IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

APPEAL No. ED96110 (Consolidated with Nos. ED96165 and ED96393)

WILLIAM DOUGLAS ZWEIG, *et al.*,
on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents/Cross-Appellants,

v.

THE METROPOLITAN ST. LOUIS
SEWER DISTRICT,

Defendant-Appellant/Cross-Respondent.

Appeal from the Circuit Court of the County of St. Louis
Cause No. 08SL-CC03051
Hon. Dan Dildine (by order of the Missouri Supreme Court)

BRIEF OF APPELLANT/CROSS-RESPONDENT METROPOLITAN ST. LOUIS SEWER DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Statutes **Page(s)**

Constitution

Rules

JURISDICTIONAL STATEMENT

This is a consolidated appeal related to three Judgments entered by the St. Louis County Circuit Court ("Trial Court") on three phases of hearings with respect to Plaintiffs' challenge under Article X, Section 22(a) of the Missouri Constitution ("Hancock Amendment") to a Stormwater User Charge adopted by Defendant Metropolitan St. Louis Sewer District ("MSD" or "District"): (1) the July 9, 2010 Judgment ("Judgment") declared that the Stormwater User Charge was a tax in violation of the Hancock Amendment (LF1541-77;A1-37); (2) the November 23, 2010 Judgment certified a class for the refund claims, denied the request for a $90.8 million class refund and entered judgment in MSD's favor on the refund claim, and enjoined MSD from collecting any further amounts under the Stormwater User Charge (LF1782-1806;A38-62); and (3) the February 3, 2011 Judgment granted Plaintiffs' motion for attorneys' fees and expenses and awarded Plaintiffs' counsel $4,357,756.00 in attorneys' fees (including a multiplier of 2.0) and $471,072.28 in out-of-pocket expenses, primarily expert witness fees. (LF2636-49;A63-76.) MSD timely filed its Notices of Appeal relating to the Judgment, the injunction entered on November 23, 2010, and the award of attorneys' fees and expenses, and Plaintiffs timely filed their Notice of Cross-Appeal with respect to the denial of the refund claims. (LF2284-2390,2650-73.)

MSD's and Plaintiffs' appeals fall within the general appellate jurisdiction of this Court under Article V, Section 3 of the Missouri Constitution because this case is not a case within the exclusive jurisdiction of the Supreme Court.

STATEMENT OF FACTS

Procedural Background

On July 18, 2008, Plaintiff William Zweig filed his initial, three-count Petition claiming that the Stormwater User Charge adopted by MSD was a tax in violation of Section 22(a) of the Hancock Amendment because it was not approved by District voters. (LF745.) A Second Amended Petition was filed on July 24, 2009, which added two more named Plaintiffs, David Milberg and Mark Kurz. (LF435-36.) This Petition sought declaratory and injunctive relief with respect to the alleged violation of the Hancock Amendment and further sought a refund of all amounts collected by MSD under the Stormwater User Charge as a class action. (LF436-51.) At no time did Plaintiffs seek a TRO or preliminary injunction to stop collection of the Charge. (LF1-17.) The three named Plaintiffs each owned property within District boundaries and had paid or were paying the Stormwater User Charge at the time of trial. (Judgment("J.") ¶¶10-14 (LF1544-46;A4-6).)

On March 13, 2009, Plaintiffs moved for class certification pursuant to Mo.R.Civ.P. 52.08. (LF42-99). On October 6, 2009, MSD and Plaintiffs agreed to a stipulation and the Trial Court subsequently entered an Order regarding the sequence of the case: (1) a class was certified for the claims for declaratory and injunctive relief relating to whether the Stormwater User Charge violated the Hancock Amendment, but no class was agreed to or certified for the refund claims; (2) the case was bifurcated so that the claims for declaratory and injunctive relief would proceed to trial first; and (3) if Plaintiffs succeeded on the claims for declaratory and injunctive relief, then the refund

claims for the amounts collected under the Stormwater User Charge (including whether a class should be certified) would be adjudicated in a second phase. (LF528-37.) Additionally, on October 8, 2009, the Trial Court denied a motion to intervene brought by the McCarthy, Leonard law firm on behalf of several groups of potential class members. (LF538.)

The first phase relating to the Hancock claims proceeded to trial on April 13-16, 2010. (LF1237.) The evidence of the parties focused on whether the Stormwater User Charge was a fee or tax under the five factors set forth in *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991). (Tr.20:4-12,51:7-11.) After post-trial briefing (LF1377-1446,1483-1523) and closing arguments on June 21, 2010, the case was taken under submission. (LF1540.) On July 9, 2010, the Trial Court entered its judgment holding that the Stormwater User Charge was a tax after finding all five *Keller* factors in Plaintiffs' favor. (J. at 35-37(LF1575-77;A35-37).) The Trial Court further held that injunctive relief would be decided in the second phase. (J. at 36(LF1576;A36).)

On October 6, 2010, evidence and argument was presented to the Trial Court on the certification of a refund class, the claim for the refund of all $90.8 million collected and spent under the Stormwater User Charge, and the injunctive relief. Plaintiffs did not put on any witnesses, but offered exhibits, a stipulation, and another stipulation with a binder of exhibits originally submitted a year before pertaining to the stipulated Hancock class. (Tr.1296:1-1312:19; Pls.Ex.95.) MSD called Jan Zimmerman, Director of Finance, and Executive Director Jeff Theerman as its witnesses. (Tr.1313-1419.) In summary, Ms. Zimmerman testified about the amounts collected under the Stormwater

User Charge, what MSD did after the July 2010 ruling in suspending the Stormwater User Charge and reinstituting the $0.24 flat stormwater fee and ad valorem taxes in August 2010, the amounts expected to be collected, and other budgetary issues relating to the Trial Court's invalidation of the Stormwater User Charge. (Tr.1313:16-1351:8.) Mr. Theerman testified about the reduction of stormwater services after the July 2010 ruling, how MSD avoided employee layoffs, and the effects that a refund would have on MSD and its customers, including that MSD would need to charge its customers the amount of any refund and then repay these same customers less the 25% contingency fee sought by Plaintiffs' counsel. (Tr.1380:22-1418:24.) On November 23, 2010, the Trial Court entered its judgment that certified a class for the refund claims, entered judgment in favor of MSD and against the class on its claims for a $90.8 million refund, and enjoined MSD from collecting its already-suspended Stormwater User Charge. (LF1805-06.)

On January 18, 2011, the Trial Court held a hearing on Plaintiffs' motion for attorneys' fees and expenses, in which evidence was presented on Plaintiffs' "lodestar" amount of attorneys' fees, the propriety of the award of a multiplier, and whether Plaintiffs could recover their litigation expenses (including expert fees) or allowable costs only. (Tr.1108-1290.) Plaintiffs called Richard Hardcastle, its lead counsel, and its expert witness, Maurice Graham. (Tr.5:13-19.) In summary, Mr. Hardcastle testified about Plaintiffs' counsel's time, billing, and rates, deductions made to the time and billing, and their costs, in particular their experts' expenses. (Tr.1109-1180.) Mr. Graham opined that Plaintiffs' counsel's rates and hours were appropriate and that a multiplier was warranted in a class action of this type. (Tr.1181-1231.) MSD offered the

testimony of its expert, Jay Levitch, who opined that certain of Plaintiffs' counsel's time entries were not recoverable, that Plaintiffs did not prevail on the refund claim, that some hourly rates were too high, and that a multiplier of attorneys' fees had never been awarded in Missouri (with which Mr. Graham concurred) and should not be awarded in this case. (Tr.1232-1287,1212:4-6.) On February 3, 2011, the Trial Court granted Plaintiffs' motion and awarded Plaintiffs' counsel a total amount, including the multiplier of 2.0, of $4,357,756.00 in attorneys' fees and $471,072.28 in out-of-pocket expenses with no deduction from Plaintiffs' request, including for time spent on the refund claims on which Plaintiffs did not prevail. (LF2648-49.)

Factual Background[1]

MSD and Stormwater. MSD is a both a wastewater utility and a stormwater utility created in 1954 under a special provision of the Missouri Constitution (Article VI, Section 30) through the adoption of a Charter (Plan) by the voters of St. Louis City and County. (J. ¶¶8-9,15(LF1544,1546); Pls.Ex.22 §§1.010,3.010-040.) MSD is governed by a six member board comprised of three members appointed by St. Louis City's Mayor and three by the St. Louis County Executive (both of whom may remove members). (Pls.Ex.22 §§5.010,.030.)

MSD funds its wastewater services through a Wastewater User Charge approved in *Missouri Growth Association v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615 (Mo.App.E.D. 1997). (Tr.675:10-679:1; Def.Ex.G.)

[1] Additional relevant facts will be discussed in the Argument section as needed.

Pursuant to its Charter, MSD is charged with maintaining, operating, reconstructing, and improving storm sewer and drainage systems and facilities within MSD's boundaries, which include all of St. Louis City and the vast majority of St. Louis County. (Pls.Ex.22 §§2.010,3.020; Def.Ex.B at 1-2(A77-78).) While MSD had provided some stormwater services in some parts of the District since 1956, it was not until 1989 that MSD adopted a policy to regulate, operate, and maintain parts of the stormwater system throughout the District, but only the parts dedicated to MSD and then only "to the extent of available funds for such purposes." (Def.Ex.B at 2(A78); Tr.704:14-22.)

In order to provide stormwater services, MSD is authorized to establish rates and charges to its customers. (Pls.Ex.22 §3.020; Def.Ex.A4.) Prior to the Stormwater User Charge, MSD's stormwater services were funded by: (1) ad valorem property taxes ($0.02 per $100 assessed value throughout MSD and $0.05 in the original MSD area), (2) special operation, maintenance and capital improvement ("OMCI") ad valorem property taxes (at varying rates in 21 sub-districts), and (3) a $0.24 per month flat charge that was added to each wastewater customer's bill. (J. ¶20(LF1547;A7); Tr.667:19-668:22, 957:24-960:10.) Tax-exempt, non-profit, and governmental entities paid the $0.24 flat fee, but did not pay the ad valorem property taxes. (J. ¶21(LF1547;A7); Tr.626:13-23.) There is no correlation between property value and stormwater services. (Tr.625:9-14, 625:22-626:5.)

The ad valorem taxes and $0.24 flat fee generated approximately $13 million per year ($1.2 million from the flat fee), with the OMCI taxes generating an additional $8-$9 million per year, for a total of $21-$22 million stormwater revenues per year. (J. ¶23

(LF1548;A8); Pls.Ex.79 at 40:16-25.) In order to fund even the limited stormwater services MSD was providing, a subsidy from MSD's wastewater operations of $19-20 million was required. (Pls.Ex.38 at 9:21-10:4,12:1-8; Def.Ex.H at 48-49; Tr.684:5-7, 958:17-959:3.)

Even with the subsidy from wastewater, stormwater services were not provided at an adequate level because of the lack of revenue; for instance, no preventive maintenance was performed, no infrastructure improvement occurred, and repairs were performed only on an emergency basis, despite complaints from customers and municipal leaders. (Pls.Ex.2 at 3; Pls.Ex.25 at 22; Pls.Ex.38 at 10:14-15; Pls.Ex.44 at 104:24-105:11; Def.Ex.H at 90; Tr.667:19-668:22,682:24-684:4,687:13-688:17,1001:6-22.) Moreover, services were not provided uniformly throughout the District, as essentially no service was provided in the annexed (more western) area of the District, while OMCI sub-districts would receive a reasonably adequate level of service. (Pls.Ex.43 at 18; Def.Ex.H at 90-91; Tr.687:13-688:19,682:24-685:8.) The Stormwater User Charge was adopted to replace this unfair and inadequate structure of revenue and services. (Tr.667:19-669:6, 1001:23-1002:12; Pls.Ex.25 at 22; Pls.Ex.44 at 22:15-23:10.)

