IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED101588

BYRNE & JONES ENTERPRISES, INC.
d/b/a BYRNE & JONES CONSTRUCTION,

Appellant,

v.

MONROE CITY R-1 SCHOOL DISTRICT, et al.

Respondents.

On Appeal from the Circuit Court of Monroe County, Missouri
The Honorable Rachel Bringer Shepherd, Presiding Judge
Case No. 14MN-CV00064

RESPONDENTS' BRIEF

Ira M. Potter, #31583
Mark R. Sanders, #46007
1610 Des Peres Rd., Suite 100
St. Louis, Missouri 63131
(314) 872-3333 Telephone
(314) 872-3365 Facsimile
ipotter@affinitylawgrp.com
msanders@affinitylawgrp.com

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES:

RULES:

JURISDICTIONAL STATEMENT

As more fully set forth in the Argument section of this brief, Appellant's Jurisdictional Statement does not comply with Rule 84.04(b), and as such Appellant's appeal should be dismissed.

STATEMENT OF FACTS

Respondents, Monroe City R-1 School District, et al., are generally satisfied with Appellant, Byrne & Jones Enterprises, Inc.'s Statement of Facts to the extent that it sets forth the allegations contained in Appellant's Petition filed in the trial court. No evidence was adduced in the underlying case, and Judgment was entered for Respondents on all counts, in response to their Motion to Dismiss Counts I, II and III of the Petition.

Appellant claims that the trial court erred in dismissing Count I of the Petition. Appellant has not challenged the trial court's ruling on Counts II and III of the Petition, and the sole issues on appeal are whether Appellant has standing to pursue injunctive relief or damages under Count I. Respondents acknowledge that for purposes of reviewing the trial court's decision, this Court will assume the allegations in the underlying Petition to be true. Respondents reserve the right to refute those allegations should this matter be remanded to the trial court.

Further responding, Appellant defines the "Project" in its brief as "the District's track and field complex" and cites to page 2 of the legal file. (Appellant's Brief at p. 7). Page 2 of the legal file, however, contains docket entries and no specific reference to the project. The underlying Petition defines the "Project" as "the new Monroe City School District stadium project and facility." (L.F. 004). For purposes of this appeal, Respondent treats the Project as it is alleged and defined in the Petition.

In addition, Appellant claims that on March 25, 2014 it filed its "Petition for Declaratory Judgment." (Appellant's Brief at p. 7). The Petition was not styled as such, but was merely styled a "Petition." (L.F. 003). In this case, Appellant was informed on

January 9, 2014 that the District awarded the Project to ATG Sports, Inc. (L.F. 053). The next day, January 10, 2014, Appellant submitted its bid protest letter. (L.F. 008 & 053). Appellant then waited two and one-half months to file its Petition wherein it sought injunctive relief and damages. (L.F. 003-012). Appellant did not move for temporary or preliminary injunctive relief, or seek declaratory relief, and thereafter the case was dismissed in its entirety on May 22, 2014. (L.F. 001-002).

POINTS RELIED ON

I. APPELLANT'S JURISDICTIONAL STATEMENT IS INSUFFICIENT AND THE APPEAL SHOULD BE DISMISSED.

Missouri Supreme Court Rule 84.04(b)

Anderson v. American Family Mutual Ins. Co., 173 S.W.3d 356 (Mo. Ct. App. 2006)

White v. Darrington, 91 S.W.3d 718 (Mo. Ct. App. 2002)

II. APPELLANT'S FIRST POINT RELIED ON FAILS BECAUSE THE TRIAL COURT DID NOT ERROR WHEN IT ENTERED JUDGMENT FOR RESPONDENTS ON COUNT I OF APPELLANT'S PETITION IN THAT APPELLANT DOES NOT HAVE STANDING TO CHALLENGE THE AWARD OF THE CONTRACT BY THE MONROE CITY R-1 SCHOOL DISCTRICT TO ANOTHER FIRM.

State ex rel. Johnson v. Sevier, 98 S.W.2d 677 (Mo. banc 1936)

Metcalf & Eddy Services, Inc. v. City of St. Charles, 701 S.W.2d 497 (Mo. Ct. App. 1985)

La Mar Const. Co. v. Holt County, R-II School Dist., 542 S.W.2d 568 (Mo. Ct. App. 1976)

III. APPELLANT'S SECOND POINT RELIED ON FAILS BECAUSE THE TRIAL COURT DID NOT ERROR WHEN IT ENTERED JUDGMENT FOR RESPONDENTS ON COUNT I OF APPELLANT'S PETITION IN THAT APPELLANT CANNOT RECOVER ITS BID PREPARATION COSTS.

