

In the United States District Court
Eastern District of Missouri
Eastern Division

Marcia Behrendt,)
)
 Plaintiff,)
)
 v.)
)
 Bradley M. Scott, in his official capacity) Case No. 4:03CV00699 AGF
 as Regional Administrator of the)
 General Services Administration, John L.)
 Nau, III, as Chairperson of the Advisory)
 Council on Historic Preservation, an)
 independent agency of the United States)
 of America)
)
 Defendants.)

Plaintiff's Motion For Summary Judgment

Comes Now Plaintiff Marcia Behrendt, by and through undersigned counsel, and pursuant to Fed.R.Civ.P. 56, moves this Court for a summary judgment in her favor invalidating the Programmatic Agreement (“PA”) entered into by the Defendants with the Developer and the Missouri Development Finance Board (“MDFB”) and ordering the Defendant federal agencies to complete a lawful Section 106 and Section 110 review and a lawful environmental impact review.

I. Introduction

Plaintiff Marcia Behrendt filed this Section 106 and Section 110 enforcement action against Defendants’ General Services Administration (“GSA”) the Advisory Council on Historic Preservation because both federal agencies failed to perform their duties under the National Historic Preservation Act, 16 U.S.C. 470 et seq. (“NHPA”), and the National Environmental Policy Act, 42 U.S.C. 4321, et seq. (“NEPA”). The GSA failed to independently fulfill its

obligations under the NHPA by delegating its Section 106 and Section 110 duties to the Developers and the MDFB, and the GSA failed to independently explore feasible and prudent alternatives to the proposed adverse effects of the Project. The GSA failed to conduct an adequate NEPA review to support its finding of a CATEX checklist exclusion. The GSA's actions and findings on these issues are not supported by substantial competent evidence, are arbitrary and capricious, and therefore unlawful.

II. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. (Fed.R.Civ.P. 56). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The evidence presented must be viewed in the light most favorable to the nonmoving party. The moving party has the burden of showing an absence of a genuine issue of material fact. (Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The moving party's burden may be met by demonstrating an absence of evidence to support the nonmoving party's case. (Celotex, 477 U.S. at 325). Once the moving party satisfies its burden, the nonmoving party must move beyond its pleadings and designate specific facts showing there is a genuine issue for trial. (Id. at 324). Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." (Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof [before the ultimate factfinder]." (Id.). The nonmovant must specifically

identify evidence in the record, as opposed to general averments, which supports its claim and upon which the factfinder can find in its favor. (Id.).

III. Key Legal Requirements of the National Historic Preservation Act

Judicial review of plaintiff's National Historic Preservation Act ("NHPA") claims is governed by Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. 1 et seq. Under the APA, a reviewing court may only hold unlawful an agency decision if that decision is arbitrary, capricious or otherwise not in accordance with the law. (Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); 16 U.S.C. 470 et seq.). The NHPA mandates that the federal agency having direct or indirect jurisdiction over an undertaking take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. (Id.). The NHPA also requires the federal agency to identify, evaluate, and mitigate adverse effects of a proposed undertaking on historic properties. (Id.). The regulations that govern this review process are set forth at 36 C.F.R. Part 800. "An undertaking has an 'effect' when the undertaking 'may alter characteristics of the property that may qualify the property for inclusion in the National Register . . . [including] alteration to features of a property's location, setting, or use. . . .' 36 C.F.R. § 800.9(a). An 'effect' is 'adverse' when it may 'diminish the integrity of the property's location, . . . setting . . . , feeling, or association.' 36 C.F.R. § 800.9(b). Examples of 'adverse effects' include physical destruction, the introduction of visual, audible, or atmospheric elements that are out of character with the property *or alter its setting*, and transferring the property. Id." (Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 808 (9th Cir., 1999)(emphasis added)).

Here, the federal agency charged with ultimate responsibility for the NHPA review is Defendant GSA. The historic review process required by federal law is commonly referred to as a Section 106 review, after one of the headings in the statute itself. Here, the GSA determined under Section 106 that the conveyance of the Old Post Office to the MDFB and the implementation of the redevelopment Project would affect the qualities that qualify the Old Post Office for National Historic Landmark status. (See Plaintiff’s First Amended Complaint, Exhibit No. 2 (Programmatic Agreement (“PA”) at 2)).