Adoption of Stormwater User Charge. Compounding these issues was the fact that MSD's Rate Commission,[2] while considering a wastewater rate, advised MSD that it should eliminate the wastewater subsidy and adopt a self-sustaining revenue source for stormwater services. MSD agreed. (Tr.667:19-668:22.) Additionally, MSD's regulatory and planning stormwater services were increased as a result of federal and state clean water laws, causing MSD to become the lead permittee for the region's Phase II Stormwater Permit, the first of which was issued in 2003. (Def.Exs. I,J,NN,OO,DDD; Tr.1007:2-1011:8.) Therefore, in 2005, MSD turned its attention to the Stormwater User Charge. (Tr.689:9-690:4.) Over the next two years, MSD developed the Stormwater User Charge and, in February 2007, delivered a rate proposal to the Rate Commission. (Def.Exs.H at 21-23, N; Tr.690:11-25,848:15-849:23.)

[2] In 2000, the voters amended MSD's Charter to create an independent Rate Commission (based on the Public Service Commission) to review and make recommendations on all changes to MSD rates, charges, or taxes in a transparent process. (Pls.Ex.22 §7.040; Tr.635:9-18,661:19-662:20,695:2-25.) The Commission is comprised of 15 diverse representative organizations (each of which designates its representative) and recommends a rate or change proposed by MSD's staff based on five criteria. (Pl.Ex.22 §§7.230,.270; Def.Ex.H at 12; Tr.696:6-21.) In turn, MSD's Board must accept the Rate Commission's recommendation unless the Board finds that the rate or change violates the five criteria. (Pls.Ex.22 §§7.260,.300; Tr.690:11-25.)

In its Rate Proposal, MSD proposed to fund what it called "basic" stormwater services of operation, maintenance, regulatory, and planning through a variable Stormwater User Charge based on the amount of impervious area on each parcel of property (areas that do not absorb water like driveways, roofs, and patios). (Def.Ex.N at 4-1-4-16.) A charge based on impervious area was chosen because impervious area drove the need for and costs of MSD's services. (Def.Exs.H at 145-46, WW at 119,121; Pls.Ex.80(Vol.II)137:4-12; Tr.664:23-670:8,699:6-700:4,708:11-21.) Moreover, a charge based on impervious area is easily understood, fair, and equitable to customers, and such charges are the industry standard and used by the majority of stormwater utilities. (J. ¶34(LF1551;A11); Tr.348:15-350:24,396:4-17,609:23-612:10,856:10-19.) MSD further proposed to fund what it called "enhanced" stormwater services (undefined services, but likely new construction of facilities, creek maintenance, and erosion control) through ad valorem property taxes that would be put to a vote in five new subdistricts based on the five watersheds in MSD. (Def.Exs.H at 22-23, N at 4-12-4-14; Tr.691:1-692:20.)

After six months of discovery, public hearings, and technical conferences, the Rate Commission (which had its own counsel and rate consultant) issued a comprehensive report which recommended that MSD adopt only the Stormwater User Charge based on impervious area, and not any ad valorem taxes, to fund *all* stormwater services. (Def.Ex.H at 7,16-21,82-83,144-50; Pls.Ex.79 at 92:10-22; Tr.741:10-17.) The Commission found that MSD's stormwater services had been provided at an unacceptable level because of the unfair and inadequate revenue system. (Def.Ex.H at

90-91.) It further found that the stormwater service level proposed by MSD and the Stormwater User Charge passed the criteria set out in the Charter, including the conclusion that the Charge was not a tax. (*Id.* at 6-7,75-80,82-85.) The Rate Commission rejected the use of ad valorem taxes because tax exempt entities would not pay those taxes, thereby resulting in continued inequities among customers. (*Id.* at 149-50; Def.Ex.QQ at 164-172; Tr.695:2-22.)

MSD's Board accepted the Commission's recommendation, but extended the phase-in of the rate from five to seven years. (Tr. 697:7-22.) In turn, after the submission of a new proposal, in March 2008, the Commission recommended the adoption of the Stormwater User Charge with a schedule of rates resulting in an average charge of $4 to $7 per month. (Def.Ex.QQ; Tr.698:6-700:4.)

Implementation of Stormwater User Charge. MSD adopted Ordinance 12560 in December 2007, effective March 2008,[3] which set the Stormwater User Charge at $0.12 per 100 square feet ("ft^2") and details how the Stormwater User Charge is charged and collected. (Def.Ex.B(A77-93); Tr.750:1-4,850:11-20.)

First, bills for the Stormwater User Charge were issued monthly for services provided in the preceding month, with the first bills being sent by MSD in April 2008 for services provided in March. (Def.Ex.B §12(A84); Tr.970:1-5.) Stormwater services are

[3] Ordinances 12789, 12906, and 13022 did not change the Charge in any substantive way, but primarily dealt with a rate increase and collection procedures. (Def.Exs.C-E.)

based on being prepared to handle stormwater from large "design storms" (15- or 20-year events) and are thus provided on a continuous and ongoing basis, unaffected by rainfall in a given month. (Tr.670:20-671:4,704:6-10,705:22-706:11.) The Ordinance's billing language was expressly based on the identical language of the Wastewater User Charge Ordinance upheld in *Missouri Growth*. (Def.Exs.B,G; Tr.675:4-9,680:16-25,681:18-682:15.)

Second, only parcels with impervious area would pay the Stormwater User Charge because these improved parcels caused the need for stormwater services. (Def.Ex.B at 3-5(A79-81).) These parcels would be billed regardless of whether they were tax-exempt, public, or private. (*Id.* at 3,6(A79,82).) Unimproved property without impervious area (approximately 38,000 parcels) would not be billed the Charge – and indeed no pervious areas would be billed – because such land in its natural state did not contribute to the need for stormwater services. (Pls.Ex.38 at 9:8-12; J. ¶27(LF1549;A9); Tr.669:10-22, 709:10-710:1,835:14-22.) Also, public rights of ways were exempted from the Charge because they are part of the stormwater conveyance system and are maintained by other entities. (Def.Ex.B §10(A84); Pls.Ex.38 at 9:8-12; Tr.861:4-863:8.)

Third, the Ordinance expressly linked MSD's stormwater services to the addition of impervious area and its corresponding generation of additional stormwater runoff with its definition of "Served" or "Service": "Property which contributes to Stormwater Runoff which is drained through the Stormwater System *as a result of the addition to or construction upon such Property of Impervious Surface*." (Def.Ex.B at 3,5(A79,81) (emphasis added).) In order to assess the Charge, MSD directly measured the impervious

area on each parcel of property by aerial photography and charged the customer at the adopted rate. (*Id*. §§11-12(A84).) Fly-overs of MSD (at a cost of about $250,000) were scheduled every two years in order to update accurate impervious area. (Tr.1036:21-1037:4.) Additionally, customers could ask MSD to update their impervious area at any time. (Def.Ex.B §§11,22(A84,86); Tr.1036:6-20.) According to Plaintiffs' expert Debo, the $4-$7 average amount of the Stormwater User Charge was in line with what other utilities charged. (Tr.396:4-17.) The implementation of this billing system cost MSD approximately $1.3 million. (Tr.969:2-22.)

The Ordinance further detailed a credit policy: properties internally drained or draining directly to a major river would receive a 50% credit and properties whose stormwater services were provided by another entity (i.e., levee districts) would receive a credit based on the percentage of service being provided by MSD. (Def.Ex.B §27(A88-89); Tr.866:11-868:1,1041:1-13.) The 50% credit was based on the fact that these properties were receiving MSD's stormwater services only in the form of regulatory and planning services, while they were not receiving services relating to use of the stormwater system. MSD's rate consultant calculated that 50% of the costs of service related to the use of the stormwater system, so a 50% credit was allowed for these customers. (Pls.Exs.39,51; Def.Ex.V; Tr.595:19-23,782:21-783:12.) Customers could appeal their Stormwater User Charge with respect to credits, calculations of impervious area, or the amount of the Charge. (Def.Ex.B §§ 22-24(A87-88); Tr.1036:6-20.) Approximately 600 customers received the 50% credit. (Tr.1040:11-14.)

Fourth, the Ordinance described the stormwater services provided by MSD: (1) the basic services of planning, regulation, and operation and maintenance of the stormwater system; and (2) the enhanced services of anything beyond the basic service (e.g., new construction of infrastructure and erosion control). (Def.Ex.B at §§4, 6-7(A82-83); Pls.Ex.18 at 2-11; Tr.662:16-663:14,875:14-876:12,1028:18-1029:20.). The Ordinance further required that the revenues from the Stormwater User Charge be placed in a separate fund and used only for the provision of stormwater services. (Def.Ex.B at 4, §21(A80,87); Tr.970:6-971:20.)

Fifth, the Ordinance detailed services that MSD will not perform such as the maintenance of private facilities (e.g., detention and retention basins) and other facilities that have not been dedicated to MSD. (Def.Ex.B §§ 3,5, App.I(A82-83,90-92); Tr.590:17-592:9,593:13-594:2; JonesDep.Desig.328:16-329:4(LF1038-39).) These private stormwater facilities would be maintained by the owner. (Def.Ex.B §5(A80).)

Summary of Evidence During Hancock Trial. Plaintiffs' testimony began with Plaintiffs Zweig's and Milberg's testimony focusing generally on their property, their payment of the Charge, and their reasons for challenging the Charge. (Tr.71-159.) Plaintiffs also called two expert witnesses, Professor Tom Debo and Jon Jones, who testified for almost two days of trial about hydrology, stormwater, and the analysis they had performed regarding total stormwater runoff (water that leaves a property). (J. ¶59 (LF1556;A16); Tr.160-656). The main focus of Debo's and Jones' testimony and evidence was on the third *Keller* factor (Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?), which they applied to the

Stormwater User Charge as requiring a one-to-one linear relationship between the impervious area on a property and its *total* stormwater runoff. (J. ¶¶60-63(LF1556-58;A16-18); Tr.278:22-279:10,378:16-20,439:16-20,597:10-14.) They both opined that there was no such relationship between the amount of impervious area and total runoff, that total area of the property bore a better relationship to the runoff, and that there were other factors such as slope and soil that affected the amount of total runoff. (J. ¶¶60-63(LF1556-58;A16-18); Tr.231:17-232:12,241:23-247:9,248:23-249:18,267:9-270:21,552:15-553:19.) Plaintiffs' experts further testified that it was their opinion that it would be "exceedingly challenging" for MSD to meet the third *Keller* factor as they defined it and that they did not consider costs or practicality in analyzing the Stormwater User Charge (even though these considerations always were relevant in setting charges). (Tr.379:16-380:14,585:7-586:10,586:24-587:4.)

At trial, MSD also called four witnesses: Jeff Theerman (Executive Director), Steve Sedgwick (MSD's Rate Consultant and Expert), Jan Zimmerman (Director of Finance), and Brian Hoelscher (Director of Engineering). (Tr.4:9-5:4.) To summarize, MSD's witnesses testified about: why the Stormwater User Charge was developed (to provide a more acceptable level of service, institute a fair and equitable charge, and eliminate the wastewater subsidy of some $20 million/year), how the Charge was billed (for the prior month, always in arrears, never in advance), who received the bills (customers with impervious area, including all tax-exempt entities, but not 38,000 undeveloped parcels), why impervious area was chosen as the basis for the rate (industry standard measure of service that is fair and easy to understand, the impervious area drives

the demand for MSD's services, and it is directly related to the increased runoff from impervious area on developed properties), why undeveloped, pervious area was not charged (land in natural state does not cause the need for stormwater services), what stormwater services MSD provided (operation and maintenance, regulatory, and planning), and what stormwater services were performed by others and not performed by MSD (such as maintaining detention basins and private systems and erosion control). (*See, e.g.*, Tr.348:15-350:23,609:23-610:7,667:19-668:22,970:1-5,706:12-707:3, 708:11-21,723:10-724:7,772:13-20; 859:12-864:18,875:14-877:14,1049:22-1051:7.) MSD's testimony reflected how MSD actually operates a stormwater utility and contrasted the academic opinions of Plaintiffs' experts with respect to the third *Keller* factor by explaining how impervious area created the demand for MSD services (more development=more required services), how it was the additional runoff from impervious area on the property that caused the need for MSD's stormwater services, and how factors such as slope and soil simply are not considered by MSD in actually running its utility. (Tr.669:23-670:8,727:7-729:2,777:5-778:8,835:23-836:11,859:12-864:18, 875:14-877:14;1022:19-1024:12.)