La Mar Const. Co. v. Holt County, R-II School Dist., 542 S.W.2d 568 (Mo. Ct. App. 1976)

M.A. Stephenson Const. Co., Inc., et al. v. The Township of Madison, 308 A.2d 380 (Superior Ct. of N.J. 1973)

Lawrence Brunoli, Inc. v. Town of Branford, 722 A.2d 271 (Conn. Sup. Ct. 1998)

ARGUMENT

I. Appellant's Jurisdictional Statement is insufficient and the appeal should be dismissed.

Rule 84.04(b) states, in relevant part, that the Appellant's jurisdictional statement "shall set forth sufficient factual data to demonstrate the applicability of the particular provision or provisions of Article V, section 3, of the Constitution whereon jurisdiction is sought to be predicated." Further, "[a] deficient jurisdictional statement merits dismissing an appeal." *Anderson v. American Family Mutual Ins. Co.,* 173 S.W.3d 356, 357 (Mo. Ct. App. 2006) citing *White v. Darrington,* 91 S.W.3d 718, 722 (Mo. Ct. App. 2002). In *Anderson,* the appeal was dismissed because the jurisdictional statement contained no facts to indicate that jurisdiction was proper, and merely concluded that jurisdiction was proper, in violation of the prohibition of conclusory statements contained in Rule 84.

Rule 84.04(b) sets forth an example of an appropriate jurisdictional statement, which clearly contains factual data regarding the nature of the underlying dispute (whether machinery and equipment used to remove rock from the ground are exempt from sales tax, therefore involving the construction of a revenue law). In this case, however, Appellant has simply concluded that the issues do not invoke the exclusive jurisdiction of the Missouri Supreme Court, and therefore this appeal must be within the general appellate jurisdiction of the Missouri Court of Appeals. Without any factual data regarding the nature of the underlying dispute, these conclusory statements are

insufficient under Rule 84.04(b). Just as in *Anderson,* the insufficient jurisdictional statement merits dismissing the appeal.

II. Appellant's first Point Relied On fails because the Trial Court did not error when it entered Judgment for Respondents on Count I of the Appellant's Petition in that Appellant does not have standing to challenge the award of the contract by the Monroe City R-1 School District to another firm.

In order to have standing, a plaintiff must allege a special pecuniary interest in the matter that demonstrates a clear legal right to the relief sought. *Metcalf & Eddy Services, Inc. v. City of St. Charles*, 701 S.W.2d 497, 499 (Mo. Ct. App. 1985). Appellant, however, admits at page 19 of its brief that it "does not allege that it has a special pecuniary interest in the award of the District's contract." The trial court's decision should be upheld as a result of this admission alone.

In this case, the authority of the School District is defined by § 177.086, RSMo. That statute gives the School District the right to reject any and all bids, which is the backbone of a long line of decisions clearly holding that an unsuccessful bidder has no standing to attack the award of the public works contract. *See State ex rel. Johnson v. Sevier*, 98 S.W.2d 677, 679 (Mo. banc 1936) (in a case where all purchases by the state purchasing agent were to be based on competitive bids, and wherein the statute allowed the purchasing agent to reject all bids, the court said of the unsuccessful bidder, that the "rejection of their bid did not give them any private right which they could enforce by mandamus or otherwise. This is for two reasons: (1) Because the 'advertisement was not an offer of a contract, but an offer to receive proposals for a contract,' and (2) because the

statute requiring that contracts be let to the lowest and best bidder was designed for the benefit and protection of the public and not the bidders."); *Metcalf & Eddy Services, Inc.,* 701 S.W.2d at 499 (the unsuccessful bidder on contract for sewer services "was not deprived of anything to which it was legally entitled and therefore [could] not state a cause of action."); *State ex rel. Page v. Reorganized School Dist. R-VI of Christian County*, 765 S.W.2d 317, 321 (Mo. Ct. App. 1989) (the unsuccessful bidder on a school project to build a new school sought an injunction and declaratory relief, and after the trial court denied relief, the court of appeals upheld the ruling and said, "The construction of § 177.086 is established …. That construction is the basis for and implicit in decisions holding that a low bidder has no standing under the statute to challenge the award of a contract to another bidder.") (Citations omitted.)