The Old Post Office is a National Historic Landmark (“NHL”). As a result of its NHL status, the NHPA imposed another duty upon Defendant GSA. It was required to conduct a review under Section 110(f) of the NHPA. This section provides the following:

“Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.”

When an agency’s proposed undertaking directly and adversely affects a NHL, Standard 4 of the Secretary of Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs further requires the agency to consider “all prudent and feasible alternatives” to avoid the adverse effects of the undertaking. See 63 Fed. Reg. 20496, 20503 (1998). The Administrative Record reflects that Defendant GSA failed to consider and make findings regarding all prudent and feasible alternatives to the identified adverse effect of demolishing the Century Building.

Finally, the federal agency charged with the Section 106 review must independently dispense with its duties under the law. (Hall County Historical Society v. Georgia Department

of Transportation, 447 F. Supp. 741 (N.D. Ga. 1978) (although others may participate in the historic review process, NHPA requires that studies, reports, and evaluations and determinations of effect, adverse effect, or no effect be the independent actions and decisions of the Federal agency and not simply rubber-stamps)). It cannot delegate this duty to another party and perform a lawful NHPA review. (Id.). Therefore, as a matter of law, a delegation of this essential duty renders any Section 106 review unlawful.

IV. Summary of Argument

There are six independent reasons for this Court to grant summary judgment in favor of Plaintiff. Each is sufficient to demonstrate Defendant GSA's actions were unlawful under the NHPA or the NEPA and mandate that Plaintiff is entitled to relief she is seeking: an injunction halting the project until Defendant GSA can conduct a lawful Section 106 and 110(f) review.

The six independently sufficient reasons are as follows: 1) Defendant GSA unlawfully delegated its Section 106 duty to independently evaluate proposed mitigation of adverse effects and viability of prudent and feasible alternatives to the Developer; 2) Defendant GSA failed to conduct its Section 110(f) duty to independently evaluate prudent and feasible alternatives to the undertaking's adverse effects on the NHL Old Post Office; 3) Defendant GSA's Record of Decision regarding the Section 106 process is not supported by substantial evidence and is arbitrary and capricious as the decision was already made before the January 29, 2002, public hearing and the Record of Decision was made before the Section 106 process was concluded; 4) Defendant GSA failed to make a record of decision of its Section 110(f) review as it never conducted a Section 110(f) review; 5) Even if Defendant GSA's decision under either section 106 or section 110(f) were done lawfully without the defects cited above, the decision would still

be arbitrary and capricious and a violation of law as the GSA allowed the Developer, through the use of threats and intimidation, to force a group of alternative developers to withdraw a viable plan that would have complemented the proposed Old Post Office renovation and mitigated the adverse effect of demolishing the Century Building by renovating it and providing upwards of 600 parking spaces which would have met the parking needs of the proposed OPO tenants and the future occupants of the restored Century and Syndicate Trust Buildings; 6) Defendant GSA violated the NEPA by claiming a checklist CATEX exclusion without retaining any documentation of the analysis used to make the checklist. If this Court finds Plaintiff is entitled to summary judgment on one or more of these six grounds, then Plaintiff is entitled to the relief she seeks.

V. Argument

Plaintiff incorporates by reference her entire “Statement of Uncontroverted Material Facts” as if they were set out in detail herein.

A. Defendant GSA Failed as a Matter of Law to Independently Resolve the Adverse Effects of the Project in Derogation of its Responsibilities under the NHPA

Defendant GSA was the “lead agency” for the Project with statutory responsibility for compliance with Section 106 and Section 110(f). At some point in the NHPA review process, the GSA determined that the undertaking might affect “the qualities that qualify the Building [the Old Post Office] for NHL status.” (See PA at 2). The GSA further determined that the demolition of the Century Building for a parking garage as a part of the undertaking was an “adverse effect” under the NHPA that would have to be mitigated. (*Id.* at 2-3). The federal agency charged with the Section 106 review must independently dispense with its duties under the law. (*Hall County Historical Society v. Georgia Department of Transportation*, 447 F. Supp.