POINTS RELIED ON

I. The Trial Court erred in declaring that MSD's Stormwater User Charge was an invalid tax under Section 22(a) of the Hancock Amendment because, under a correct application of the *Keller* factors, the Stormwater User Charge is a true user fee not subject to Hancock, in that:

A. The Stormwater User Charge was due after the stormwater services were provided, and MSD's stormwater services are continuous and ongoing.

B. The Stormwater User Charge was not blanket-billed, but was paid only by residents who received and caused the need for stormwater services, including tax-exempt entities.

C. The Stormwater User Charge is a variable rate charge, not a flat fee, individualized for each customer based on each parcel's impervious area, which causes the need for MSD's services.

D. MSD provides stormwater services to its customers, and the revenues from the Stormwater User Charge were used to provide those services and not paid into MSD's general revenues.

E. In addition to MSD, private individuals and entities provide stormwater services.

F. Other facts and law demonstrate that the Stormwater User Charge is not a tax under the Hancock Amendment.

Arbor Investment Co. v. City of Hermann, 341 S.W.3d 673 (Mo.banc 2011)

Keller v. Marion County Ambulance District, 820 S.W.2d 301 (Mo.banc 1991)

Larson v. City of Sullivan, 92 S.W.3d 128 (Mo.App.E.D. 2002)

Missouri Growth Association v. Metropolitan St. Louis Sewer District, 941 S.W.2d 615 (Mo.App.E.D. 1997)

II. In the event the Trial Court's Hancock Judgment is affirmed, the Trial Court erred in awarding Plaintiffs' counsel $4,828,828.28 in attorneys' fees and expenses because this award is unreasonable, improper, and contrary to Missouri law, in that:

A. The unprecedented application of a multiplier of 2.0 to Plaintiffs' "lodestar" attorneys' fees amount is not permitted.

B. Hours billed on Plaintiffs' unsuccessful refund claim are not recoverable because Plaintiffs were not the prevailing party on that claim.

C. Expenses and expert fees (except for deposition time) are not recoverable under the Hancock Amendment or Declaratory Judgment Act, which provides only for recovery of "costs."

O'Brien v. B.L.C. Ins. Co., 768 S.W.2d 64 (Mo.banc 1989)

Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60 (Mo.App.E.D. 2003)

Perdue v. Kenny A. ex rel. Winn, ___ U.S. ___, 130 S.Ct. 1662 (2010)

City of Burlington v. Dague, 505 U.S. 557 (1992)

ARGUMENT

Standard of Review

In reviewing a court-tried case, the appellate court should sustain the trial court's judgment "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976). However, no deference is afforded the trial court's conclusions of law, and the appellate court will "independently evaluate whether the trial court properly declared or applied the law to

the facts presented." *Transcont'l Holding Ltd. v. First Banks, Inc.*, 299 S.W.3d 629, 643 (Mo.App.E.D. 2009); *Mullenix-St. Charles Props., L.P. v. City of St. Charles*, 983 S.W.2d 550, 554-55 (Mo.App.E.D. 1998). Moreover, when the evidence is not controverted and the sufficiency of evidence is not at issue, no deference is due the trial court's judgment. *St. Charles County Convention & Sports Facilities Auth. v. Mydler*, 950 S.W.2d 668, 670 (Mo.App.E.D. 1997); *Bremen Bank & Trust Co. v. Muskopf*, 817 S.W.2d 602, 604 (Mo.App.E.D. 1991); *see also Hoffman v. City of Town & Country*, 831 S.W.2d 223, 225 (Mo.App.E.D. 1992) (no deference was due where experts used different sets of facts and no credibility finding was made by trial court). This is particularly true here because the Trial Court made no credibility findings, and there were no real factual disputes. Rather, the issue was the legal conclusions and inferences drawn from the undisputed facts. Furthermore, the review of constitutional challenges under the Hancock Amendment is de novo. *Sch. Dist. of Kans. City v. State*, 317 S.W.3d 599, 604 (Mo.banc 2010); *Franklin County v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo.banc 2008); *see also Akers v. City of Oak Grove*, 246 S.W.3d 916, 919 (Mo.banc 2008) ("Constitutional interpretation is a question of law and is subject to *de novo* review.").

I. THE TRIAL COURT ERRED IN DECLARING THAT MSD'S STORMWATER USER CHARGE WAS AN INVALID TAX UNDER SECTION 22(a) OF THE HANCOCK AMENDMENT BECAUSE, UNDER A CORRECT APPLICATION OF THE *KELLER* FACTORS, THE STORMWATER USER CHARGE IS A TRUE USER FEE NOT SUBJECT TO HANCOCK.

Introduction

As a challenge to MSD's Stormwater User Charge under the Hancock Amendment, this case must be decided under the five factors developed by *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991), and its progeny (especially *Missouri Growth*) through the *Arbor Investment Co. v. City of Hermann*, 341 S.W.3d 673 (Mo.banc 2011), case decided by the Supreme Court after the Trial Court's decision here. In *Arbor*, the Supreme Court reaffirmed use of the five *Keller* factors, provided a history and synthesis of the cases applying *Keller*, and clarified how the factors are to be applied. *Arbor*, 341 S.W.3d at 678-86.[4]

[4] The Supreme Court further held that other factors beyond the *Keller* factors may be considered only "when the balance [of the *Keller* factors] is a close one." *Arbor*, 341 S.W.3d at 683. As shown herein, the *Keller* factors are not close and are dispositive in MSD's favor, but other factors are still discussed as a precaution in Part I.F, *infra*.

The factors are not meant to be determinative by an "arithmetic score,"[5] but are to be evaluated together with no one factor controlling. *Id.* at 682 (citing *Keller*, 820 S.W.2d at 304 n.10). Moreover, in Hancock cases, the Supreme Court has repeatedly noted, today and even prior to *Keller*, that the traditional distinction between a tax and fee must be kept in mind: "*Leggett* teaches, and *Roberts* agrees, that an exaction demanded by the government for a special privilege or for specific purposes and not intended to be paid into the general fund to defray general public needs or governmental expenditures is not a tax." *Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70, 77 (Mo.banc 1989) (citing *Leggett v. Mo. St. Life Ins. Co.*, 342 S.W.2d 833, 875 (Mo.banc 1960), and *Roberts v. McNary*, 636 S.W.2d 332 (Mo.banc 1982)); *see also Zahner v. City of Perryville*, 813 S.W.2d 855, 858-59 (Mo.banc 1991); *Keller*, 820 S.W.2d at 303-04; *Arbor*, 341 S.W.3d at 679.

Here, the Trial Court misstated the *Keller* factors and misapplied the *Keller* analysis to the facts by considering elements that have been rejected by Missouri courts, and its Judgment is directly in conflict with *Arbor*. When the correct *Keller* analysis is undertaken, the Trial Court's judgment in favor of Plaintiffs must be reversed, and the

[5] The Trial Court misstated the law when it held that "Missouri courts have adopted a mathematical application of the *Keller* factors" (J. ¶97(LF1566;A26)), a notion that MSD repeatedly contended was incorrect (LF1484) and which was firmly rejected by *Arbor* and other cases.

Stormwater User Charge should be upheld as a fee not subject to the Hancock Amendment.

Judgment's Misconceptions

At the outset, the Judgment was practically a verbatim acceptance of Plaintiffs' Proposed Findings of Facts, Conclusions of Law and Judgment. (*Compare* LF1447-1482 *with* LF1541-77;A1-37.) Indeed, the Trial Court authored only 11 of 134 paragraphs. (J.¶¶24-27,34,41,45,52,72,80,108(LF1548-49,1551,1553,1555,1560,1562,1568;A8-9,11,13,15, 20,22,28).) Appellate courts have cautioned against the practice of wholesale adoption of a parties' proposed judgment and labeled the practice "unwise," "of doubtful utility," and "troublesome." *See Massman Constr. Co. v. Mo. Highway & Transp. Comm'n*, 914 S.W.2d 801, 804 (Mo.banc 1996); *Nolte v. Wittmaier*, 977 S.W.2d 52, 57-58 (Mo.App. E.D. 1998).

Here, the Trial Court did not make any credibility findings with respect to witnesses or evidence, but simply adopted the facts and conclusions of law proposed by Plaintiffs that may, at first blush, sound pertinent and arguably convincing, but, under the *Keller* framework and the reality facing MSD as a stormwater utility, are really completely irrelevant.

Foremost among these misconceptions is the adoption of the requirement proffered by Plaintiffs' experts that there be a one-to-one linear relationship between impervious area and *total* runoff from a property. (Tr.248:23-249:18,278:25-279:10,501:14-505:16,597:10-14.) Legally, as described in Part I.C, *infra*, this is not

what the third *Keller* factor requires.[6] Factually, there was overwhelming evidence that MSD, in developing the rationale for the Charge, focused on the increased runoff due to the addition of impervious area because that additional runoff above the natural state drove the demand for MSD's stormwater services, and that MSD's Stormwater User Charge was a variable rate charge based on each customer's amount of impervious area. (*See, e.g.*, Defs.Exs.B at 3,App.I (A79,90-92), H at 79,146), SedgwickDep.Desig.77:21-78:11(LF354-55); Pls.Ex.75(Vol.I)160:14-161;4; Tr.669:23-670:8,708:11-21,754:11-755:18,756:1-19,765:7-766:6,772:13-20,835:8-13,863:8-864:18,894:11-895:5,1007:7-9, 1037:5-24,1071:8-18.)

Other examples of misconceptions adopted by the Trial Court in its Judgment include:

- ¶¶40, 42-43 – The Stormwater User Charge does not vary month-to-month based on the amount of rainfall.
    - MSD's stormwater services encompass much more than just the use of the stormwater system, and the actual amount of stormwater that may flow through the system in a given month is irrelevant because the system is a

[6] In overruling an objection by MSD at trial to the one-to-one relationship developed by Plaintiffs' experts, the Trial Court recognized the questionable nature of this standard, when it stated: "I'm not saying that that's the standard. The Court of Appeals is going to grant that. With that in mind, the objection is overruled." (Tr.274:10-276:3.)

demand service – i.e., the system must be operated and maintained year round and in all types of weather so that it can properly function when large rain events occur.[7] (Tr.705:22-706:11; SedgwickDep.Desig.223:13-226:21,229:8-25(LF1363-67.) Thus, the amount of rainfall in a given month does not affect MSD's system and costs because MSD's services are continuous and ongoing without regard to whether it rains 2 inches or 10 inches in a month. (Tr.375:24-376:8,1030:18-1031:13.)

- ¶¶46-47 – The Stormwater User Charge is an apportionment of costs and is not based on the actual services provided to a customer in a given month.
  - This is what utility rates are. All utilities' rates are based on a standard unit of measurement (e.g., kilowatt hour) that represents the unit cost to provide services in order to equitably distribute the total costs of providing all services. (Pls.Ex.80(Vol.I)145:11-24; Tr.170:21-171:1; HoelscherDep. (Vol.II)98:13-99:7(LF1278-79.) No utility can give the precise cost of providing a service (such as gas or electric) to a particular customer for a month. (Tr.396:23-397:17,767:8-25.) Rates do not vary based on the

[7] MSD's stormwater system is designed for 15- or 20-year design storms, meaning that the infrastructure is built and maintained to handle stormwater from rainfalls that occur only on average once every 15 or 20 years (i.e., large, infrequent storms). (Tr.1019:13-1022:4.) Indeed, a 20-year design storm equates to 4.8 inches of rain in an hour. (*Id.*; Def.Ex.EEE at 79.)

distance from the power plant or the number of electric lines replaced after a storm. (Tr.574:23-575:22,788:3-789:4.) For stormwater services, impervious area is the industry standard unit of measurement because it is what causes the demand for stormwater services. (Def.Ex.WW at 124; Tr.609:23-610:19,804:24-805:18,852:19-853:13,865:13-866:1.)

A. THE STORMWATER USER CHARGE WAS DUE AFTER THE STORMWATER SERVICES WERE PROVIDED, AND MSD'S STORMWATER SERVICES ARE CONTINUOUS AND ONGOING.