In the face of this long line of cases following the Missouri Supreme Court's decision in *Sevier,* Appellant relies on two cases, one out of the United States Court of Appeals for the Eighth Circuit and a 2013 case out of the Missouri Court of Appeals for the Western District, to support the standing of an unsuccessful bidder when it claims that the bid process was unfair. A review of those cases, and more specifically the cases they rely on, however, shows that Appellant's reliance is misplaced.

Appellant first cites to *Metropolitan Express Services, Inc. v. City of Kansas City.* 23 F.3d 1367 (8th Cir. 1994). While federal decisions merit the respect of state courts, they are not binding on this Court, particularly when the determination rests upon an issue of state law, as it does in this case. *Kunzie v. Jack-In-The-Box, Inc.,* 330 S.W.3d 476, 482 (Mo. Ct. App. 2010) citing *State of Missouri v. Storey*, 901 S.W.2d 886, 900

(Mo. banc 1995). As for *Metropolitan Express Services, Inc.,* in that case Kansas City solicited bids to provide scheduled ground transportation between the airport and several destinations in the metropolitan area. 23 F.3d at 1368-69. The bid form allowed the successful bidder to have three stationary ticket counters and an office in each terminal of the airport. *Id.* at 1369. Metropolitan did not submit a bid because it believed that entering into such a concession agreement without a provision for a mobile ticket counter was not economically viable. *Id.* The City awarded the bid to KCI Shuttle, and thereafter negotiated a deal with KCI Shuttle allowing it to operate mobile ticket counters in each terminal. *Id.* Metropolitan then sued, arguing that the City improperly bid the agreement because it negotiated material changes with the successful bidder. *Id.*

After the trial court dismissed the underlying action for lack of standing, the Eighth Circuit reversed. This Court should not follow the decision of the Eighth Circuit for multiple reasons. First, in *Metropolitan Express Services, Inc.* the plaintiff did not bid on the contract and did not claim that it should have been awarded the contract. *Id.* at 1371. In this case, however, Appellant bid on the project. (L.F. 006). The Eighth Circuit went on to state that Missouri courts have not yet decided the issue of whether an unsuccessful bidder has standing to raise a claim that it did not have an opportunity to bid on the contract because the City disregarded competitive bidding procedures. *Id.* The Eighth Circuit, therefore, was deciding a case different from the one at issue here, where Appellant did bid on the project.

Still, the Eighth Circuit did state in dicta "that an unsuccessful bidder has standing to challenge a contract that was not fairly bid." *Id.* at 1371. The Eighth Circuit relies on

the case of *State ex rel. Stricker v. Hanson,* 858 S.W.2d 771 (Mo. Ct. App. 1993) to support this statement. In *Hanson* there were two plaintiffs, one of which was the unsuccessful bidder. The court specifically held that "because both parties agree that Appellants have standing as taxpayers and because Ozark Management, Inc. does not ask for any relief as a qualified bidder that it is not seeking jointly with Dr. Stricker as a taxpayer, whether Ozark Management, Inc. has standing as a participant in the public contract process is of no consequence to this action and is not addressed by this court." *Id.* at 775. As such, the Eighth Circuit erroneously relied on portions of the *Hanson* decision that were discussing the merits of the underlying claim, not the issue of whether an unsuccessful bidder has standing to challenge the public bidding process.

Also notable in the Eighth Circuit's analysis is that it ultimately held that, if the plaintiff's claim has merit, it suffered injury because it was deprived of an opportunity to bid on the contract. *Metropolitan Express Services, Inc.,* 23 F.3d at 1371-72. This statement is counter, however, to the long line of cases holding that an invitation to bid, or an opportunity to bid on a contract, does not provide the unsuccessful bidder any pecuniary right that would support standing to challenge the award of a public contract. *See Sevier*, 98 S.W.2d at 679; *Metcalf & Eddy Services, Inc.*, 701 S.W.2d at 499.

Appellant's position appears to be that it has standing, where unsuccessful bidders before it did not, because it alleges that the bidding process was unfair, in addition to simply alleging that it should have been awarded the contract as the lowest and best bidder. This position, however, confuses two different concepts; one being the rationale for allowing a challenge to the award of a public contract (to ensure that the public

bidding procedures are fair and to protect the public, not the bidders) and the other being the longstanding limitation in Missouri on who has standing to assert that challenge. In other words, standing is not, nor should it be, impacted by the nature of the underlying argument as to why the bidding, or the ultimate decision, was handled improperly. It does not matter whether the public body simply made a mistake as to who the lowest and best bidder was, or whether the public body acted arbitrarily or capriciously, or even whether the public body colluded with the successful bidder or made the process unfair. The unsuccessful bidder's standing, or lack thereof, should be the same in each of these scenarios, because the unsuccessful bidder has no pecuniary interest in each of these scenarios.

