No. SC97352

SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* SHELTER MUTUAL INSURANCE COMPANY

Relator

v.

THE HONORABLE R. MICHAEL WAGNER
Circuit Judge, Division II
17 Judicial Circuit
Johnson County, Missouri

Respondent

Original Proceeding in Prohibition
Circuit Court Case No. 13JO-CV01550-01

Transfer from the Missouri Court of Appeals, Western District
No. WD81541

SUBSTITUTE REPLY BRIEF OF RELATOR

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POINT I

Shelter is entitled to an order prohibiting Judge Wagner from allowing discovery of Shelter's documents submitted for *in camera* review because those documents are protected from discovery by the attorney/client and work-product privileges, in that the documents consist of communications between Shelter and its attorneys and pertain to the subject matter of the attorneys' representation of Shelter, the communications were prepared in anticipation of litigation against Shelter and contain mental impressions of Shelter and its counsel, and no privilege has been waived.

I. Standard of Review

Brennan suggests in his brief on behalf of Judge Wagner that, because this writ involves a discovery decision, Judge Wagner's ruling is to be afforded deference and reviewed solely for abuse of discretion. However, "[a]pplication of the attorney-client privilege is a matter of law, not judicial discretion." *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 838 (Mo.App.1995) (*citing State ex rel. McBride v. Dalton*, 834 S.W.2d 890, 891 (Mo.App.1992) (*citing State ex rel. Hayter v. Griffin*, 785 S.W.2d 590, 595 (Mo.App.1990) ("Plaintiffs cite a number of cases holding that an appellate court should give considerable deference to the discretion of a trial judge in prohibition proceedings involving questions of discovery. Those cases are not applicable here, because the questions for decision concern matters of law which are not within the sphere of respondent's discretion")). The test is not whether Judge Wagner abused his

discretion. The test is whether, as a matter of law, communications between Shelter and its attorneys about the subject matter of the pending litigation are privileged.

More than once, this Court "has spoken clearly on the sanctity of the attorney-client privilege." *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607 (Mo.banc 1993). "As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law—that is, by lawyers—anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened." *Id* (*citing State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo.banc 1978)). "The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value than the admissibility of a given piece of evidence in a particular lawsuit." *Id* (*citing Great American*, 574 S.W.2d at 383).

II. The New Theory: Paul Link

Much of Brennan's brief is founded on an argument that Shelter waived its attorney/client and work-product privileges by providing the privileged materials to attorney Paul Link, whom Shelter retained to represent Brennan's parents in the event of a claim against them. The theory does not hold up, but the Court should disregard it in its entirety because it was raised for the first time on appeal.

A. Raised for the First Time on Appeal

In fact, the argument about Mr. Link was raised for the first time in the Substitute Brief of Respondent filed in this Court, having been omitted from anything filed on

behalf of Judge Wagner even in the appellate court. In all the briefing before Judge Wagner, neither Brennan nor the Browns suggested there had been a waiver because documents were provided to Mr. Link. In the argument to Judge Wagner during hearings, there was no mention of such a waiver. Similarly, in the suggestions Brennan filed in opposition to Shelter's writ petition in the appellate court, Mr. Link's name never came up. Only now, at the final stop for review, has this new theory of waiver been raised.

"A party may not raise claims for the first time in this Court and 'shall not alter the basis of any claim that was raised in the brief filed in the court of appeals.'" *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo.banc 2014) (*quoting* Mo.Sup.Ct.R. 83.08(b)) (*citing State v. Moore*, 303 S.W.3d 515, 523 (Mo.banc 2010); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo.banc 1999); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-727 (Mo.banc 1997)). "It is elementary that we will not consider matters raised for the first time on appeal." *Bennett v. Kitchin*, 400 S.W.2d 97, 103 (Mo.1966). Accordingly, the Court should disregard Brennan's argument about Mr. Link and a waiver having occurred because Shelter supposedly provided him some of the privileged materials.

B. No Disclosure of Privileged Communications

Brennan points out that Shelter sent a file to Mr. Link in August 2011 so that he could represent Brennan's parents in the event of a claim against them. He then makes the leap that the file Mr. Link received must have included all of the redacted items now at issue that existed at the time. This is pure conjecture, and it appears to be false.