The first *Keller* factor inquires:

> When is the fee paid? – Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.

Keller, 820 S.W.2d at 304 n.10.

In *Missouri Growth Association v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615 (Mo.App.E.D. 1997), this Court held that the first *Keller* factor was resolved in MSD's favor because, "[a]lthough this [Wastewater User Charge] is billed periodically, payment is due 'only on or after provision of a good or service,' making it more like a user fee than a tax." *Id.* at 623. This finding was based entirely on the wording of MSD's wastewater ordinance. *Id.* In *Arbor*, the Supreme Court resolved the first factor in the city utility's favor on the basis that, although the utility fees were "paid at periodic monthly intervals," the fees were like the wastewater charge upheld in

Missouri Growth because the bills were "sent out only for service that already has been provided by the time the bill is sent." 341 S.W.3d at 684.

At trial, it was not disputed that the Stormwater User Charge was modeled on the wastewater user charge upheld in *Missouri Growth*. (Tr.675:4-9,680:16-681:12.) Nor was it disputed that the language of the respective Stormwater and Wastewater Ordinances relating to billing the charge is identical and that they require billing the charge *after* the provision of the services. (Tr.681:18-682:15; *compare* Def.Ex.B §12(A84-85) *with* Def.Ex.G §6.) Likewise, there was no dispute that, pursuant to Ordinance 12560, the first bills for the Stormwater User Charge were sent to customers in April 2008 for stormwater services provided in March 2008, and each month thereafter for services provided in the previous month. (Tr.859:14-860:4,970:1-5.) MSD never billed in advance; it always billed in arrears. (Tr.705:1-21.) Therefore, just as in *Missouri Growth* and *Arbor*, payment of the Stormwater User Charge is due only on or after the provision of stormwater services.

Moreover, this Court has found that a periodic fee was not subject to the Hancock Amendment when the service "is an ongoing service that continues every year." *In re Tri-County Levee Dist.*, 42 S.W.3d 779, 786 (Mo.App.E.D. 2001), *rev'd on other grounds by Riverside-Quindaro Bend Levee Dist. v. Intercont'l Eng'g Mfg. Corp.*, 121 S.W.3d 531 (Mo.banc 2003). Here, all agreed that MSD's stormwater services are ongoing and continuous in nature. Professor Debo testified that MSD had a system in place with the capacity to handle large storms and that MSD's services were continuous in nature. (Tr.375:25-376:8.) Messrs. Theerman and Hoelscher likewise testified that

MSD's stormwater services are demand services that are continuous and ongoing in nature because the infrastructure needs to be in place continuously to handle stormwater and because MSD operates and maintains the stormwater system and performs regulatory and stormwater management services regardless of the weather (i.e., services are essentially the same each month). (Tr.704:6-10,705:22-706:11,1030:18-1031:13.) Therefore, because MSD's stormwater services are ongoing and continuous, akin to the levee system, MSD prevails on the first *Keller* factor for this additional reason.

The Judgment incorrectly interpreted the first *Keller* factor to be primarily concerned with the timing and regularity of the payment of the fee. (J. ¶¶101,103 (LF1567;A27).) This consideration of "only timing" was squarely rejected by *Arbor*, which affirmed the consideration of whether the fee was paid after the service was provided. 341 S.W.3d at 684 n.10.

Plaintiffs and the Trial Court also attached an additional element to the first *Keller* factor – whether the service can be accepted, rejected or used on a limited basis. (J. ¶¶40, 103(LF1552, 1567; A12, 27).)[8] There simply is no mention of this consideration in

[8] If relevant at all, this contention should be considered in the third *Keller* factor, and the Plaintiffs and the Trial Court confused the factors here and elsewhere by allowing Factor 3 considerations to leak into other factors. *See Ashworth v. City of Moberly*, 53 S.W.3d 564, 576 (Mo.App.W.D. 2001) (holding party confused the *Keller* factors).

Arbor.[9] In support of this differing analysis, the Trial Court relied on *Building Owners & Managers Ass'n v. City of Kansas City*, 231 S.W.3d 208, 212 (Mo.App.W.D. 2007), which is not in point for several reasons with respect to Factor 1. Like the Trial Court here, the *Building Owners* court mistakenly focused only on the regularity of the bill and failed to consider whether the bill was sent after the provision of the service, *id.* at 212, which is directly in conflict with *Arbor's* holding that regularity of payment cannot be considered alone. Moreover, the fee was annual, the service previously had been funded from general revenues, and that court, in a clumsy attempt to distinguish *Missouri Growth*, misinterpreted *Missouri Growth* in holding that the ability to accept, reject or limit service was a consideration in Factor 1 (which *Missouri Growth* did not consider at all).

Therefore, the Trial Court erred in finding *Keller* Factor 1 in favor of Plaintiffs where the settled law and undisputed evidence demonstrates that this factor should be found in MSD's favor.

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[9] Likewise beyond the *Arbor* analysis was the consideration by the Trial Court of other elements regarding Factor 1, including: that MSD apportions the total annual costs of its stormwater services, that the Stormwater User Charge is not based on actual services provided to a customer in a month, and that MSD does not identify the amount of services provided to a customer each month. (J. ¶¶44-50(LF1553-54;A13-14).) Indeed, these considerations are irrelevant to or misconceive the services provided by MSD and how utilities like MSD charge. (*See* discussion *supra* at pp. 21-24.)

B. THE STORMWATER USER CHARGE WAS NOT BLANKET-BILLED, BUT WAS PAID ONLY BY RESIDENTS WHO RECEIVED AND CAUSED THE NEED FOR STORMWATER SERVICES, INCLUDING TAX-EXEMPT ENTITIES.

The second *Keller* factor asks:

> Who pays the fee? – A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.

Keller, 820 S.W.2d at 304 n.10.

In MSD's wastewater cases, MSD prevailed on Factor 2 because, even though "almost all" MSD residents received a wastewater bill, there were approximately 75,000 properties that did not use MSD's wastewater services because they had septic tanks, had their water turned off, and other reasons. *See Missouri Growth*, 941 S.W.2d at 623. Therefore, "only those individuals who actually use MSD's [wastewater] services pay the charge," and this factor was found in MSD's favor. *Id.*; *see also Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217, 220 (Mo.banc 1993) ("*Beatty II*") ("While it is true that almost all residents of the district pay the charge, it is also true that only those persons who actually use MSD's services pay the charge.").

Moreover, in *Arbor*, the Supreme Court recently reaffirmed this application of the second factor by holding:

> Here, the evidence is that those few residents not receiving any services to their properties do not pay any utility fees, that only those who receive natural gas service are charged for it, that only those who receive electric service are charged for it, and so forth. Although most residents receive most of these services and so most residents pay these fees, *Beatty* held that this is the natural result of the fact that most residents receive the provided service and militates in favor of the municipality.

Arbor, 341 S.W.3d at 684 (citation omitted); *see also Larson v. City of Sullivan*, 92 S.W.3d 128, 132 (Mo.App.E.D. 2002) (finding Factor 2 in favor of city on its sewer connection fee because vacant lots were not charged the fee and only those properties using the system were charged); *Ashworth*, 53 S.W.3d at 576 (holding charge was specific and not blanket in nature); *cf. Feese v. City of Lake Ozark*, 893 S.W.2d 810, 813 (Mo.banc 1995) (holding Factor 2 against city because sewer charge was imposed on properties not connected to sewer).

The Stormwater User Charge falls squarely within these favorable cases. At trial, the facts were undisputed that MSD did not blanket bill the Stormwater User Charge. MSD did not bill its Stormwater User Charge to 38,000 undeveloped properties that do not have impervious area. (Tr.706:12-707:3,1049:22-1051:7; Def.Ex.UU.) Indeed, no customer was charged for their pervious or undeveloped land; only owners of property with impervious area are billed for stormwater services. (Tr.599:19-25,860:5-861:3; Def.Exs.B,C,D,E § 12.) This is because development (adding concrete and roofs) causes the demand for MSD's services, whereas undeveloped land represents the natural state

before development that drained naturally, and the natural state did not require (or cause the need for) a stormwater system or regulatory and planning services. (Tr.669:10-670:8,709:10-713:25,775:12-21,835:14-22,840:13-841:12,873:14-874:9,1050:1-12.)

Equally important is that *all* who receive services pay the charge. Here, non-profit, governmental, and tax-exempt property owners, which represent a large amount of impervious area in MSD, *do pay* the Stormwater User Charge because they create the demand for MSD's stormwater services just like anyone else with impervious area. (Def.Exs.H,TT; Tr.723:10-724:7,860:2-25,1047:19-1049:17.) In fact, the inequity of the previous (and, once again, current) revenue system is that a large tax-exempt property with abundant impervious area like the Barnes-Jewish Hospital campus is charged less ($0.24 per month) than a small residence because the Hospital does not pay ad valorem taxes. (Pls.Ex.79 at 169:13-170:8; J. ¶21(LF1547;A7); Tr.626:15-23,958:13-959:3.) Therefore, the second *Keller* factor should be decided in MSD's favor because the Stormwater User Charge is not blanket-billed and is paid only by those, and by all of those, who cause the need for and receive the services.

The Trial Court, in ruling that Factor 2 favored Plaintiffs, made factual findings unsupported by evidence, relied on an inapposite case, and misapplied irrelevant facts to the law, thereby warranting reversal.

First, although Plaintiffs never addressed MSD's not charging the 38,000 properties without impervious area and how this was analogous to the 75,000 properties on septic tanks or without water service in the wastewater cases (LF1491-93; Cl.Arg.Tr.51), the Trial Court concluded that MSD's not charging properties without

impervious area was "only related to an attempt to comply with the Keller factors, by not billing everyone." (J. ¶108(LF1568;A28).)[10] This remarkable conclusion is utterly without legal and factual support. In adopting the Stormwater User Charge, MSD naturally had to comply with the Hancock Amendment. (Def.Ex.H at 62-87; Pls.Ex.22 §7.270.) In effect, the Trial Court stated that the Charge violated the Hancock Amendment because MSD attempted to comply with the Hancock Amendment. Moreover, this finding is without evidentiary support. As detailed above, MSD did not charge these 38,000 properties because undeveloped properties (as well as undeveloped parts of properties) do not contribute to the need for MSD's stormwater services (Tr.706:12-707:3,835:14-22,840:13-841:12,1049:22-1051:7); there was no evidence that MSD did not charge these properties as a subterfuge to meet the second factor. The Trial Court's analysis placed MSD in a no-win situation because, if MSD billed these 38,000 properties, Plaintiffs would argue that MSD did blanket bill.

[10] Similarly, with respect to the undeveloped properties, the Trial Court made a factual finding that: "Landowner's [sic], with no impervious area pay nothing, though presumably they would benefit by Defendant's services, at least equivalent to 50% benefit, as do the properties that drain directly into rivers, etc." (J. ¶52(LF1555;A15).) By its own wording, this "finding of fact" is a presumption that is not supported by a citation to evidence in the trial record and was made in error. Again, pervious area is not charged because it does not cause the need for any stormwater services.

Second, the Trial Court mistakenly relied on *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo.banc 1995), for the proposition that MSD does not meet Factor 2 because customers whose properties do not drain into the stormwater system (i.e., those on major rivers or internally drained) are still assessed the Charge. (J. ¶¶51-52,106-09 (LF1554-55,1568; A14-15,28).) This overly simplistic analogy to the "unconnected" properties in *Feese* does not withstand scrutiny. In *Feese*, the properties were not connected to the sewage system (i.e., had septic tanks) and thus received no wastewater services, but were still charged the same as those who were connected and received services. 893 S.W.2d at 813. The court held that this charge was worse than the charge in *Beatty II* (where MSD did not charge septic tank properties) because of this fact and found it was a tax. *Id.* However, the "unconnected" customers in *Feese* bear no relation to MSD's customers that receive credits here. Unlike the other 99.9% of MSD customers (only 600 of 480,000 receive the credit), these customers' stormwater does not drain through the stormwater system, and so (unlike the "unconnected" properties in *Feese*) they are *not charged* the portion of the Stormwater User Charge relating to use of the stormwater system. (Tr.782:21-783:12,866:11-868:1,1040:11-14.) But these customers still contribute to the need for regulatory and planning services, and they accordingly are charged only for that portion of the Charge. (Tr.595:19-23,1041:1-24.) Simply stated, customers receiving credits are charged for the amount of services they have caused by their development like all other MSD customers, unlike the properties in *Feese* that were billed, but received nothing.