To the extent that the allegations of improper conduct asserted by Appellant in its Petition are true, a taxpayer with proper standing can assert those same allegations and insure that the public is protected. There is no need to expand upon the longstanding limitations of standing and open the door to suits by unsuccessful bidders who have no pecuniary interest.

Appellant's reliance on *Public Communication Services, Inc. v. Simmons* misses its mark for the same reasons. 409 S.W.3d 538 (Mo. Ct. App. 2013). First, the *Public Communications Services, Inc.* decision merely cites to the *Metropolitan Express Services, Inc.* case to support the proposition that an unsuccessful bidder has standing to challenge a contract if the bidding process did not allow all bidders to compete on equal terms. *Id.* at 547. Again, this Court need not follow that Eighth Circuit opinion, and as

discussed above, that case is not only distinguishable, but misapplies prior Missouri case law.

The erroneous application of law is further highlighted by the court's reliance on *La Mar Const. Co. v. Holt County, R-II School Dist.* 542 S.W.2d 568 (Mo. Ct. App. 1976). In *Public Communications Services, Inc.*, to support the standing of an unsuccessful bidder, the court states that "Missouri decisions recognize that members of the public have standing to challenge a contract award where the contracting authority exercises its discretion to solicit and evaluate bids unlawfully or capriciously." *Id.* at 546. The court cites *La Mar* for this principle, quoting it as follows;

> "[t]he rejection of the lowest bid must not be made fraudulently, corruptly, capriciously or without reason. The officials must exercise and observe good faith and accord all bidders just consideration, avoiding favoritism and corruption. If any of these standards are violated, the **public**, as the real, moving party, may bring mandamus to enforce cancellation of the contract and its award to the lowest responsible bidder."

Id., citing *La Mar Const. Co. v. Holt County, R-II School Dist.,* 542 S.W.2d at 571 (emphasis added).

In *La Mar,* however, while recognizing that the **public** has standing to challenge a contract when the low bid was rejected fraudulently, corruptly, arbitrarily or capriciously, etc…, the court reminded us that § 177.086 was designed for the protection of the public, and not the bidders. Therefore, bidders are not part of the **public** to which the court referred. Rather, the reference to the **public** could only have meant taxpayers. In fact,

the court rejected an unsuccessful bidder's standing, finding that "as an unsuccessful bidder [La Mar] has no private pecuniary interest in this matter which the law will recognize and enforce …" and "[a]s an unsuccessful bidder, La Mar was not deprived of anything to which it was legally entitled and therefore cannot state a cause of action." *Id.* at 570-71.

Just as nothing in *Hanson* supported the Eighth Circuit's holding that an unsuccessful bidder has standing, nothing in the *La Mar* decision supports the expanded view taken by Appellant that it has standing to enforce any right to a fair bidding process. Appellant claims at page 19 of its brief that the *La Mar* decision supports its claim that the District has a duty to Appellant to give it the opportunity to compete on a level playing field, and it quotes the first two sentences of the above referenced passage from *La Mar* in support of its position. The very next sentence of *La Mar,* conveniently left out of the quotation on page 19 of Appellant's Brief, states that "[i]f any of these standards are violated, the **public**, as the real, moving party, may bring mandamus to enforce cancellation of the contract and its award to the lowest responsible bidder." *Id.* at 571 (emphasis added). The *La Mar* decision in fact rejected an unsuccessful bidder's argument that it had standing, and when the entire relevant passage is read, clearly supports Respondents' position that Appellant likewise has no standing here.

A simple comparison of the instant case with the seminal Missouri Supreme Court case further demonstrates the fallacy in Appellant's argument. In *Sevier,* the plaintiff did not just allege it was the lowest and best bidder, but like the Appellant in this case, also challenged the fairness of the bidding process. The petition for mandamus in *Sevier*

"characterizes the action of the purchasing agent in so awarding the contract as fraudulent, collusive, and a gross abuse of discretion …." *Sevier,* 98 S.W.2d at 679.

