is not relevant to whether the underlying violation occurred.

Appellants thus assert that the "violation" occurred on day three after Appellants sent their initial letter. Appellants also suggest that even though the trial court did not

order the production of all records it examined *in camera*, once some records were ordered, that was enough to amount to a "violation" under the Sunshine Act.

Discussion - Purposefully

Appellants ask a simple question. How can maintaining a contention that the investigation was not criminal, which was, to quote the trial judge, "wholly inaccurate", have been anything but purposeful?

The Appellants original statement to the City of Arnold was that law enforcement officials had accessed their private information in law enforcement databases. The court may take judicial notice that everyone in law enforcement, and their counsel, knows that accessing a subject's private information in law enforcement databases without a lawful purpose is criminal. Appellants concede that a law enforcement official or attorney may not know the number of the federal code section, Title 18 U.S.C. Section 1030(a)(2), but it is common knowledge that a law enforcement official or an attorney would know the conduct is criminal.

Further, counsel's original letter requesting the documents stated that the purpose of the request was for pursuit of a civil claim, *see* RSMo. 610.100.4, A8, and Laut I L.F. 11, and the effort to stop the disclosure may be inferred to be an attempt to thwart that claim.

The use of the past tense in the City's first written response to Appellants' Sunshine Act: "the documentation you request contains personnel information about specific employees who *have been* subject to discipline", (emphasis added), indicates that

the investigation was over. The fact that there was "discipline" indicates the bad conduct did occur. As stated in the Statement of Facts, these facts have long since been settled.

Right from the start the issues were thus fully joined and known to the parties, and yet the City persisted for years in trying to draw fine points such that either the Internal Affairs report contained *some* personnel information and so was *completely* outside the realm of disclosure, or more cleverly, that Chief Shockey was choosing to ignore the criminal issues and was somehow just focused on whether the miscreants were fit for duty, which would make the investigative report not an inquiry into criminal conduct and so not subject to disclosure. The problem with the latter argument is that years before this case started this Court in *Guyer v. Kirkwood*, 38 S.W.3d 412, 415 (Mo 2001) stated that "the key aspect of an investigative report is that it is *directed* to alleged criminal conduct," (emphasis added). Thus the proper issue to be addressed by the City was not how the Chief chose to describe his own investigation, as the City has maintained, but was to what subject the Chief was directing the investigation. And the Chief was directing his investigation into the criminal conduct of improper accessing of records.

Under a *de novo* review this court should conclude that the Trial Court erred in denying a Civil Penalty and attorney's fees by erroneously applying the law to its own central finding of fact, because the Trial Court itself wrote that the City had made a contention which was "wholly inaccurate." (That conclusion has not been appealed and so is established for the purposes of the appeal), see *Strake v. Robinwood*, SC94842 footnote 1, citing *J.A.R. v. D.G.R*, 426 S.W.3d 624, 629-630 (Mo. 2014).

When a party has made a "wholly inaccurate" contention the party has "exhibit[ed] a conscious design, intent, or plan to violate the law and do so with awareness of the probable consequences", *White v. City of Ladue*, 422 S.W.3d 439, 451-52 (Mo. Ct. App. 2013) citing *Spradlin v. City of Fulton,* 982 S.W.2d 255, 262 (Mo. banc 1998). A wholly inaccurate contention does not fall within the *R.L. Polk & Co. v. Missouri Dept. of Revenue,* 309 S.W.3d 881, 886 (Mo.App. W.D.2010) safe harbor of "[e]ngaging in conduct reasonably believed to be authorized by statute". The City has never claimed that it accidentally or inadvertently denied the Sunshine Act request, and it is a fair statement that at the time of the denial of the request it was the City and its representatives, including its attorney, and no one else who knew the contents of the records. The City, through its officials and representatives all of whom had a duty to comply with the Sunshine Act, were thus fully aware of the probable consequences of an inappropriate denial and resultant violation of a Sunshine Request, including payment of a civil penalty and reasonable attorney's fees. Such purposefulness is compounded by the fact that the refusal to produce the records was committed based on a "contention" or position that the trial court has unquestionably characterized as "wholly inaccurate." While "engaging in conduct reasonably believed to be authorized by statute does not amount to a purposeful violation" of the Sunshine Act, *White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App. 2014), engaging in conduct by taking a position or relying on a contention that is "wholly inaccurate" cannot be characterized as being "reasonably believed to be authorized by statute". Given the state of the law at the time of the records

denial as expressed in *Guyer*, such "wholly inaccurate" contention by the City only renders the non-disclosure more unreasonable.

Appellants suggest that when a government entity has denied a Sunshine request based on taking a position which is "wholly inaccurate" and in direct contradiction to the current state of the law that act should be viewed as one that is "willed, [] a product of conscious design, intent or plan that is to be done, and [] done with awareness of probable consequences", and not one that is "reasonably believed to be authorized by statute."

Appellants acknowledge that it makes sense that after the proper determination of whether the initial violation was knowing or purposeful the entity's conduct during the litigation should be relevant to the amount of civil penalty and attorney's fees assessed by the court. And Appellants respectfully suggest that the City's post-suit conduct here has been at best "difficult".