Once the fog is lifted from Plaintiffs' arguments and the Trial Court's strained analysis of the second *Keller* factor, there remains a straightforward analysis mandated by *Arbor* that is fully supported by the record: a lot of MSD's residents pay the Charge, but it is not blanket-billed because undeveloped properties do not pay and only the customers (and all the customers) that cause the need for MSD's services pay for those services.

C. THE STORMWATER USER CHARGE IS A VARIABLE RATE CHARGE INDIVIDUALIZED FOR EACH CUSTOMER BASED ON EACH PARCEL'S IMPERVIOUS AREA, WHICH CAUSES THE NEED FOR MSD'S SERVICES.

The third *Keller* factor looks at how the amount of the Stormwater User Charge is calculated:

> Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer? – Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer.

Keller, 820 S.W.2d at 304 n.10.

Beatty II later held that "the charge imposed must bear a *direct* relationship to the level of services a 'fee payer' actually receives." 867 S.W.2d at 221. There, the court found that MSD's then wastewater charge did not meet the Factor 3 test because it was a *uniform flat rate* charge for all residential customers based on the average usage for all

residential customers. *Id*. Non-residential customers' charges, in contrast, were based on individual water usage. The court distinguished between the uniform flat rate, average residential charges and the variable, individualized non-residential charges by stating that there was not a "direct relationship" between the uniform flat rate charges and the level of services provided to residential customers. *Id.* (holding Factor 3 against MSD "[b]ecause the vast majority of MSD fee payers are residential").

Later, in the *Missouri Growth* case, after MSD had changed its method of determining residential wastewater charges from the uniform flat charge to a variable charge based on each customer's water usage, the court held that the direct relationship test was met. *See Missouri Growth*, 941 S.W.2d at 623 ("[U]nlike the [prior] residential user charges, MSD's [new] user charges . . . are not uniform flat charges. Rather, the [new] charges . . . are based on a new study that determined sewer services on an individual basis as measured by an individual customer's water usage."); *see also Larson*, 92 S.W.3d at 132 (finding Factor 3 in favor of city where "[t]he level of goods and services provided to residents is consistent with the fees being charged"); *cf. Bldg. Owners & Mgrs. Ass'n v. City of Kans. City*, 231 S.W.3d 208, 212 (Mo.App.W.D. 2007) (suggesting tiered rates based on square footage of property inspected would have met "direct relationship" element had the rate not been capped).

And most recently, in *Arbor*, the Supreme Court found Factor 3 in the city utility's favor because the charge varied depending on the customers' utility use and even though there was a small quarterly flat charge of $0.75 charged to some accounts. 341 S.W.3d at 685. Therefore, the direct relationship requirement as interpreted by the Supreme Court

is nothing more than a *rejection* of a uniform flat rate, average charge and the *approval* of a variable, individualized charge.

Under this standard, MSD's Stormwater User Charge unquestionably is a variable, individualized charge that is affected by and directly related to the level of service because each customer's impervious area was measured by aerial photography and then the charge to each customer varied based on the amount of impervious area ($0.14 per 100 ft^2 of impervious area). (Def.Ex.B §§11,12; Tr.680:16-681:2,714:1-23,863:13-866:1,1033:19-1034:10.) Therefore, a customer with 2,500 ft^2 of impervious area will be billed more than a customer with 2,000 ft^2 of impervious area. This rate methodology is easily understandable by the customers because it is simple and logical – and correct. (Tr.714:1-23,852:19-853:13,855:10-19.) Also, unlike many stormwater utilities across the country, MSD does not use the ERU (equivalent residential unit) method, which takes an average amount of impervious area for residences and uses the average to determine the charge (Def.Ex.WW at 119-122; Tr.680:16-681:2,836:12-837:21), because *Beatty II* clearly forbade a charge based on average use by customers.

Moreover, impervious area is the correct basis for the user charge. Boiled down to their essence, MSD's stormwater services are demand services, meaning that customers cause the demand or contribute to the need for stormwater services by the development of their property – i.e., the addition of impervious area. (Def.Ex.H at 145-146; Pls.Ex.80 (Vol.III)137:4-12; Tr.669:23-670:8,708:11-21,710:2-713:25,772:13-20,1007:7-9,1071:8-18.) Before an area is developed, stormwater runoff occurs naturally and flows to the area's creeks and rivers naturally. (Tr.669:10-22,835:14-22,840:13-841:12;

HoelscherDep.Desig.98:1-101:4(LF1295-96).) By definition, no stormwater services are needed – no pipes, no creek erosion, no planning, no regulations. (Tr.709:10-710:1.) It is only when an area is developed, and additional stormwater runoff is created by that development, that a utility is needed to provide stormwater services. (Def.Exs.H at 79, QQ at 162; Tr.699:6-700:4,708:11-21,710:2-713:25,758:17-24,772:13-20,804:24-805:18,835:8-13,1071:8-18.) Furthermore, the additional runoff generated on a property is entirely dependent on the increased impervious area (e.g., more pavement=more runoff). (Tr.357:12-361:4,602:16-24,606:13-608:5,616:10-621:15,765:7-766:6,894:11-896:12,1037:5-24.) Therefore, the charge is properly based on this addition of runoff, i.e., impervious area.

More telling are the books authored by Plaintiffs' experts that recognize the same basic principle of impervious area equaling the demand and thus being related to the stormwater services caused by the development. (Def.Ex.WW(Debo's book) at 119("The greater the demand (i.e., the more the parcel of land is paved), the greater the user fee should be"), 121("So, it only makes sense to pay for stormwater on the same basis – the more you pave, the more you pay. All citizens can intuitively grasp this concept, and the vast majority feels it is fair."); Def.Ex.F4(Jones' book) at 21("The fee should be related to service provided, the most common basis being area of impervious surface. . . . Funding does not fall entirely on those who experience flooding problems, but is distributed equitably to all those who contribute to the problem."). Indeed, the Trial Court recognized this principle by finding (in a paragraph authored by it) that the

"improved area that already exists . . . has created the need for the stormwater system." (J. ¶27(LF1549;A9).)

To further ensure that the charge is related to service, the Ordinances provide a system of credits for customers whose level of service is not suitably determined using the same rate as other customers. In particular, some customers' stormwater may not enter the stormwater system because their property is internally drained or drains directly to a major river. (Def.Exs.B-E §27; Tr.782:21-783:12,866:11-868:1.) These customers are eligible to receive a 50% credit of the Stormwater User Charge, which is based on the customer's not receiving services related to the stormwater system itself, but still receiving all the other stormwater services provided by MSD, including the regulatory and planning stormwater services. (Def.Ex.V; Pls.Ex.39 at 6; Tr.595:19-23,866:11-868:1,1041:1-24.) Another credit is available to customers where the stormwater services are provided by another entity under agreement with MSD. (Def.Ex.B §27(3) (A88-89).) Under agreements between MSD and certain levee districts, the customers within the levee districts receive a 97% credit for MSD's Stormwater User Charge because the levee districts provide almost all the services that MSD would otherwise be providing. (Def.Ex.P; Tr.1043:3-20.) Thus, the Stormwater User Charge is flexible to account for situations where the normal rate is affected by a lower level of service provided by MSD.

Missouri Growth further stands for the proposition that a true user fee need not be perfect because the wastewater charge at issue there was not based on the actual, metered water usage for a month, much less metered sewage. Rather, the charge was based on a

water meter reading for a "winter quarter" between November and April, which "minimizes the chance of customers being charged for water used for outdoor purposes since the water used outdoors does not enter MSD's [sanitary] sewer system." *Missouri Growth*, 941 S.W.2d at 618. Thus, a customer's monthly bill is a snapshot of a winter water meter reading and remains the same until the next meter reading the following winter. Moreover, the wastewater charge did not measure how much or what kind of wastewater actually left a residence. But water usage is the industry standard for determining wastewater service and is a practical, fair, and equitable means by which to charge. Here, like water usage, impervious area is the industry standard and a common basis across all MSD on which a rate can be based. (Def.Exs.B at 3, WW at 124; Tr.609:23-610:19,835:8-836:11.)

In stark contrast to the straightforward and practical analysis applied in *Beatty II*, *Missouri Growth*, and *Arbor*, Plaintiffs manufactured a new, academic, overly complicated standard – one-to-one linear relationship – based on a classic strawman argument, i.e., there is no one-to-one linear relationship between impervious area and *total* runoff from a property. Plaintiffs' experts produced two reports and charged over $400,000 to construct this strawman and then knocked him down with their academic opinions. (Tr.588:19-589:25; LF2647-48.) The Trial Court adopted this new standard, despite its being without a basis in law and despite Plaintiffs' experts' admissions that there *was* a one-to-one relationship between impervious area and the additional runoff on a property from adding impervious area, which, as previously described, is how MSD's

services are properly viewed. (Def.Ex.B §1(A80-82); Tr.357:12-361:4,616:10-621:15,895:18-896:12.)

Plaintiffs' experts interpreted "direct relationship" to require a one-to-one linear relationship between the amount of impervious area and the *total* runoff from a property (runoff naturally occurring plus additional runoff from impervious areas). (Tr.228:17-23, 248:13-249:18,378:16-20,439:16-20,501:14-505:16,597:10-14.) Plaintiffs' experts first established the self-evident concept that the larger the area, the more total stormwater runoff that would come from the property. (Tr.241:23-242:10,552:15-553:19.) They then opined that, in order for there to be a direct relationship, the total runoff from a piece of property would need to progress in one-to-one fashion with the addition of more impervious area and concluded through calculations that this was not the case. (Tr.247:25-249:18,258:23-263:22,439:11-440:9.) Additionally, Plaintiffs' experts performed analyses of different parcels of property with similar amounts of impervious area (but vastly different amounts of total area) and showed that the total runoff was not the same. (Tr.501:4-505:20.) The Trial Court erred by accepting this strawman theory for several reasons.

First, there is no case cited by Plaintiffs or the Trial Court requiring a perfect or one-to-one linear relationship. To the contrary, several cases found in favor of the public entity's user charge without such perfection. *See Arbor*, 341 S.W.3d at 685; *Missouri Growth*, 941 S.W.2d at 623; *In re Tri-County Levee Dist.*, 42 S.W.3d at 788 (upholding charge and noting that levee district based the level of service on an "*estimate* of increased physical efficiency and decreased maintenance costs afforded by Tri-County's

levees") (emphasis added); *see also Massachusetts v. United States*, 435 U.S. 444, 467-70 (1978) (holding that charge that was a "fair approximation of the cost" of service was not a tax).

Second, the strawman is based on the mistaken premise that the "assumption" underlying the charge was the existence of a direct relationship between the impervious area and the total runoff from a property. (J. ¶58(LF1556;A16).) In support of this, the Judgment relied on non-specific materials from the Rate Commission proceedings (which in context are at odds with Plaintiffs' strawman) that discuss just "runoff" without distinguishing between "total" runoff and the additional runoff from development. (*Id.*) In fact, MSD and the Rate Commission always were focused on the runoff resulting from the addition of impervious area to property, which, in turn, has caused the need for MSD's stormwater services. (Tr.745:9-19,760:20-25,765:7-766:6.) It is this additional runoff due to impervious area that determined the demand and contribution to the services, and thus it is the basis for the rate.

Indeed, this Court need not look further than the Ordinance itself, which defines "Served" and "Service" as "Property which contributes to Stormwater Runoff which is drained through the Stormwater System *as a result of the addition to or construction upon such Property of Impervious Surface*" and further states that "owners or users of improved property . . . are served by and benefit from the Stormwater System in that the manmade impervious surface on such improved property contributes to stormwater runoff which occurs from such property, *beyond the amount which would occur if such property were undeveloped and in its natural state*." (Def.Ex.B at 3, §1(A79,A81)

(emphasis added).) The Ordinance thus accurately and succinctly describes why impervious area is used as the measure of service. The testimony affirmed this basic premise. (Tr.699:6-700:4,708:11-21,777:5-778:8,863:8-864:18,865:13-866:1,894:11-895:5,1037:5-24,1071:8-18.) The Court did not find that MSD's testimony and evidence (including the language of the Ordinances) that MSD was concerned with additional runoff from impervious area was not credible. Therefore, the Trial Court committed error by accepting a new standard without basis in law or fact.