741 (N.D. Ga. 1978) (although others may participate in the historic review process, NHPA requires that studies, reports, and evaluations and determinations of effect, adverse effect, or no effect be the independent actions and decisions of the Federal agency and not simply rubber-stamps)). Here, however, in direct contravention of its legal duty, Defendant GSA accepted the Developer's parking study and recommendation that the only way to provide a parking solution for the proposed Project was to demolish the Century Building and build a garage on its site. (Plf. St. of Undisputed Mat. Facts at ¶1 - ¶4). GSA never conducted its own analysis of the parking situation and GSA never hired an independent third party with no financial interest in the parking solution to evaluate whether the claims of the Developer were accurate. (*Id.*). This failure is a violation of the NHPA and demonstrates that the Record of Decision is not supported by substantial evidence, is arbitrary and capricious and is a violation of law.

B. GSA Failed to Conduct its Section 110(f) Duty to Independently Evaluate Prudent and Feasible Alternatives to the Undertaking's Adverse Effects on the NHL Old Post Office

Once GSA determined that the proposed Project would affect the NHL Old Post Office, it was under a duty to conduct a Section 110(f) review. (See 63 Fed. Reg. 20496, 20503 (1998)). It wholly failed to do so in that there is no Record of Decision reflecting such a review and the GSA never conducted an independent analysis of prudent and feasible alternatives to the demolition of the Century Building. (Plf. St. Of Uncontroverted Mat. Facts at ¶1 - ¶4). Defendant GSA simply accepted the Developer's parking study without any independent analysis or verification of its contents. (*Id.* at ¶1). Even though the NHPA did not impose an affirmative duty on Defendant GSA to do so, it didn't accept the Developer's representations on the financing for the transaction, and hired an independent third party to do a scrubbing of the numbers. (*Id.* at ¶3). Yet when the NHPA did require Defendant GSA to consider prudent and

feasible alternatives to the identified adverse effect (i.e. the demolition of the Century Building), GSA failed to do so and chose instead to merely rubber stamp the parking study done by the Developer. (*Id.* at ¶1). GSA's failure to independently explore prudent and feasible options to the demolition of the Century Building, as a matter of law, is a violation of the NHPA that means its Record of Decision is therefore arbitrary and capricious and not supported by substantial evidence.

C. Defendant GSA's Record of Decision Regarding the Section 106 Process Is Not Supported by Substantial Evidence and Is Arbitrary and Capricious as the Decision Was Already Made Before the January 29, 2002, Public Hearing and Was Made Before the Section 106 Process Was Concluded

Defendant GSA did not conduct the public hearing on January 29, 2002, to gather information on the proposed demolition of the Century Building for a parking garage to be evaluated and analyzed independently and objectively by the GSA pursuant to Section 106 because GSA's portfolio managers had already expressed their support of the Project and the proposed demolition of the Century Building (Ogden's email dated December 18, 2001), and they did so again at the beginning of the hearing on January 29, 2002. (AR at 3137; 3702; 3652-3696). Indeed, as early as October 23, 2001, GSA was talking about what the "strategy" should be for the public meeting to handle groups like Landmarks that were opposed to the demolition and the fact that the preservationists supporting GSA's position should "unite in opinion" before the public meeting to support each other in the face of contention. (AR at 2224-25). This is not the hallmark of an open process but one of people who have already made up their minds. The Developer sent a draft letter to the GSA on November 19, 2001, indicating what it thought had been accomplished, among other things. (AR at 3326). In that the letter, the Developer asserted that "[t]he absolutely needed parking solution - the Ninth Street Garage - is