Regardless of the nature of the claims, however, the court held that "the rejection of their bid did not give them any private right which they could enforce by mandamus or otherwise … (1) Because the 'advertisement was not an offer of a contract, but an offer to receive proposals for a contract,' and (2) because the statute requiring that contracts be let to the lowest and best bidder was designed for the benefit and protection of the public and not the bidders." *Id.* The court further enunciated the rule of law "that plaintiffs had no cause of action, **regardless of the motive which prompted the rejection of their bid** … they, as unsuccessful bidders, were not deprived of anything to which they were legally entitled …." *Id.* at 680 (emphasis added).

The same is true in this case. Appellant admittedly has no pecuniary interest. As such, it was not deprived of anything to which it was legally entitled, and cannot have standing in this matter. Only taxpayers have standing to protect the public interest.

III. Appellant's second Point Relied On fails because the Trial Court did not error when it entered Judgment for Respondents on Count I of Appellant's Petition in that Appellant cannot recover its bid preparation costs.

Even if Appellant is a taxpayer and has standing to assert a cause of action to enforce its right to participate in a fair public bidding process, nothing in the case law, statutes or regulations supports Appellant's additional claim to recover bid costs as damages. Moreover, despite Appellant's contention that no Missouri cases have ruled on this issue, *La Mar* disposes of Appellant's claim for damages.

In *La Mar* the unsuccessful bidder argued to the Court that "the interest of the public can be preserved and protected by sanctioning a cause of action for damages for the unsuccessful bidder's lost profits from the School District." *La Mar,* 542 S.W.2d at 571. The unsuccessful bidder reasoned that "the right to recover lost profits from a school district is a sufficient sanction to ensure that the public authorities will guard the public interest." *Id.* Appellant uses the same argument here, citing to cases from other states supporting a right to recover bid costs.

Disposing of this issue, however, the court in *La Mar* held that "[t]he plaintiff's laudable purpose is lost when followed to its logical conclusion. If an unsuccessful bidder may recover its lost profits from a school district, the district is required to pay, from public funds, profits to both the unsuccessful bidder and the contractor who performs the work. This is not a means of protecting the public that is to be encouraged." *Id.* This rationale is sound regardless of whether the damage claim is based on lost profits, bid costs, or some other measure.

Just as Appellant cites cases from other jurisdictions supporting its position, so to have other states supported the rationale in *La Mar.* In *M.A. Stephenson Const. Co., Inc., et al. v. The Township of Madison,* the Superior Court of New Jersey addressed the following question; "Does the wrongful rejection of the bid of the lowest responsible bidder by a municipality render the municipality liable in damages to the bidder – whether for lost profits, increased cost of performance, costs of preparing and submitting the bid, or for other alleged consequential losses?" 308 A.2d 380, 383 (Superior Ct. of N.J. 1973). In holding that the unsuccessful bidder cannot recover damages, regardless

of whether they were seeking lost profits, bid costs, or some other measure of relief, the court reasoned as follows; "Nor should it be overlooked that, to allow the lowest responsible bidder to recover damages not only would violate and run counter to sound and long established principles of law, but also would invert the very policy and reasons which gave rise to the obligation of the public official to accept the bid proposal which best serves the public interest … to permit the low bidder to recover damages would simply twice penalize the public." *Id.* at 385.

The Supreme Court of Connecticut has likewise reasoned that allowing an unsuccessful bidder a cause of action for damages runs counter to the purpose behind the public bidding statutes. In *Lawrence Brunoli, Inc. v. Town of Branford,* in holding that an unsuccessful bidder did not have standing to assert a claim for damages, the Court stated that, "[t]o grant standing to unsuccessful bidders who seek to bring actions for money damages would undermine the purpose underlying the municipal bidding statutes." 722 A.2d 271, 274 (Conn. Sup. Ct. 1998). The court went on to reason that, if a claim for damages is permitted then "the taxpayers of the municipality would be subject to paying once to have the work performed by the successful bidder and … again for damages above and beyond the cost of the project. Such extra costs clearly are not in the public interest." *Id.* Injunctive relief provides a sufficient deterrent upon public officials to comply with public bidding statutes, "without the detriment to the public interest that an action for money damages would cause." *Id.; see also Sutter Brothers Const. Co., Inc. v. City of Leavenworth,* 708 P.2d 190, 194 (Kan. Sup. Ct. 1985) (in rejecting the unsuccessful bidder's right to pursue a claim for damages, the Supreme Court of Kansas

quoted and relied on the reasoning from a Nevada Supreme Court opinion as follows; "A **timely** challenge [to compel the award of the contract to the low bidder] is compatible with the public interest since it serves to force compliance with the purpose of the bidding procedure. After the project is completed, however, it is difficult to perceive how the public interest is served by investing the low bidder with a cause of action for damages. The public already has paid the difference between the lowest bid and the bid which was accepted. The taxpayer should not further be penalized.") (emphasis added) quoting *Gulf Oil Corp. v. Clark County,* 575 P.2d 1332 (Nev. Sup. Ct. 1978).[1]