Third, if Plaintiffs' one-to-one direct relationship were the correct standard, MSD should still prevail on Factor 3. Both of Plaintiffs' experts admitted that, in using the standard runoff formula (also used by MSD), the additional runoff from the impervious area progressed in a linear, one-to-one fashion (i.e., adding 100 ft^2 of impervious area adds a proportionate amount of runoff from that property). (Tr.357:12-361:4,616:10-621:15; Def.Ex.G4.) Moreover, an examination of Plaintiffs' experts' calculations and graphs[11] confirms the basis of MSD's Stormwater User Charge – when impervious area is added to a parcel of property, there is additional runoff from that property that did not exist when the property was in its natural state. (Def.Ex.G4; Tr.616:10-621:15.) In

[11] Plaintiffs' experts compared the *total* runoff of properties in order to skew the results in their favor. (Tr.351:22-354:7.) When the curtain is pulled back and the naturally occurring runoff is subtracted from their calculations – as it should be when considering the impact of development on stormwater services – a linear relationship emerges. (Tr.357:12-361:4,616:10-621:15.) And Plaintiffs' experts admit it. (*Id.*)

addition, Plaintiffs' expert Jones admitted that a direct, one-to-one relationship existed between impervious area and runoff from impervious area and that this relationship was unaffected by slope, soil type, or other factors. (Tr.616:10-621:15.)

Beyond failing to properly apply Factor 3, the Trial Court made several factual findings that are irrelevant or misplaced or were improperly relied upon in applying the incorrect legal analysis. Much of Plaintiffs' and the Trial Court's analysis of the third *Keller* factor misunderstands how utility rates work. For instance, it is stated that the Stormwater User Charge is "simply a way of apportioning its total stormwater costs amongst its fee payers," that the Charge is a pro rata share of MSD's stormwater costs, and that the Charge is a means to distribute the costs of the service. (J. ¶¶25,65,67,69, 103,114(LF1548,1558-59,1567,1569;A8,18-19,27,29).) Yet this is what all utility rates (like the ones upheld in *Arbor* and *Missouri Growth*) actually do – all the costs of providing the services and running the utility are determined and then a common measurement is used to fairly and equitably allocate those costs to the customers. (Tr.170:21-171:1,852:19-853:13,865:13-866:1,961:20-963:23.)

Similarly, MSD is criticized because it cannot and does not identify the specific services or the amount of services provided each month by MSD. (J. ¶¶44,46-50,114-16(LF1553-54,1569-70;A13-14,29-30).) No utility rate does this. Actual services and the costs of those services to each individual utility customer can be impractical, if not impossible, to quantify. Thus, a rate is used to recover the costs of service. (Tr.396:23-397:17,574:23-575:22,767:8-25,788:3-789:17,865:13-866:1; HoelscherDep.Desig.80:16-81:10(LF1290).) For example, electric or gas utilities do not vary their rates by each

customer based on the location or characteristics of a property, such as how far the property is from the distribution center or whether the utility was performing maintenance in the area in the past month. (Tr.574:23-575:22,788:3-789:17.) Yet this is what the Trial Court required of MSD's Stormwater User Charge. Indeed, under Plaintiffs' and the Trial Court's analysis, any rates charged by municipal utilities would not meet Factor 3, which is directly in conflict with *Arbor* and *Missouri Growth*. *See, e.g.*, *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 156 S.W.3d 376, 384 (Mo.App.W.D. 2005) ("ratemaking involves the making of pragmatic adjustments") (internal quotations and citation omitted).

In a similar vein, the Trial Court based its decision on Factor 3 on the immaterial fact[12] that the Stormwater User Charge is not based on the actual runoff from a property (i.e., dependant on rainfall). (J. ¶¶45,112,114,116(LF1553,1569-70;A13,29-30).) However, the Trial Court found that "[i]t would be impractical, if not impossible for MSD to determine the amount of runoff from given properties." (J. ¶45(LF1553;A13).) Therefore, MSD was held to an impractical and insurmountable standard. This conclusion is reinforced by the admissions of Plaintiffs' experts that they did not take cost and practicality into account in analyzing the Stormwater User Charge and that their Factor 3 "standard" is next to impossible to meet. (JonesDep.Desig.241:25,242:5, 247:10-248:10,250:15-251:10(LF1027-29); DeboDep.Desig.129:13-19(LF985);

[12] The costs of MSD's stormwater services are not related to how much it rains or the amount of runoff coming off a property at any given time. (Tr.669:10-671:4.)

Tr.379:16-380:14,585:7-586:10,586:24-587:4,599:2-7,609:3-22.) In fact, Plaintiffs' expert Jones would not concede that MSD would meet Factor 3 even if MSD spent $5,000-$10,000 on each property (a total of $2.4-$4.8 billion to collect $40 million annually) to analyze runoff characteristics like he did. (Tr. 603:10-605:1.)[13]

The Judgment also found that MSD's "primary service" was "handling runoff." (J. ¶¶56,112 (LF1556,1569;A16,29).) However, this finding is faulty for two reasons. First, the operation and maintenance of the stormwater system represents only half of the costs to provide MSD's stormwater services. (Tr.594:3-20,595:19-23,866:11-868:1, 1041:1-24.) Second, the amount of runoff or rainfall in each month does not affect the level of MSD's services or its costs because MSD's services are based on large design storms and the fact of runoff from development (which causes the need for planning and regulations), not on how much it rains. (Tr.375:24-376:8,1019:13-1022:4,1030:18-1031:13.) Thus, the amount of runoff from a property (based on how much it rains) is not equated to "actual use" of MSD's system. (*Cf.* J. ¶116(LF1570;A30).)

[13] In any event, while other characteristics of property discussed by Plaintiffs' experts like soil-type, slope, and vegetative cover might be relevant in an academic exercise of calculating runoff estimates, in the real world of a stormwater utility, such characteristics are irrelevant because MSD does not consider these factors in designing the system. (Tr.713:13-25,835:23-836:11,857:22-858:14.) Indeed, under MSD's Rules and Regulations, the only variable in the formula used to calculate runoff for an area is impervious area. (Def.Ex.EEE; Tr.1022:19-1024:12,1104:8-1105:4.)

As shown, MSD's Stormwater User Charge meets the third *Keller* factor as it has been interpreted by the Supreme Court and this Court, and the Trial Court's adoption and application of a new, impossible to meet, standard was in error.

D. MSD PROVIDES STORMWATER SERVICES TO ITS CUSTOMERS, AND THE REVENUES FROM THE STORMWATER USER CHARGE WERE USED TO PROVIDE THOSE SERVICES AND NOT PAID INTO MSD'S GENERAL REVENUES.

The fourth *Keller* factor asks whether a specific service is provided for the user charge:

> Is the government providing a service or good? – If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.

Keller, 820 S.W.2d at 304 n.10. This factor distinguishes user charges from traditional taxes that are paid into general revenues without regard to any specific service. *Beatty II*, 867 S.W.2d at 221.

In numerous utility cases (two involving MSD), the Supreme Court and this Court easily resolved this factor in favor of the governmental utility. *See Arbor*, 341 S.W.3d at

685; *Beatty II*, 867 S.W.2d at 221; *Larson*, 92 S.W.3d at 133; *Mullenix*, 983 S.W.2d at 562; *Missouri Growth*, 941 S.W.2d at 624.

There is no dispute that MSD provides stormwater services to its customers. Plaintiffs Zweig and Milberg acknowledged services being provided by MSD. (Tr.99:1-5,141:15-142:5.) Professor Debo admitted that MSD was performing stormwater services relating to operation and maintenance, regulatory, and planning. (DeboDep. Desig.65:13-66:4,134:19-24(LF982,986); Tr.197:18-198:20,375:1-14.) Not only did Mr. Jones admit that MSD provides stormwater services, but he provided a detailed, comprehensive list of those services, including maintenance, regulatory compliance, public education, water quality monitoring, coordination with local governments on Phase II permit, and design standards and review. (Tr.577:25-578:23,594:3-20; JonesDep.Desig.106:18-19,107:14-108:21(LF1005).)

The evidence also detailed the limited services that MSD provided prior to the Stormwater User Charge (e.g., operation and maintenance of stormwater facilities on a band-aid emergency basis) and then the additional services that MSD would provide under the Stormwater User Charge, including a program of preventive maintenance (like cleaning and repairing inlets and replacing or rehabilitating pipe) and enhanced services (like creek erosion control). (Tr.682:24-684:4,685:9-686:1,1001:23-1002:19,1028:18-1029:20; Pls.Exs.18 at 2-10,2-11; 25 at 22; 38 at 9:13-10:15; 39 at 12; 44 at 27:14-28:14,98:13-25,158:15-22; Def.Ex.H at 90-91.) Indeed, MSD had not been performing its stormwater services at an appropriate level, and more revenues were required to

provide these services at a satisfactory level. (Tr.667:19-668:22,682:24-684:4,685:9-686:1,1001:6-21.)

Additionally, the stormwater services being performed at the time of trial were not contested. Clean water laws mandate that MSD provide regulatory and planning services, including MSD's responsibilities as lead permittee on the Phase II Permit, and require reports on how MSD performs those services. (Def.Exs.I,K,NN,DDD; Tr.1014:2-1017:5.) The testimony of Messrs. Theerman, Hoelscher, and Sedgwick detailed MSD's stormwater services and further described the new enhanced services (like new construction and erosion control) that were in their infancy at the time of trial, including 1,085 possible projects at a cost of $600 million identified. (Def.Ex.M; Tr.715:1-14,875:14-876:12,1005:17-1006:24,1028:18-130:17,1077:12-1078:3.) The prime example of an enhanced-type service actually performed by MSD was the rebuilding of the severely eroded banks of Fishpot Creek in St. Louis County, which endangered homes and was caused by the proliferation of impervious area over the years. (Def.Ex.BB; Tr.1053:9-1056:7; HoelscherDep.Desig.234:3-236:6(LF1323-24).)

Most tellingly, on at least 21 instances in the Judgment, the Trial Court referenced MSD providing stormwater services or customers receiving the benefits of those services. (7/9/10 J. ¶¶27,43,44,46-50,52,53,56,57,65,67,72-74,79,90,112 (LF1549,1553-56,1558-61,1564,1569;A9,13-16,18-21,24,29).)

Furthermore, it is not disputed that the revenues generated from the Stormwater User Charge were placed in a separate fund and were spent on providing stormwater services, rather than used as general revenue for MSD. (Def.Ex.C §21; Tr.682:18-23,

719:3-6,970:6-971:20.) Plaintiffs' experts confirmed that all the revenues from the Charge were spent on stormwater, and not other, services. (Tr.386:22-387:1,596:22-597:7; DeboDep.Desig.267:5-13(LF996).)

Yet, incomprehensibly, despite all the prior cases, the mountain of evidence, and its own 21 separate findings of service, the Trial Court still found the fourth *Keller* factor in favor of Plaintiffs by finding that MSD was not providing any service or at least any new service. The Trial Court again mistakenly relied on the *Building Owners* case. First, no case, not even *Building Owners*, supports the proposition that a new service must be provided. Second, even assuming that a new or different service was a requirement, the ever-increasing Phase II Permit services and other management and regulatory services and the increased level and nature of stormwater services (i.e., more services performed at higher levels) since the implementation of the Stormwater User Charge easily meet this misplaced standard. (Tr.685:9-686:1,1001:23-1002:19.) Third, the fire inspection fee in *Building Owners* is completely different from MSD's Stormwater User Charge. In that case, fire inspections previously were performed as part of the fire code enforcement, were done only upon complaints, and were funded by general tax revenues. Thus, the court held that the City was converting an enforcement activity into a service in order to increase revenues, which was, indeed, the express purpose of that charge. *Bldg. Owners*, 231 S.W.3d at 214.