The party asserting that a privilege has been waived bears the burden of proving the privileged materials were disclosed to a third party. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 368 (Mo.banc 2004) ("Ford has the burden of establishing that any particular document is entitled to work product status. Plaintiffs have the burden of establishing that this status has been lost by unprotected disclosure"); *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 63 (Mo.banc 1999) ("Suzuki has not demonstrated that Dubis waived her statutory privilege under any recognized theory"). Thus, even it is assumed for the sake of argument that a hypothetical delivery to Mr. Link of items listed in the privilege log would constitute a waiver, Brennan bore the burden of proving Shelter actually did provide privileged materials to Mr. Link.

Brennan has offered no proof whatsoever that the file Shelter provided to Mr. Link did include any of the privileged items for which Shelter seeks protection. Rather, Brennan's entire argument is that a file was sent to Mr. Link and there are items in the privilege log pre-dating that delivery. There is nothing in the record to support the leap Brennan makes to conclude that, just because privileged communications existed when the file was sent to Mr. Link, they must have been disclosed to Mr. Link. Such a conclusion would be inconsistent with the position Shelter has taken all along, which is that Shelter's communications with its attorneys at Foland Wickens are not part of the claim file as contemplated by the *Grewell* cases. More importantly, the record actually demonstrates that the file sent to Mr. Link very likely did not include any of the privileged items at issue.

Shelter's corporate representative, an in-house attorney named Connie Morley, was asked about the file provided to Mr. Link in her deposition. Ms. Morley testified:

Q: What is the entry file O/N to Paul Link, Jr.? What is that?

A: Overnighted.

Q: What was overnighted to Paul Link?

A: The file.

Q: Nathaniel Brennan's entire claim file to this point was overnighted to Paul Link?

A: Correct.

Q: Everything in it? No redactions?

A: Nothing from my part of the file would have been sent. It would have only been the defense part of the file.

Q: How do we know that?

A: That was our general practice.

[*Brennan's Exhibit 1, at pg. 168, lines 9-22*] As is clear from Brennan's brief, Ms. Morley's "part of the file" included the communications with Foland Wickens.

The burden fell on Brennan to show that Shelter actually did disclose privileged materials to Mr. Link, but he offers only unsupported speculation. Nothing in the record suggests items listed in the privilege log were provided to Mr. Link. Most significantly, while it is not Shelter's burden to disprove that privileged documents were sent to Mr. Link, Ms. Morley testified as Shelter's corporate representative that the documents at

issue would not have been sent to him. No waiver can be found by virtue of some other materials having been sent to Mr. Link.[1]

III. Brennan's Other Arguments

Shelter refuted most of Brennan's other arguments in its first brief to this Court. Shelter will not re-argue the points it covered previously, but some of the specific arguments made by Brennan do need to be addressed.

A. Employees of Shelter

Brennan attempts to convince this Court he is entitled to discover Shelter's privileged communications by restricting the attorney/client privilege to far narrower than it really is. In *Great American*, this Court "adopted the very broad concept of attorney-client privilege" advocated by one commentator and, in doing so, "rejected the narrower attorney-client privilege" advocated by another as an alternative. *See State ex rel. Syntex Agri-Business, Inc. v. Adolf*, 700 S.W.2d 886, 888 (Mo.App.1985). Brennan suggests

[1] At the time Mr. Link was asked to represent Brennan's parents, he practiced with the firm of Baird, Lightner, Millsap & Harpool, P.C. out of Springfield, Missouri. Shelter and its counsel wish to disclose to the Court in the interest of candor that Mr. Link has since begun practicing with Foland Wickens. That began in 2018, long after the limitations period for a potential claim against Brennan's parents had expired and Mr. Link's representation of the parents had ended. Respecting the role Mr. Link played in the case and his duties of confidentiality to his former clients, counsel for Shelter have not discussed this matter with Mr. Link.

that, rather than Shelter itself, the specific employees at Shelter who primarily dealt with counsel at Foland Wickens (*i.e.*, Ms. Morley, Brian Waller while filling in while Ms. Morley was on maternity leave, and Gary Dauer) were the clients in this situation. From there, he says disclosure of attorney/client communications to other Shelter employees either destroys the privileged nature of the communications or amounts to a waiver of the privilege. This is not how the very broad concept of attorney/client privilege works in Missouri.