defined and financeable.” (AR at 3330). Even with the knowledge that other alternatives existed, Defendant GSA still beat the path to demolition. (AR at 3151-54; 3183-84). Stephen Stanberry gave an update to another GSA employee on December 11, 2001, and discussed the garage controversy and then proceeded to give the Developer’s justification for the demolition of the Century Building and the construction of the Ninth Street Garage to save the district. (AR at 3183-84). In fact, during the Section 106 hearing, the proposed parking solution was presented as a *fait accompli* to the public consistent with the comments of GSA portfolio manager, Stephen Stanberry, expressed on January 7, 2002, regarding the “garage debate.” “I think the wedge issue that Landmarks, Ralston [Ralston Cox, program analyst for Defendant ACHP] and other *like-minded obstructionist* will argue is that the project needs to be opened up for requests for competing proposals. We have a sound response: that we have tirelessly solicited proposals for years and even had an expert in the field of historical building reuse contact known developers all to no avail.” (AR at 3057). The point that Stanberry misses and ignores is that the proposed Project involved *two* buildings, the OPO and the Century. The proposals he is referring to were for the OPO only. RFPs were never issued for the Century Building because it was in litigation from 1995 until 2002, with the City of St. Louis fighting to keep the Conlon Group from tearing it down for a parking lot. (See Exhibit 4, Plaintiff’s First Amended Complaint; AR at 2296).

The City finally took title to the Century Building in February of 2002. (*Id.*).

The GSA had an affirmative duty under federal law to consider feasible and prudent alternatives to the demolition of the Century Building. Defendant GSA, through an employee of the Public Building Service, James Ogden, issued its Record of Decision on January 29, 2002, the *same day* it held the public hearing required by Section 106 and Section 110 of the NHPA. (AR at 3645-3646). The agency had no time to consider the comments and objections raised at

the public hearing. This renders any decision arbitrary and capricious. Caroline Alderson, the Program Manager for the GSA's Center for Historic Buildings in the Public Building Service, promised the public at the January 29, 2002, hearing that the GSA welcomed the ideas of the public and that the agency would "*leave no stone unturned in exploring alternatives.*" (AR at 3715-17). As noted above, the GSA issued its Record of Decision the same day as the hearing and before the transcript was even available to be reviewed, since it was not finished until late February, 2002. (AR at 3581). Defendant GSA failed to consider any feasible and prudent alternatives and its failure to do so means summary judgment should be granted to Plaintiff on this point.

D. Defendant GSA Failed to Make a Record of Decision of its Section 110(f) Review as it Never Conducted a Section 110(f) Review

There is no evidence in the record that GSA conducted an Section 110(f) review. There is no evidence in the record that it considered feasible and prudent alternatives to the demolition of the Century Building, an identified adverse effect on the NHL Old Post Office. Defendant GSA's failure to do so renders the Programmatic Agreement arbitrary and capricious. (36 C.F.R. §800.11(e)(1-5); 36 C.F.R. §800.6(b)(2); 800.10(a)). Plaintiff should be granted summary judgment on this point.

E. Defendant GSA's Record of Decision Is Arbitrary and Capricious and a Violation of Law Under Section 110(k) as GSA Allowed the Developer Through the Use of Threats and Intimidation to Force a Group of Alternative Developers to Withdraw a Viable Plan That Would Have Complemented the Proposed Old Post Office Renovation and Mitigated the Adverse Effect of Demolishing the Century Building

Defendant GSA failed to independently consider and analyze the alternative developers' proposal even after it had evidence that the Developer was directly involved in forcing the withdrawal of the alternative plan for the Century and Syndicate Trust Buildings in March of

2002. (Plf. St. of Uncontroverted Mat. Fact at ¶1). The record reveals many internal communications within the GSA that indicate that the agency had intentionally minimized communications made to it that The Century Building could be saved while also providing the necessary amount of parking spaces required for the Old Post Office and Customs House project. For example, an August 29, 2002, email from GSA's Public Building Commissioner Joseph Moravec's to GSA's Regional Director Bradley Scott clearly indicates the GSA failed to adequately consider this prudent and feasible alternative. (AR at 5550). In this communication, Mr. Moravec indicated that he was aware that a National Park Service "expert" believed that the Century Building could be converted into a parking garage without compromising its historic character. (Id.). Mr. Moravec stated that he was highly dubious of this conclusion, but the record completely fails to show how the GSA reasonably and independently assessed this alternative. In fact, Defendant GSA lost or destroyed this letter written by an expert on the staff of the National Park Service Director's Chief of Staff, Bill Walters. Remember, this is also after the January 29, 2002, public hearing where GSA promised "no stone would be left unturned" while exploring alternatives to demolition.