Nothing could be further from MSD's Stormwater User Charge and stormwater services. MSD had been providing stormwater services, albeit at an inadequate level, for years, and these services were not funded by general revenues. (Def.Ex.H at 90, B

§21(A87); Tr.682:18-23.) All that MSD did was change the method of payment (to make it fair and equitable) and increase the revenue (to cover all its stormwater costs and increase the level of services). (Tr.667:19-668:22,682:24-684:4,865:13-866:1,1001:6-21.) MSD did not simply recast prior enforcement activities as new "services" because the services had been provided all along.

Another legal deficiency regarding Factor 4 is the Trial Court's conclusion that MSD improperly charges, or does not provide credits to, (unidentified) customers who supposedly "maintain predevelopment conditions" by implementing certain BMPs and LIDs, and thus MSD is not providing "measurable service" to these customers. (J. ¶120 (LF1572;A32).) This is another instance of the Trial Court's taking Plaintiffs' arguments from Factor 3 (because credits would appear to be relevant to how the charge is affected by service) and applying them to other factors, which no case allows. *See Ashworth*, 53 S.W.3d at 576. However, no matter where this conclusion is placed, it is erroneous for several reasons.

First, the "maintain predevelopment conditions" premise is wrong. As previously explained, MSD's system is designed for the largest rain events (i.e., 15- or 20-year design storms). MSD does not mandate that a newly developed property must maintain the same level of stormwater runoff in those conditions. The requirements that Plaintiffs and the Trial Court tout for this notion of "maintaining predevelopment conditions" are not applicable in these large storms. As Mr. Hoelscher explained, MSD's Rules and Regulations require that newly (after 2006) developed properties install BMPs (like a rain garden or infiltration trench) for water *quality* purposes (not runoff reduction), but only to

maintain such conditions in a *small storm* (e.g., 1- or 2-year storm), not the large 15- or 20-year storms for which MSD's stormwater system is built. (Def.Ex.EEE at 65-67; Tr.1091:13-1024:12,1025:2-1026:8,1027:18-1028:14).) In these large design storms, these BMPs are inundated and ineffective, and accordingly not entitled to a credit. (Tr.1025:19-24,1026:19-1028:14.) Similarly, the detention requirement (to supposedly "maintain predevelopment conditions") does not justify a credit. As Mr. Hoelscher explained, detention basins are designed only to maintain the peak rate of runoff, but the total volume of runoff is greater than before and it still enters the stormwater system. (Tr.1026:19-1028:14,1039:7-15.) And, in any event, when designing a stormwater facility downstream of a detention basin, MSD's Rules and Regulations require the engineer to assume that the upstream detention basin does not exist. (Def.Ex.EEE at 67; Tr.1027:11-17.) So not only do BMPs and LIDs not lower the costs of services, they actually increase MSD's costs because of having to regulate and inspect them. (Tr.633:13-634:15,1027:18-24,1045:21-1046:8.)

Second, credits should only be offered where there is a cost savings to MSD. (Tr.866:11-20.) However, Professor Debo admitted that credits for BMPs and LIDs are not related to cost reductions, but are policy-driven incentives for people to construct things that may be helpful to a stormwater program. (Tr.378:16-379:15,384:21-385:24.) Yet again, if MSD offered credits for BMPs and LIDs that had no reduction in costs of service, Plaintiffs would likely point to these credits as evidence that the charge is *unrelated* to the level of service and that the credits merely try to incentivize environmentally sound behavior.

Finally, the implementation of BMPs and LIDs (required after 2006) is relatively insignificant in MSD's operating and maintaining its stormwater system, which was constructed and developed almost entirely before these new regulations. (Tr.707:12-18.)

For the foregoing reasons, the Trial Court erred by finding that MSD does not provide service because such a conclusion is based on an erroneous legal conclusion and results from a misapplication of the law to the facts.

E. IN ADDITION TO MSD, PRIVATE INDIVIDUALS AND ENTITIES PROVIDE STORMWATER SERVICES.

The fifth *Keller* factor asks about who has provided stormwater services:

> Has the activity historically and exclusively been provided by the government? – If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.

Keller, 820 S.W.2d at 304-05 n.10.

The Supreme Court recently clarified that there are three prongs to this factor: (1) "whether the service is one provided by private versus public entities generally"; (2) whether the service was historically provided by the government; and (3) whether the service was being exclusively provided by the government at the current time. *Arbor*, 341 S.W.3d at 685-86. When the Trial Court found this factor against MSD because no other entities provided services for a charge (J. ¶¶122-23(LF1572-73;A32-33)), it did not

have the benefit of *Arbor*. When the evidence at trial is reviewed under this clarified standard, Factor 5 should be found in MSD's favor.

First, private entities are providing stormwater services, and such services were not historically provided only by MSD. Drs. Zweig and Milberg testified that they, either as individuals or through their subdivision, have performed stormwater services like erosion control and detention basin maintenance on their properties. (Tr.90:11-93:19, 143:1-21,157:4-19.) This is consistent with Mr. Theerman's testimony about MSD's inability to provide such services due to lack of funds before the Stormwater User Charge. (682:24-684:4.) Similarly, Mr. Theerman testified that the subdivision in which he lives has a stormwater system that was never dedicated to MSD, and, therefore, the roughly 25 owners in the subdivision pay for the operation and maintenance of that system. (Tr.715:8-717:8.) Mr. Jones testified that, within MSD, there are private entities that have NPDES (National Pollutant Discharge Elimination System) stormwater permits from the EPA or Department of Natural Resources, that many large commercial and industrial entities provide their own stormwater management and services on site, and that private entities (not MSD) construct the stormwater infrastructure and maintain the system before dedication to MSD. (Tr.590:17-592:9,593:13-594:2; JonesDep.Desig. 328:16-329:4(LF1039-39); Def.Ex.F4 at 16.) Professor Debo confirmed that subdivisions provide stormwater services such as building and maintaining detention basins. (Tr.197:10-15,217:6-25.) Messrs. Theerman and Sedgwick testified that private entities finance and build the stormwater infrastructure and then operate it until they dedicate it to MSD, that some systems are operated and maintained by private entities

and individuals, and that private entities and individuals operate and maintain detention ponds. (Tr.715:18-717:8,876:18-877:14.) Also, the Ordinances make it clear that MSD does not maintain certain facilities, such as detention basins, listed in the Ordinances' Appendix and that MSD does not accept dedication of certain facilities. (Def.Ex.B §5, App.I.(A83,90-92)) Therefore, the record shows other entities have provided stormwater services in the past and continue to do so today.

Moreover, unlike in *Arbor*, MSD has not prohibited other entities from providing stormwater services. 341 S.W.3d at 685-86. To the contrary, the Ordinances, as noted above, require other entities to perform services because MSD will not accept dedication or will not maintain certain facilities. (Def.Ex.B §§3,5(A82-83).)

Therefore, under *Arbor*, the fifth *Keller* factor should be resolved in MSD's favor.

F. OTHER FACTS AND LAW DEMONSTRATE THAT THE STORMWATER USER CHARGE IS NOT A TAX UNDER THE HANCOCK AMENDMENT.

In *Arbor*, the Supreme Court held that factors besides the *Keller* factors may only be considered in the minority of cases "when the balance [of the *Keller* factors] is a close one." 341 S.W.3d at 683. As demonstrated above, the balance of the factors weighs overwhelmingly in favor of MSD in this case, but, if other factors are considered, they must be considered appropriately, which the Trial Court failed to do.

Plaintiffs and the Trial Court attempted to graft a new, amorphous factor – "The Stormwater User Charge Has All the Characteristics of a Tax" – onto the *Keller* analysis.

(J. ¶¶89-93(LF1564-65;A24-25).) With one exception,[14] the consideration of these additional factors was erroneous for multiple reasons. At the outset, this general consideration that a Trial Court needs only examine the definition of a tax using common sense is contrary to the holdings of *Keller* and *Arbor*. In fact, the five *Keller* factors are based on Missouri's definition of what a tax is. *Keller*, 820 S.W.2d at 303-04; *see also* discussion *supra* at p. 20. Therefore, a generalized and non-specific analysis outside of the five factors is unnecessary. Moreover, *Arbor* rejected the plaintiffs' contentions in that case that only one factor (sole provider of a service) needed to be considered by the Court in deciding whether the charge was a tax. 341 S.W.3d at 686. Here, then, the Trial Court's reliance on the one overarching factor of "characteristics of a tax" was in error.

More specifically, the "characteristics of a tax" analysis is a house of cards. First, the Trial Court found that half of MSD's services were of "general benefit" to MSD's

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[14] *Arbor* held that whether a lien can be imposed on the customer's property for failure to pay the charge can be considered in a close case. 341 S.W.3d at 686 (reaffirming this consideration in *Beatty II*). Putting aside that a lien is not indicative of a tax, in that liens may be imposed on property when various, non-tax charges are not paid (*see, e.g.*, R.S.Mo. §§429.010 (mechanic/materialman's lien); 429.609 (real estate broker's lien); 430.020 (lien for storing or repairing vehicle or aircraft); 484.130 (attorney's lien)), there was no evidence that MSD has used the lien power in its Stormwater User Charge, and, like *Arbor*, MSD has other avenues like late fees and collection lawsuits by which to recover unpaid charges. (Def.Ex.B §§13,16.)

customers purportedly by relying on *Feese*. (J. ¶90 (LF1564;A24).) This premise did not come from the *Feese* court's Factor 3 analysis or even that Court's *Keller* analysis. Instead, Plaintiffs lifted the premise from the part of the opinion that was addressing whether the charge at issue was covered by ballot language previously approved by voters. *Feese*, 893 S.W.2d at 813-14. The court merely held that the authorization for charges "for the use and services of the system" did not include the ability to charge properties unconnected to the sewer system because such properties received no specific benefit. *Id.* Clearly, this "general benefit" analysis is considered when the validity of an ad valorem tax is at issue, but not in the case at hand where not all residents are being charged the Stormwater User Charge. Moreover, this "general benefit" analysis is based on Plaintiffs' and the Trial Court's misconception that MSD must provide an individualized amount of benefits and services each month and be able to show them. (*See*, *e.g.*, J. ¶¶46-50,65,67(LF1553-54,1558-59;A13-14,18-19).) However, that is not how any utility rate works, and the actual benefit received by customers is that MSD is handling the stormwater demand caused by their development of land. (*See supra* pp. 22-24, 35-36.)

Plaintiffs and the Trial Court further found, without any actual factual support, that MSD's motivation was to disguise a large and unnecessary tax increase as a charge to avoid going to the voters. (J. ¶91(LF1564-65;A24-25).) This accusation is really just idle speculation based on the ultimate question in this case – whether a charge must be submitted to the voters. Moreover, unlike in *Building Owners* where the City admittedly told its fire department to invent a "service" charge to raise more revenues, 231 S.W.3d at

210, there was no evidence that the Stormwater User Charge was created to generate more general revenue by converting an enforcement activity into a nominal service. To the contrary, all the evidence showed that the demands for MSD's services were being dramatically increased because MSD needed to provide adequate services throughout the District and because of the increasing requirements under the Phase II Permit and clean water laws. (Tr.685:9-686:1,1001:23-1002:19.)

Furthermore, the Trial Court failed to analyze other factors and considerations that weigh in favor of the Stormwater User Charge's not being a tax. First, there are strong presumptions that municipal ordinances, and in particular those relating to utility rates, are valid and constitutional unless there is a clear contravention of the constitution or the rates "are clearly, palpably and grossly unreasonable." *See St. Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 725 (Mo.banc 2007); *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo.banc 1995); *Shepherd v. City of Wentzville*, 645 S.W.2d 130, 133 (Mo.App.E.D. 1982); *see also Parking Sys., Inc. v. Kans. City Downtown Redev. Corp.*, 518 S.W.2d 11, 16 (Mo. 1974). Here, Plaintiffs' expert Debo admitted that the Stormwater User Charge was fair and reasonable. (Tr.348:15-350:23,377:2-7,396:4-17.) Moreover, the fact that MSD has a voter-adopted Rate Commission in place that held hearings and analyzed the Stormwater User Charge does have a bearing on the ultimate question of whether the charge complies with the Hancock Amendment. The Rate Commission was established to analyze proposed rates under a variety of factors, including the legality of the rate, and MSD should be able to rely on the Commission's findings in implementing a rate.