Mr. Crawford was asked to represent Shelter as a corporate entity, not individual Shelter employees. This is evident from the assignment memorandum Dauer sent to Mr. Crawford.[2] The client was Shelter, and plainly "[a] corporation may claim an attorney-client privilege." *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 531 (Mo.App.1991) (*citing Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)); *also State ex rel. Lause v. Adolf*, 710 S.W.2d 362, 364 (Mo.App.1986). Of course, a corporate entity can only communicate through its employees and other agents. *Smith v. Kansas City Southern Ry. Co.*, 87 S.W.3d 266, 271 (Mo.App.2002). So, attorney/client communications necessarily would have been between Foland Wickens and employees of Shelter, and they remain privileged. *DeLaporte*, 812 S.W.2d at 531 (*citing Weintraub*, 471 U.S. at 348).

[2] That memo has not been produced because it is privilege. It is contained in the documents Shelter submitted to this Court for *in camera* review, however, specifically at SHELTER.00171.

Disclosure of a privileged attorney/client communication to another employee does not destroy the privilege. For example, the court in *Syntex Agri-Business*, 700 S.W.2d at 889, went so far as to hold that the privileged documents "did not lose their confidential nature and privileged status by being shared by employees of other corporations in the family." If the disclosure of an attorney/client communication to an employee of a different, albeit affiliated, corporation is not a waiver of privilege, surely disclosure of attorney/client communications to employees within the represented company is not a waiver. An employee of the corporate client is not a third party. So, dissemination to other Shelter employees could not have waived the privilege. "[A]ttorney-client communications in the presence of, or disclosed to, clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when made to further the interest of the client or when reasonably necessary for transmission or accomplishment of the purposes of the consultation, remain privileged." *Id* (*citing Insurance Co. of N. Am. v. Superior Court for the County of Los Angeles*, 166 Cal.Rptr. 880, 888 (Cal.App.1980)).

B. Notes of Attorney/Client Communications

Brennan continues to argue notes made by Shelter employees memorializing communications with Foland Wickens are not privileged. He calls them communications between Shelter employees and the file, as if to distinguish them from communications with a lawyer. On that basis, Brennan says the notes are discoverable. This misses the point of the privilege.

Shelter has already addressed the flaw in Brennan's theory in its first brief, but perhaps an additional illustration is helpful: If a client sends his attorney a letter describing an incident for purposes of obtaining legal advice, that letter is obviously privileged. If the client speaks with the attorney over the phone or meets with the attorney in person and gives the same description, what was said is likewise privileged. If the attorney then makes notes about what the client said, those notes cannot be discovered because they would reveal the privileged communication, even though the attorney's notes in and of themselves are not communications. The notes still reflect, and would reveal if discovered, the communications between attorney and client. It is the communication that is privileged and protected by discovery, whether memorialized in real time (such as by letter) or after the fact (such as where the attorney made notes in the hypothetical). And, notes by an attorney reflecting privileged communications are no different from notes by a client reflecting privileged communications. If the note is discovered, the privileged communication is revealed either way, and that communication is what is protected.

C. What does *Grewell* really mean?

Brennan continues to insist that, because he has a right of "free and open access" to his "claim file" under *Grewell*, and because Shelter's privileged items were stored in the same place as the claim file, he should get free and open access to the

communications between Shelter and its counsel.[3] In doing so, he asks the Court to turn a blind eye to its own careful analysis in the *Grewell* case, which was clear that an insured's right to a claim file comes from the fiduciary character of a liability insurer acting on behalf of the insured. It is a different situation when an insurer is not acting as fiduciary but to protect its own interests. It will be up to this Court to announce what its holding in *Grewell* truly meant with regard to the issue here, but nothing in the opinion suggests it was intended to eliminate an insurance company's right to have privileged communications with legal counsel when seeking to protect itself from threatened litigation.