This court should therefore reverse the trial court, find the City purposefully violated the Sunshine Act, examine the City's long-standing defiance, find that the defiance justifies the full $5,000.00 civil penalty available, and then award Appellants their full reasonable attorney's fees.

Discussion – Knowingly

If this court should find that the City did not act "purposefully", then the court should find it acted "knowingly". The *White* court favorably cited *Wright v. City of Salisbury, Mo.*, No. 2:07CV00056, 2010 WL 2947709, at *5 (E.D.Mo. July 22, 2010) and the test for knowing as "actual knowledge that the conduct violated a statutory provision." Once more, how can a party which has made a contention about the nature of

the documents at issue which was wholly inaccurate not "know" that it was in violation? Should this court find the conduct of the City to only meet the standard of "knowingly" this Court will have discretion over the amount of the Civil Penalty up to a $1,000.00 and Attorney's Fees. In light of the City's conduct in this case, it should exercise its discretion in favor of the Appellants and award the full Civil Penalty for a knowing violation and the full amount of reasonable Attorney's Fees.

Self-Immunization

Let us turn to the recent decision in *Strake v. Robinwood*, SC94842, where the City claimed to be self-immunized under RSMo. 610.027.6, A15, because it had sought counsel before denying the Sunshine Act request and counsel had said that because a personal injury settlement agreement contained a confidentiality clause the requested document did not have to be immediately disclosed.

RSMo. 610.027.6, A15, reads:

> A public governmental body which is in doubt about the legality of closing a particular meeting, record or vote may bring suit at the expense of that public governmental body in the circuit court of the county of the public governmental body's principal place of business to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body.

Perhaps this issue can be resolved summarily in Appellants' favor here because Respondents did not make the self-immunization argument in the Court of Appeals, but pursuant to the belts-and-suspenders theory Appellants will discuss the issue.

The first reason that this court should not conclude that a government entity can immunize itself from liability by consulting counsel is because RSMo. 610.027.6, A15, does not say that consultation from counsel will provide such immunization. It only gives the entity the option of seeking counsel, with an implication that if the entity receives bad advice from its lawyer it has the same remedies anyone else has when it gets bad advice from its lawyer – sue the lawyer.[3]

The second reason is that this Court in *Strake* stated:

> [T]he advice Robinwood received from counsel does not negate Robinwood's knowledge of its obligations under the Sunshine Law.

The *Strake* court thus rejects the theory that a City can hide behind its lawyer. Admittedly, there was direct evidence of the City's knowledge in *Strake*; however, the state of the law was clear at the time Appellants' initial records request was denied that investigative reports are required to be disclosed under the Sunshine Law as expressed in *Guyer*. The City, in reliance on the advice of counsel, is presumed to know the state of the law and reliance on erroneous advice of counsel cannot negate its obligations under the Sunshine Law. Just as in *Strake*, where the City knew that settlement agreements were subject to disclosure but chose to honor the confidentiality provisions at its own peril, so too has Respondent relied on the incorrect advice of counsel to hide behind the

[3] Of course after a bad outcome in a criminal trial a Defendant has the right to assert that he lost because his attorney was ineffective, Rule but that would appear to be a different situation.

exemption for personnel records that the Trial Court described as "wholly inaccurate."

The third reason is that any such "immunization by counsel" rule would create a problem of privilege. Counsel must be free to give advice, go back and forth as things change and the attorney thinks further, and if counsel must operate under knowledge that his communications to his client may be subject to disclosure in a later fee dispute, the attorney will be unwilling to be candid and the entity may get less than honest advice.

The fourth reason is the concern that a lawyer with knowledge that a letter could immunize his client might be tempted to engage in artifice. One can even imagine a lawyer concluding in a close case that he had a duty to write such a letter to protect his client from liability. Immunization by counsel would thus create an incentive for entities to get bad advice. That must be wrong.

Size of Jurisdiction and Seriousness of the Offense

Both subsections 3 and 4 of RSMo. 610.027, A15, include two remaining factors for the court to consider: the size of the jurisdiction and the seriousness of the offense. Appellants suggest those factors are in their favor. The court may take judicial notice that the population of the City of Arnold, according to the front page of its website, was according to the 2010 census 20,808. A casual driver up and down JeffCo Boulevard will immediately recognize that the City of Arnold is prosperous and growing. The City of Arnold is not a small rural village for which the funds at stake here would present a hardship.

Further, the offense is serious. As stated in the Statement of Facts, the very first sentence of the original Sunshine Act request stated that the request was in connection

with a possible claim against the City or its employees. Appellants suggest that when a government makes a contention which is wholly inaccurate in order to stonewall a civil claim, that is a serious offense indeed.

Discussion – Purpose of the Law, Incentives, Fulfilling Policy Objectives

In the first decision from this court in this case, *Laut v. City of Arnold*, 417 S.W.3d 315, 318 (Mo. Ct. App. 2013), the Court of Appeals stated:

> The overarching purpose of the Sunshine Law is one of open government and transparency. *Smith v. Sheriff*, 982 S.W.2d 775, 778 (Mo.App. E.D.1998). Section 610.011.1 states: "Sections 610.010 to 610.200 shall be liberally construed and then-exceptions strictly construed to promote this public policy."