The distinction between the lost profits sought in *La Mar* and the bid costs sought in this case is without a difference. Allowing recovery of either measure of damages imposes an undue hardship and cost on the public taxpayers, those the public bidding statutes are designed to protect, and does so for the benefit of bidders, whom the statutes are not designed to protect. Further, allowing damages in this case, even if Appellant has standing to challenge the bidding process, would open the door to a cottage industry of litigation. What happens when there are two complaining bidders, three complaining bidders, or more? How many unsuccessful bidders will be allowed to recover damages,

---

[1] Note that Appellant's Petition alleges that the bid was awarded on January 9, 2014, and that the very next day Appellant submitted its bid protest letter. (L.F. 053). However, Appellant waited two and one-half months thereafter before filing its Petition, and even then failed to move for temporary or preliminary relief. (L.F. 003-012). The Petition was not just untimely but also was not verified, a prerequisite to moving for such relief.

and how would forcing the taxpayers to foot the bill for those damages, in addition to the cost of the project itself, be in the public's best interest? What happens when the public body exercises its discretion under § 177.086 to reject all bids; could it still be responsible for paying bid preparation costs to any number of bidders? Such a result would only serve to protect the bidders and foster litigation, which is not what the public bidding process is intended to do. If the legislature believes that successful challengers are entitled to affirmative relief of any kind, whether it would be comprised of bid costs, lost profits, or otherwise, it may enact legislation to that effect. Until it does so, the courts have no authority to grant the relief requested.

CONCLUSION

Perhaps the following quote from the *La Mar* decision best sums up why Appellant's position is wrong; "we express no concern but that an aware public will become aroused and angry at the least suspicion of the misuse of its money and particularly, in the case of a school district." *La Mar Const. Co.,* 542 S.W.2d at 571. This observation comes in the context of rejecting any notion that an unsuccessful bidder should be allowed to recover damages. It also highlights why this Court need not expand the scope of those entitled to challenge the public bidding process, because the aware public will guard against the misuse of its money. The longstanding case law in Missouri has been that the fairness of the public bidding process ensures the proper use of public funds, and that the public (taxpayers), not unsuccessful bidders, have standing to challenge the award of public contracts. Unsuccessful bidders have no pecuniary interest and therefore no standing to pursue such a challenge, and certainly no right to further damage the public (taxpayers) by forcing it to pay damages while paying for the public contract at the same time. Accordingly, the Judgment of the trial court should be upheld.

AFFINITY LAW GROUP, LLC

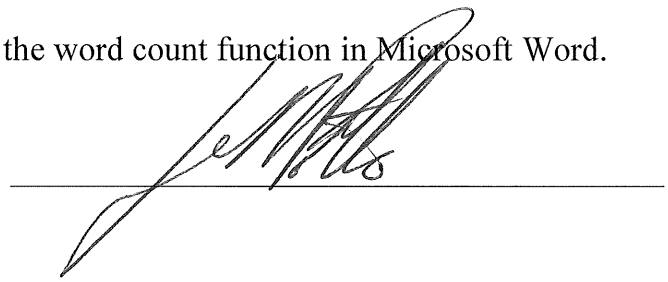
By: _____

Ira M. Potter, #31583
Mark R. Sanders #46007
1610 Des Peres Rd., Suite 100
St. Louis, Missouri 63131
(314) 872-3333 Telephone
(314) 872-3365 Facsimile
Ipotter@affinitylawgrp.com
Msanders@affinitylawgrp.com

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies by signature below that this Brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 and Local Rule 360, and contains 4,505 words, exclusive of the sections exempted by Rule 84.06(b)(2), based on the word count function in Microsoft Word.



CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies by signature below that on July 29, 2014, an electronic copy of this Brief in PDF format was served pursuant to the Court's electronic filing system, and a paper copy was served by U.S. mail, postage prepaid, upon: W. Dudley McCarter and Andrew J. Kriegshauser of Behr, McCarter & Potter, P.C., 7777 Bonhomme, Suite 1400, St. Louis, Missouri 63105 (dmccarter@bmplaw.com and akriegshauser@bmplaw.com).