Shelter hired the Foland Wickens firm to give it legal advice after two things had become clear.

First, there was a dispute as to the interpretation of the Shelter policies and whether liability coverage stacked. Shelter's interests and Brennan's interests diverged on that question. Counsel for the Browns, who is now counsel for Brennan, wanted

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[3] Brennan attempts to counter Shelter's position that it does not matter where—*i.e.*, in what box or file folder—a document is put by citing to *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835-836 (Mo.banc 2000), for the holding that privilege was waived when the insurer gave a designated, testifying expert a set of documents containing the privileged materials. The difference between that case and this one is simple. In *Tracy*, the privileged documents were actually given to the expert, a third party. Here, Shelter did not give its privileged materials to anyone outside the company.

Shelter to pay more than Shelter believed it owed, and it would have been in Brennan's interest for coverage to stack and afford him more insurance. So, when Shelter sought legal advice[4] on the issue from Foland Wickens, it could not have been acting on behalf of Brennan. It could not have been acting as Brennan's fiduciary. Further, there have been countless opinions handed down by this Court and the appellate court on the issue of stacking, many with respect to liability coverage and many more on underinsured motorist coverage. Those cases have resulted in a variety of holdings, often based on often-overlooked subtleties in policy language and case law. *See, e.g.,* *Dutton v. American Family Mut. Ins. Co.*, 454 S.W.3d 319 (Mo.banc 2015); *Yager v. Shelter Gen. Ins. Co.*, 460 S.W.3d 68 (Mo.App.2015). Thus, answering the legal question of whether liability coverage stacked under the Shelter auto policies was not a simple matter of ordinary claim handling.

Second, the Browns' attorney (now Brennan's attorney) had demanded that Shelter sign what he calls a "Shelter/Chad Vulgamott agreement." [*Exhibit K: R. at 55*] He made the demand under the guise that the agreement would protect Brennan under Section 537.065. [*Exhibit K: R at. 55, 58 (para. 4)*] However, the contract counsel demanded of Shelter went well beyond protecting Brennan's personal assets from a judgment. In the document, which counsel wanted Shelter to sign, Brennan would have been contractually obligated to sue Shelter for bad faith refusal to settle. [*Exhibit K: R*

[4] The interpretation of an insurance policy is an issue of law, *Allen v. Continental Western Ins. Co.*, 436 S.W.3d 548, 553 (Mo.banc 2014).

at. 57-58 (para. 2)] In that suit, Brennan and Shelter would have been direct adversaries, and it would have been Shelter's interests at stake. Moreover, the document included a provision that would have prevented Shelter from using the agreement as evidence in the bad faith claim to show it took measures to protect Brennan. [*Exhibit K: R. at 59-60*] Brennan now claims in the underlying suit that Shelter acted in bad faith by not signing the proposed agreement. Ironically, Shelter would be prohibited by contract from proving it did just that if it had signed. When it sought legal advice about the implications of the contract demanded by the Browns and similar demands, Shelter was not undertaking ordinary claim handling or making decisions on behalf of Brennan. It was looking after its own interests, through its own attorneys, with regard to complicated legal issues of whether it was required to sign the so-called Vulgamott agreement[5] or whether signing would be appropriate under Missouri law. All of this was plainly in anticipation of bad faith litigation, as the contract at issue expressly required a bad faith lawsuit against Shelter.

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[5] Missouri courts have not yet considered the question of whether good faith requires an insurer sign or otherwise consent to a contract of this type in order to protect an insured. In the few states of which Shelter and its counsel are aware that have considered the question, the courts have held an insurer owes no such duty. *See* *Allstate Ins. Co. v. Miller*, 212 P.3d 318 (Nev.2009); *Kropilak v. 21st Century Ins. Co.*, 806 F.3d 1062 (11th Cir.2015) (Florida law); *Kemp v. Hudgins*, 133 F.Supp.3d 1271 (D.Kan.2015); *see also* *Ivy v. Pacific Auto Ins. Co.*, 156 Cal.App.2d 652 (Cal.App.1958).