In *Spradlin v. City of Fulton*, 982 S.W.2d 255, 263 (Mo. 1998) the court faced a situation in which the city had held meetings about a proposal for a golf course which should have been open but were closed. The fact that a golf course necessarily involves real estate creates a colorable argument that the meetings could be closed. The court allowed the City some leeway and denied attorney's fees, but said:

> [M]embers of governmental bodies are on notice that the provisions of the open meetings law will be strictly enforced and that our trial courts will have less latitude to avoid a finding of a purposeful violation.

While this case is of course about an investigative report and not about open meetings, the admonition in the quote informs us which way the wind is blowing and *Spradlin* gives government entities "less latitude" in these matters. Here, where in trying

to avoid disclosure in order to thwart a civil claim the City made a contention which was wholly inaccurate, and where the City then fought tooth-and-nail for years, there would seem to be "little or no latitude". The City has played by the litigation sword and now must face the consequences of that choice.

And, of course, as in all fee shifting situations, if the court does not fairly compensate attorneys willing to take on matters of this nature, then attorneys will stop taking on such matters, government bodies will have no fear of committing violations, and at that point the purpose of the act will be undermined. Thirty years ago, in the context of civil rights, the Supreme Court cited the legislative history and explained how the incentives really work, *City of Riverside v. Rivera*, 477 U.S. 561, 576-78 (1986):

> "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> "... If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report, at 2, U.S.Code Cong. & Admin.News 1976, p. 5910.

See also *Kerr v. Quinn,* 692 F.2d 875, 877 (2nd Cir. 1982):

> The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned

because of the financial imperatives surrounding the hiring of competent counsel.

See also *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010), noting that:

> If plaintiffs ... find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied.

See also *Kassim v. City of Schenectady*, 415 F.3d 246, 252 (2d Cir. 2005):

> [i]n litigating a matter, an attorney is in part reacting to forces beyond the attorney's control, particularly the conduct of opposing counsel and of the court. If the attorney is compelled to defend against frivolous motions and to make motions to compel compliance with routine discovery demands, or to respond to unreasonable demands of the court for briefing or for wasteful, time-consuming court appearances, the hours required to litigate even a simple matter can expand enormously. It is therefore difficult to generalize about the appropriate size of the fee in relation to the amount in controversy. (Citations omitted).

In this Sunshine Act context the incentives work exactly the same way. The only way future attorneys will take on matters of this nature is if the attorneys who work on cases like this are compensated for their work. Otherwise the law will be that a governmental entity can take with impunity what approaches a frivolous position. If that is the law then the purpose of the Sunshine Act will be defeated, because competent

counsel will have no choice but to decline Sunshine Act cases in favor of cases with a better chance of remuneration.

The Trial Court's denial of fee in this case thus showed "indifference and a lack of proper consideration." *Klinkerfuss* at 613 The appropriate remedy is reversal.

Appellants do not quarrel with the City's right under the law to challenge Appellants' legal positions at every step of the way. But taking that approach carries with it the burden of paying the bill for the journey once the parties get to the end of the road. That is where we are now.

Resolution and Not Remand

Rule 84.14 states:

> The appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or in part, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.

Under that Rule this Court has the power to issue a judgment which disposes finally of the case. Should this Court see fit to rule in Appellants' favor in this appeal, Appellants respectfully request that this Court issue a judgment for the full available civil penalty of $5,000.00 for a purposeful violation (or the full available civil penalty of $1,000.00 for a knowing violation), and the reasonable attorney fees as requested - and not remand back to the trial court. See *Trimble v. Pracna*, 167 S.W.3d 706, 715 (Mo. 2005) for authority of the court to issue an attorney's fee award without remand to the Trial Court.

Appellants believe the prior fee application at L.F. 2&c and the fee application which Appellants will submit before oral argument will provide sufficient information for this Court to issue such a Judgment.

CONCLUSION

Appellants pray the Court to find that the City violated the Sunshine Act in a "purposeful" manner, award a full $5,000.00 civil penalty; (or alternatively find the violation "knowing" and award a full $1,000.00 civil penalty), award reasonable attorney's fees as requested pursuant to RSMo. 610.027, A15, and for such other and further orders as the Court deems just, meet, and proper.

The amount of the attorney's fees sought will be $51.394.66, plus fees accrued after September 2, 2015.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATION AND VIRUS PROTECTION NOTICE

Undersigned counsel certifies that this Brief complies with the limitations contained in Rule 84.06(b) because the Brief's word count is less than 31,000, that is, the word count is 9515.

Pursuant to undersigned counsel's customary practices and virus protection software, all emails and attachments have been checked for viruses and on information and belief are virus free.

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CERTIFICATE OF SERVICE

Undersigned counsel for Appellants hereby certifies that on November 17, 2015 pursuant to Rule 103 he is delivering an email copy of this brief to opposing counsel named below via the electronic filing system, is simultaneously sending a copy in Word, and within five days thereafter undersigned counsel will deliver by regular mail to that counsel two paper copies of the brief:

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