Another, more egregious, example of the GSA's failure to consider prudent and feasible alternatives are the comments by GSA portfolio manager James Ogden's on February 21, 2002, the day after GSA found out that the alternative developers had publicly proposed their alternative plan they claimed would complement the proposed Project and save The Century Building. Mr. Ogden's comments are completely dismissive: "I haven't seen the proposal... I'd consider it "Vaporware" until there's something substantive.... Holding up waiting until this so called proposal reaches full gestation does no party to this deal any good." (Id.). Defendant GSA's in-house lawyer, Mark Warnick, realized the legal significance of this public proposal to

the NHPA review, and the legal significance of Ogden's desire to simply dismiss the alternative proposal. Warnick wrote to the regional counsel privately and said "don't we have at least an obligation [under the Section 106 review process] to at least look at and consider that proposal?" (AR at 4761). The record, however, fails to reveal any independent analysis conducted by the GSA to determine the soundness of the specific proposal put forth by the alternative developers to leave the Century Building standing. What the record does reveal is that the Developer provided Mr. Warnick with his analysis of the alternative proposal. (AR at 4683). This self-interested analysis appears to be the basis for which the GSA may have dismissed the alternative plan; however, there is no indication at all that the GSA ever looked at the alternative proposal with an independent eye. At minimum, this failure to independently assess the merits of this alternative is in contravention of Section 106 and 110(f) of the NHPA. (See Hall County Historical Society v. Georgia Department of Transportation, 447 F. Supp. 741 (N.D. Ga. 1978) (although others may participate in the historic review process, NHPA requires that studies, reports, and evaluations and determinations of effect, adverse effect, or no effect be the independent actions and decisions of the Federal agency and not simply rubber-stamps)).

Furthermore, such e-mail communications indicate GSA gave overriding considerations to the speed of completing a deal that it had given its support to from an early date at the expense of completing a satisfactory Section 106 review process involving a National Historic Landmark. (Plf. St. of Uncontroverted Mat. Fact at 2-8). As the administrative record shows, the GSA began the only public hearing, held on January 29, 2002, by announcing its support for the plan. (Id. at ¶4). And much of the record reveals that GSA had already decided in the time between October, 2001 and the January 9, 2002, meeting that GSA was going to support the plan as proposed by the Developer. (Plf. St. of Uncontroverted Mat. Fact at 4). Defendants GSA and

ACHP had a legal duty to hold an appropriate review process. Had they done so, they would have explored the feasibility of the alternative plan and question why the plan was abruptly withdrawn.

The abrupt withdrawal of the alternative plan and the close involvement of the Developer should have set off alarm bells at the GSA. Indeed, the record is clear that Defendant GSA was presented with evidence that there was a meeting held on March 8, 2002, in which the following persons attended: Craig Heller and Kevin McGowan, who had proposed with their partner W. Robert Bates the alternative plan for the Century and Syndicate Trust Building; representatives of the City of St. Louis, Deputy Mayor for Development, Barbara Geisman, or Mayor Francis Slay's Chief of Staff, Jeff Rainford; Zack Boyers, a representative of USBank; and Steve Stogel, one of the principals of the Developer. Evidence in the record shows this meeting may have been a part of what Bob Bates referred to in his letter of March 21, 2002, as the "extreme pressure," "promises of retribution," and "continuing threats" that his partners Craig Heller and Kevin McGowan were under to withdraw the alternative plan, which was put forth during the Section 106 review process being conducted by Federal Defendants in February and March of 2002. (Plf. St. Of Uncontroverted Mat. Facts at ¶19; See also Plaintiff's Response to Defendant's Motion for Protective Order, Exhibit No. 4, Bates letter dated March 21, 2002).