Shelter was not acting as Brennan's fiduciary when it communicated with Foland Wickens. Shelter sought legal advice in regard to issues of stacking and a potential bad faith lawsuit against itself. Those communications are not contemplated by the *Grewell* opinion as part of an insured's right of free and open access to the claim file.

D. Waiver by Putting at Issue

Brennan tells the Court that other jurisdictions have found that an insurer waives privilege by placing advice of counsel at issue "regardless of whether the insurance carrier directly plead advice of counsel as a defense." Missouri has already answered the question to the contrary. The defendants seeking to protect its privilege in *State ex rel. Behrendt v. Neill*, 337 S.W.3d 727 (Mo.App.2011), a malicious prosecution case, did not plead advice of counsel as an affirmative defense, but they did testify in deposition when examined by opposing counsel that they relied on their attorney. The court held:

> Relators did not waive their attorney-client privilege by their pleadings or deposition testimony. As to the former, Relators never pleaded advice of counsel as a defense. They did plead that they acted "without malice"—which is now the sole liability issue left for trial—but this injected no new issue because malice is an element of malicious prosecution on which Plaintiffs bear the burden of proof. *See Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 318 (Mo.App.2010).
>
> Nor did Relators lose their privilege by answering opposing counsel's deposition questions, because a waiver "extorted

> under cross-examination" is not voluntary. [*Smith v. Smith*, 839 S.W.2d 382, 385 (Mo.App.1992)]. Likewise, disclosure "in response to an adverse party's discovery inquiry is not voluntary." *State ex rel. Chance v. Sweeney*, 70 S.W.3d 664, 670 (Mo.App.2002). *Chance* involved the physician-patient privilege, but the same rule applies here. Information given in reply to an adverse party's inquiry is considered to be "extorted" and involuntary. *Id*.

Behrendt, 337 S.W.3d at 729-730. Missouri has already held that nothing Shelter did was a waiver of privilege. No resort need be made to cases in other states in order to sweep Shelter's privilege away after the fact.

As to Ms. Morley's specific testimony cited by Brennan, nothing there amounts to a waiver. Ms. Morley was asked why Shelter did not move to enforce a settlement agreement it believed was reached, and she said there was a discussion with counsel at Foland Wickens but did not reveal what was discussed. That excerpt from Ms. Morley's deposition contains no question calling for disclosure of communications with Foland Wickens,[6] and no such disclosure was made. Ms. Morley was asked a direct question and answered it without revealing a privileged communication. She had no choice but to

[6] This is why no objection was asserted. If counsel had asked Ms. Morley what was said between Shelter and the Foland Wickens firm, the objection would have been made, but no question requiring an objection was asked in the testimony cited by Brennan.

answer the question truthfully, so any answer given could not have been a voluntary waiver regardless.

E. Fairness Doctrine

Brennan argues next that Shelter is invoking its privileges in a fundamentally unfair way, such that a waiver can be implied under the "fairness doctrine" intended to prevent parties from using privileged information as a sword when it would be advantageous but putting up the privilege as a shield when the information might be harmful. Shelter has no quibble with the general concept of the fairness doctrine, but it has no application here for a simple reason: Shelter is using the privilege as a shield to protect its right to consult with legal counsel, but it has not once even begun to use privileged information as a sword.

Brennan points to a few specifics he claims supports application of the fairness doctrine.

First, he says Mr. Crawford and Mr. Maloney were participating in the ordinary claim handling process. Shelter has already dealt with that unfounded contention. Simply put, the Foland Wickens' attorneys were dealing with Shelter's legal obligations to Brennan and threatened claims against Shelter, not merely defending the bodily injury claim against Brennan.

Second, Brennan says Shelter is disclosing only selected communications for self-serving purposes. That is simply not true, as Shelter has not produced any of the communications between it and the Foland Wickens firm. It might possibly be selective production and more akin to a "sword and shield" scenario if Shelter had produced some

privileged communications because they benefit its position but hid others because they could be harmful. Shelter has not done that.