Although not necessary to the analysis here because the five *Keller* factors weigh heavily in MSD's favor, the factors manufactured by Plaintiffs discussed above must be ignored, while the Court should consider the traditional deference due to rate making bodies and how other stormwater utilities are charging.

II. IN THE EVENT THE TRIAL COURT'S HANCOCK JUDGMENT IS AFFIRMED, THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS' COUNSEL $4,828,828.28 IN ATTORNEYS' FEES AND EXPENSES BECAUSE THIS AWARD IS UNREASONABLE, IMPROPER, AND CONTRARY TO MISSOURI LAW, IN THAT:

A. THE UNPRECEDENTED APPLICATION OF A MULTIPLIER OF 2.0 TO PLAINTIFFS' "LODESTAR" ATTORNEYS' FEES AMOUNT IS NOT PERMITTED.

Although this Court need not reach the issues relating to the Trial Court's award of attorneys' fees and expenses if it holds that the Stormwater User Charge is not a tax, that award likewise contained several errors requiring reversal.

Section 23 of the Hancock Amendment provides that a plaintiff prevailing on a Hancock challenge may recover "costs, including reasonable attorneys' fees incurred in maintaining such suit." In its February 3, 2011 Judgment granting in total Plaintiffs' motion for attorneys and expenses ("Fees Judgment"),[15] the Trial Court took the

[15] Once again, the Trial Court merely signed Plaintiffs' proposed judgment, adding merely one paragraph (¶30) of its own. (*Compare* LF2636-49 *with* LF2586-2601.)

unprecedented step of awarding Plaintiffs *double* what the lodestar fee amount of $2,082,576.50 (which amount, in and of itself, MSD believed was unreasonable and reflected a lack of billing judgment where there was no client reviewing bills) was in this case, thereby resulting in Plaintiffs' counsel receiving a windfall award of $4,165,153 (plus the almost $200,000 in fees spent on the fees motion itself). The multiplier award is unprecedented under Missouri law and is clearly a misstatement and misapplication of Missouri and other persuasive law for several reasons, thus rendering the amount of fees awarded unreasonable.

At the outset, both Plaintiffs and the Trial Court recognized that there is no Missouri case, statute or other authority allowing the award of a multiplier. (Fees J. ¶22(LF2643-44;A70-71); LF1822; Tr.1212:4-1213:12.) Moreover, such an enhancement is unwarranted and unreasonable in Hancock Amendment challenges because the defendant will always be a public entity that must contend with budgetary constraints and be a steward of the public's money. *Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, 130 S.Ct. 1662, 1676-77 (2010). While an award of the traditional lodestar amount may be awarded to a successful plaintiff, a multiplier benefits only the counsel involved. Here, an award of lodestar attorneys' fees in excess of $2 million for a case involving five days of trial pushed the limits of reasonableness out to the edge; the multiplier pushed reasonableness over the cliff.

As justification for awarding the multiplier, the Trial Court relied on out-of-state cases primarily from Florida and California and found that the multiplier was warranted

because of the contingent risk that Plaintiffs' counsel took in prosecuting the case. (Fees J. ¶¶22-24(LF2643-45;A70-72).) This was an error of law.

When deciding issues relating to awards of attorneys' fees, Missouri courts have followed U.S. Supreme Court precedent with respect to the reasonableness or reduction of such fee awards. *See, e.g., O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo.banc 1989); *Trout v. State*, 269 S.W.3d 484, 488-89 (Mo.App.W.D. 2008); *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 184-85 (Mo.App.W.D. 2002). Therefore, it stands to reason that Missouri courts would not follow cases from California, Florida or any other state[16] that are not in line with the well-reasoned and convincing U.S. Supreme Court precedents. The U.S. Supreme Court has rejected the use of multipliers in statutory fee cases and has specifically rejected awarding an enhancement to reward contingency risk because the lodestar amount itself accounts for the difficulty in prevailing on the merits and such enhancement would improperly subsidize unsuccessful contingent fee cases. *See City of Burlington v. Dague*, 505 U.S. 557, 562-67 (1992) (rejecting contingency enhancement); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 721-22 (1987) (*Delaware Valley II*) (plurality opinion rejecting contingency enhancement). The Court has likewise rejected a variety of other reasons for a multiplier. *See Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (presumption that lodestar is reasonable); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478

[16] These cases were distinguished, analyzed, and shown to be inapplicable by MSD in briefing below. (LF1923-25.)

U.S. 546, 565 (1986) ("*Delaware Valley I*") (no enhancement for superior performance because quality is reflected in rates and hours billed); *Perdue*, ___ U.S. ___, 130 S.Ct. at 1673-75 (performance of counsel is subsumed within lodestar). These legal principles should control here, and, if Plaintiffs are entitled to any fees, the lodestar amount is the presumptive maximum.

In any event, the extent of the contingency risk taken by Plaintiffs' counsel and the Trial Court's concern that the Stormwater User Charge would have gone unchallenged are belied by the fact that another law firm sought to intervene in this case, but Plaintiffs' counsel successfully opposed this intervention to keep the case for themselves. (LF18-41,LF538.) In other words, there was no risk of the Charge going unchallenged as other able counsel was willing to prosecute the case.

For these reasons, the award of a multiplier of the lodestar amount of fees must be reversed.

B. HOURS BILLED ON PLAINTIFFS' UNSUCCESSFUL REFUND CLAIM ARE NOT RECOVERABLE BECAUSE PLAINTIFFS WERE NOT THE PREVAILING PARTY ON THAT CLAIM.

The Trial Court further committed legal error by awarding fees for the amount spent on Plaintiffs' unsuccessful refund claim. It is well-settled Missouri law, with a foundation in U.S. Supreme Court precedent, that a plaintiff cannot recover fees incurred on an unsuccessful claim and that the trial court should attempt to segregate those fees or reduce the award to account for the limited success. *See O'Brien*, 768 S.W.2d at 71; *Alhalabi v. Mo. Dep't of Natural Res.*, 300 S.W.3d 518, 531 (Mo.App.E.D. 2009);

Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60, 75-76 (Mo.App.E.D. 2003); *McClain v. Papka*, 108 S.W.3d 48, 54 (Mo.App.E.D. 2003); *Gilroy-Sims & Assocs. v. Downtown St. Louis Bus. Dist.*, 729 S.W.2d 504, 507-08 (Mo.App.E.D. 1987); *Trout*, 269 S.W.3d at 488-89 (Mo.App.W.D. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

Here, the Trial Court entered judgment in MSD's favor on the refund claims. Under the cases cited above, the burden was on Plaintiffs to segregate the amounts spent on the unsuccessful claim, but they chose to formulate a strained argument (that the denial of the refund was a victory for Plaintiffs). (Tr.1226:10-1227:23.) Not only did the Trial Court not hold Plaintiffs to task, but the Fees Judgment incorrectly included the amounts billed on the refund claim despite its judgment in MSD's favor and merely found that Plaintiffs' counsel had saved the customers from having to pay the Stormwater User Charge in the future (which was the result of the first phase, not the refund claims), but did not find that Plaintiffs prevailed on the refund claims. (Fees J. ¶30(LF2648; A75).) This was error and warrants reversal.[17]

[17] As a result of Plaintiffs' steadfast refusal to segregate the time spent on the refund claims, an outright reversal is appropriate. Alternatively, this Court could modify the award based on the reductions suggested by MSD (LF1903-12), or the case could be remanded for reexamination of the fees relating to the refund claim.

C. EXPENSES AND EXPERT FEES (EXCEPT FOR DEPOSITION TIME) ARE NOT RECOVERABLE UNDER THE HANCOCK AMENDMENT OR DECLARATORY JUDGMENT ACT, WHICH PROVIDES ONLY FOR RECOVERY OF "COSTS."

The Trial Court further erred by awarding Plaintiffs all of their out of pocket litigation expenses, including over $400,000 in expert fees, on the basis that the term "costs" as used in §23 of the Hancock Amendment and in the Declaratory Judgment Act (R.S.Mo. §527.100; Mo.R.Civ.P. 87.09) means all expenses and not the traditional, narrow definition of costs. *See Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 44 (Mo.banc 1976); *Kaplan*, 166 S.W.3d at 76 (Mo.App.E.D. 2003); *Briner Elec. Co. v. Sachs Elec. Co.*, 703 S.W.2d 90, 91 (Mo.App.E.D. 1985). If the intent was to provide for expert fees and all expenses to be recoverable under Section 23 or the Declaratory Judgment Act, those broader terms would have been used, as they were in several other statutes. *See, e.g.*, R.S.Mo. §§136.315.1(4) ("Reasonable litigation expenses" defined to include "attorneys' fees and fees for expert and other witnesses"); 407.835.1 ("actual and reasonable expenses of litigation, including, but not limited to, . . . expert witnesses and attorney fees"); 444.880.4 ("costs of litigation (including attorney and expert witness fees)"); 523.259(1) ("reasonable attorneys' fees, expert expenses and costs"); 536.085(4) ("Reasonable fees and expenses" defined to include "reasonable expenses of expert witnesses"). Therefore, "costs" means "costs" and not all out-of-pocket expenses.

This conclusion is reinforced by the litany of cases that have construed the term "costs" to not include expert fees (outside of deposition time), photocopies, and surveyor

fees. *See Fairbanks v. Weitzman*, 13 S.W.3d 313, 329 (Mo.App.E.D. 2000); *Nichols v. Bossert*, 727 S.W.2d 211, 213-14 (Mo.App.E.D. 1987); *Kaplan*, 166 S.W.3d at 76; *Anderson v. Howald*, 897 S.W.2d 176, 181 (Mo.App.S.D. 1995); *Gerst v. Flinn*, 615 S.W.2d 628, 632 (Mo.App.E.D. 1981).[18] Therefore, under these authorities, Plaintiffs should not be entitled to approximately $442,821 (of the $471,072.28 awarded) for these expenses, and the Fees Judgment for this amount should be reversed.

Conclusion

As shown above, the Trial Court erred in its interpretation of the five *Keller* factors and compounded this error by misapplying the law to the facts. Viewed under the standards set out in *Arbor* and *Missouri Growth*, the Stormwater User Charge is unquestionably a true user charge under the *Keller* analysis and is not a tax under the Hancock Amendment. Reversal of the Judgment (along with the related Fees Judgment) and entry of a judgment in MSD's favor are thus warranted.

[18] Reliance on *Roberts v. McNary*, 636 S.W.2d 332 (Mo.banc 1982), is misplaced because that case involved a mere $1,100 in costs, as compared to over in expert fees alone $400,000 here.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following were served on this 16th day of September, 2011, by hand delivery on Richard R. Hardcastle, George A. Uhl, and Kirsten Ahmad, Greensfelder, Hemker & Gale, P.C., 10 South Broadway, Suite 2000, St. Louis, MO 63102:

(a) two copies of the Brief of Appellant/Cross-Respondent Metropolitan St. Louis Sewer District;

(b) two copies of the accompanying Appendix; and

(c) one CD-ROM containing electronic copies of the Brief (in Microsoft Word 2003 and Adobe PDF formats) and the Appendix (in Adobe PDF format), which copies have been scanned for viruses and are virus-free.

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CERTIFICATE REQUIRED BY RULE 84.06(c)

The undersigned hereby certifies that the foregoing Brief of Appellant/Cross-Respondent Metropolitan St. Louis Sewer District (1) includes the information required by Rule 55.03 and (2) complies with the limitations contained in Rules 84.06(b) and Eastern District Special Rule 360 in that it contains 15,463 words (excluding the cover, table of contents, table of authorities, signature block, certificate of service, this certificate, and appendix) according to the word count of the Microsoft Word 2003 word-processing system used to prepare the brief.

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INDEX TO SEPARATE APPENDIX OF APPELLANT/CROSS-RESPONDENT