Under Section 110(k) of the NHPA, no federal agency shall give assistance to an applicant who intends to intentionally create an adverse effect. Such a threat, if true, is such an intentional act, and would have tainted the entire review process. GSA's lawyer, Mark Warnick, knew from the telephone call that he had with the Developer on March 7, 2002, that the above meeting would occur on March 8, 2002, and, incredibly, the Developer told Warnick that the alternative plan would be "dismissed" as a result of this meeting. (AR at 4612). The record

reflects that no one at the GSA ever spoke with any of the alternative developers to find out independently why they withdrew their plan. Whether or not the alternative plan was feasible as presented, the agency failed to independently determine whether or not a tweaked plan by the alternative developers or other interested parties could accomplish the overall project goals while saving the Century Building. Moreover, GSA never independently investigated whether the Developer intentionally created an adverse effect in violation of Section 110(k).

In addition, Defendant GSA knew from the public hearing, that neither the City of St. Louis nor the MDFB, ever issued a Request for Proposal (“RFP”) to determine whether the private marketplace could provide a solution that would put parking in the Century Building that could serve the proposed Old Post Office tenants. GSA also knew that the Developer admitted on January 29, 2002, that 422 parking spaces could be located within the Century Building. GSA also knew from the public hearing neither governmental agency has ever issued an RFP to determine whether a parking garage could be built on the vacant parcel immediately to the north of the Old Post Office. This parcel, which occupies nearly a half square block immediately adjacent to the Old Post Office, could easily accommodate a parking structure and avoid the demolition of the Century Building. An RFP for a parking structure on this vacant north parcel would have been consistent with the City of St. Louis’ own planning documents regarding the Old Post Office district, which called for parking to be located one to two blocks away from the Old Post Office itself so that the historic and pedestrian nature of the square would be preserved. (See Plf. First Amended Complaint, Exhibit No. 6 at 8-10).

Despite all of this information before the GSA and its legal duties under the NHPA, there is no indication that the agency considered any “prudent and feasible alternatives” to the Developer’s plans even after it had evidence that the Developer had forced a viable alternative

off the table. The execution of the PA and the failure of the GSA comply with Sections 106, 110(f), and 110(k) of the NHPA constituted agency actions and failures to act, that were for the reasons set forth above, are arbitrary and capricious, without observance of procedure required by law, and factually unwarranted within the meaning of the APA. Therefore, for the reasons stated above, Plaintiff should be granted summary judgment on this point.

F. GSA’s Checklist CATEX Exclusion Is Unlawful as the Agency Lost or Destroyed the Documentation of the Decision

The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §4321 et seq., requires that a project receiving HUD funds undergo an independent environmental review of any proposed action that would adversely effect the environment. Among other things, this review must address the environmental impact of the proposed action, and any alternatives to the proposed action. 42 U.S.C. §4332(C). Here, rather than conduct an environmental impact statement (“EIS”) as required by the statute when an undertaking effects the human environment, the GSA concluded that the transfer of the OPO to the MDFB as a part of the Project met the regulatory criteria for a categorical exclusion, or a CATEX as known by the GSA, under the NEPA. This decision by Defendant GSA meant that an EIS would not be performed regardind the proposed Project. The GSA considered the CATEX a checklist CATEX, and the actual checklist is a part of the Administrative Record. (Plf. St. Of Undipusted Mat. Facts at ¶25). Defendant GSA, however, lost or destroyed the documentation that would support the basis for the exclusion. Since there is no record evidence to support Defendant GSA’s CATEX exclusion, the exclusion, as a matter of law, must be reversed as there is no evidence to support the analysis and decision to make such a decision.

VI. Conclusion

Based upon the uncontroverted, material facts set out by Plaintiff in her motion, and the application of those facts to the NHPA and NEPA sections at issue, Plaintiff is entitled to summary judgment for either of six independently sufficient reasons asserted above.

Respectfully submitted,

Chackes, Carlson & Spritzer, LLP

By: /s/ Matthew J. Ghio

Matthew J. Ghio #68960

8390 Delmar Blvd., Suite 218

St. Louis, Missouri 63124

Phone: (314) 872-8420

Fax: (314) 872-7017

Email: mghio@vccs-law.com

Attorney for Plaintiff's

Certificate of Service

I hereby certify that on this 18th day of October, 2004, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following Defendants' counsel:

Jane Rund
Assistant United States Attorney
Eastern District of Missouri
111 South Tenth Street, 20th Floor
St. Louis, Missouri 63102

/s/ Matthew J. Ghio