Third, Brennan complains that "Shelter is using the privilege to prejudice Brennan's bad faith case." Brennan is suing Shelter. Nothing requires Shelter to help Brennan with that. Suggesting that Shelter's assertion of the privilege makes it harder for Brennan to prove his bad faith claim is, at best, window dressing an argument that Brennan should be able to overcome the privilege because the documents are relevant and might help his case. Shelter's first brief demonstrates that argument lacks merit.

Fourth, Brennan suggests Shelter chose to engage Mr. Crawford and Mr. Maloney on tough decisions in order to cloak its claim handling. As indicated above, the decisions in which these attorneys were involved related to protecting Shelter's interests against claims against it, not handling the claim against Brennan. This baseless allegation should not be afforded any weight.

Fifth, Brennan cites cases from other jurisdictions for the notion that anticipation of litigation is sometimes unreasonable prior to a final decision being reached on an insured's claim. That might make sense in a first-party coverage claim, such as property coverage or UIM coverage,[7] but it does not make sense here. Before it retained the

[7] In fact, all of the cases cited by Brennan on this point are first-party insurance claims. *See* *Lindley v. Life Investors Ins. Co. of Am.*, 267 F.R.D. 382, 386 (N.D.Okla.2010) (supplemental health coverage); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 658 (S.D.Ind.1991) (fire loss, property coverage); *Morrison v. Chartis Prop. Cas. Co.*, 2014

Foland Wickens' attorneys, Shelter had acknowledged coverage for the claim under the Mercury policy. By the time the attorneys were brought on as Shelter's counsel, it was plain there was a dispute about whether other policies also applied, and a bad faith suit against Shelter had been threatened. There is nothing ordinary about that from a claim handling perspective.

F. State of Mind

Finally, near the end of his brief, Brennan discusses the elements of a claim for bad faith refusal to settle. He points out that bad faith is a state of mind and says a "claims file is the best evidence what the insurance company did and why." This changes nothing. Shelter has produced the "claims file" maintained for the defense of Brennan. More importantly, this is nothing more than an argument of substantial need. Shelter's first brief makes clear that substantial need overcomes one thing and one thing only: work-product privilege as to tangible work product. Substantial need does not entitle a litigant to his adversary's intangible work product consisting of an attorney's or other agent's mental impressions. Nor does it entitle a litigant to materials protected by the attorney/client privilege.

Insurance companies are not so unique that, unlike all other corporate bodies, they are not entitled to consult privately and confidentially with counsel. Shelter has a right to

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WL 840597, *1 (N.D.Okla.2014) (UIM); *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331, 331 (E.D.Pa.1999) (UIM). None was a third-party coverage claim like this one.

consult with its own attorneys about legal issues impacting its interests and potential liabilities. That is what Shelter did here, and those communications are privileged.

CONCLUSION

For the foregoing reasons, as well as those stated in the initial Substitute Brief of Relator, Shelter requests that the Court issue a writ of prohibition (i) to prevent Judge Wagner from enforcing any of his February 28, 2018 orders refusing to comply with the January 31, 2018 order of the Western District in the first writ proceeding; (ii) to prevent Judge Wagner from denying Shelter's emergency motion to protect Shelter's privileged communications from the documents Judge Wagner had ordered be disclosed and produced to Shelter's adversaries; and (iii) to prevent Judge Wagner from making available or otherwise compelling Shelter to produce to any other person or entity the privileged documents submitted for *in camera* review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Rule 84.06(c) that:

(i) This brief complies with the limitations contained in Rule 84.06(b); and

(ii) Excluding the cover, this Certificate of Compliance, the Certificate of Service, and signature blocks, this brief contains 4,494 words, as determined by the "word count" tool included in the Microsoft Word software with which the brief was prepared.

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CERTIFICATE OF SERVICE

I hereby certify that, in conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that, on this 7th day of January, 2019, I electronically filed the foregoing using the Missouri Courts eFiling System, which will send notice of electronic filing. I further certify that, on said date, I placed a true and accurate copy of the foregoing for delivery via U.S. Mail to:

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