MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

COOPERATIVE HOME CARE, INC., MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, MISSOURI RESTAURANT ASSOCIATION, INC., THE MISSOURI RETAILERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NAUFEL, INC. d/b/a CARRIE ELLIGSON GIETNER HOME, and ASSOCIATED INDUSTRIES OF MISSOURI,	)	
Plaintiffs,	)	
	)	Cause No. 1522-CC10607
v.	)	
	)	Division 31
CITY OF ST. LOUIS, MISSOURI, MAYOR FRANCIS G. SLAY, WINSTON CALVERT, EDDIE ROTH, MAVIS THOMPSON, BOARD OF PUBLIC SERVICE OF THE CITY OF ST. LOUIS, MISSOURI, RICHARD T. BRADLEY, MELBA MOORE, GREG HAYES, RICHARD GRAY, CURTIS SKOUBY, and STEPHEN RUNDLE,	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Our experiences as St. Louisans in the past year have reminded us all of the many racial inequities and economic disparities holding our region back. From improving relationships between police officers and the diverse communities they serve to empowering those who have been too often left out or left behind due to race or economics, the challenges we face as St. Louisans are complex. They require decisive, immediate action.

The current minimum wage at the state level is only $7.65 per hour. That means that a St. Louisan who works full time on a minimum wage job earns less than $16,000 per year, placing them below the federal poverty line. It is difficult to fathom raising a family on $16,000 per year. After all, the average hourly wage needed to afford a basic two-bedroom apartment in St. Louis is $15.69. *See* National Low Income Housing Coalition, *Out of Reach 2015*, *available at* http://nlihc.org/oor/missouri. The decline in the real value of federal and state minimum wages, and the rising cost of living and inflation, has led municipalities across the country to adopt their own minimum wage ordinances. *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1143 (9th Cir. 2004); 2004); *Int'l Franchise Ass'n v. City of Seattle*, 2015 U.S. Dist. LEXIS 33744 (W.D. Wash. Mar. 17, 2015).

These dynamics, in part, gave rise to the growing disparities between rich and poor, providing the framework for the events that have driven public conversation in our region. Just yesterday, the Ferguson Commission highlighted the key steps we must take to build a better St. Louis for tomorrow. One the Ferguson Commission's top priorities is the issue before the Court—ensuring that folks who work hard and play by the rules can earn enough to feed their children and have a roof over their heads. *See* Ferguson Commission, *Forward Through Ferguson: A Path Toward Racial Equity*, at p. 49, *available at* http://forward throughferguson.org/wp-content/uploads/2015/09/Ferguson CommissionReport_091415.pdf (the "Ferguson Commission Report"). An increase in the minimum wage is also an important tool for promoting racial equality; as the Ferguson Commission explained in its report, "St. Louis does not have a proud history on [the topic of race], and we are still suffering the consequences of decisions made by our predecessors." Ferguson Commission Report, at pg. 7. St. Louisans have waited long enough for the decisive actions necessary to move our region beyond our

region's past sins toward a future of equality and dignity for all.

Seeing the desperate needs in our community, the City's Mayor and Board of Aldermen acted. They acted decisively, leading where others balked. They acted swiftly, to comply with the deadline the state General Assembly set for adopting municipal minimum wage ordinances. They embraced innovation, innovating above the "bare minimum" floor set by state law. They acted reasonably, balancing the needs of workers with the desires of the business community. And they acted within the bounds of the City's authority under the Missouri Constitution, state law, and the City Charter.

Plaintiffs now challenge the City's decision to support its residents, to provide workers dignity, to promote racial equity, and to promote innovation in public policy. Obviously, plaintiffs may file whatever lawsuit they wish, but plaintiffs have not established any of the material prerequisites for obtaining a temporary restraining order. A temporary restraining order is an emergency measure. *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 646 (Mo. App. 1995). It is a "harsh remedy, to be used sparingly and only in clear cases." *Hagen v. Bank of Piedmont*, 763 S.W.2d 384, 384 (Mo. App. 1989). Injunctive relief is not a matter of right, but rather a matter of judicial discretion. *Hardesty v. Mr. Cribbin's Old House, Inc.*, 679 S.W.2d 343, 348 (Mo. App. 1984). The circumstances here do not rise to the level of emergency required by the law—the only "emergency" plaintiffs have identified is that some businesses will pay their employees sixty cents an hour more starting on October 15 and will make unilateral business decisions to play for their own futures. The motion for temporary restraining order should be denied.

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I. Plaintiffs have not carried their burden of proving that they are entitled to a temporary restraining order because plaintiffs cannot satisfy the elements for obtaining a TRO.

To obtain a TRO, the plaintiff has the burden of proving that "immediate and irreparable injury, loss, or damage will result in the absence of relief." Rule 92.02(a)(1). The plaintiff must also show that he is likely to succeed on the merits of his claim, that the balance of harms favors the plaintiff, and that the injunction requested would benefit the pubic interest. *See, e.g., Joseph,* 900 S.W.2d at 648; *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996); *Hill v. Xyquad, Inc.,* 939 F.2d 627, 629-30 (8th Cir. 1991).

A. Plaintiffs cannot show that they will suffer an immediate and irreparable injury absent a TRO.

"To succeed in demonstrating a threat of irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Powell v. Noble*, 2015 WL 4774650 at *9 (8th Cir. 2015). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc*., 555 U.S. 7, 129 S.Ct. 365, 375–76 (2008). "Unless it can be shown that reasonable grounds exist for apprehending that absent the injunction the actions will be done, the injunction will be denied." *Hudson v. Sch. Dist. of Kansas City,* 578 S.W.2d 301, 312 (Mo. App. 1979).

Here, plaintiffs cannot show a threat of immediate and irreparable harm absent a temporary restraining order. First, plaintiffs fail to show that they will suffer irreparable harm if the relief they seek is not granted. Theoretically, plaintiffs might assert that they will suffer economic damage if they are required to pay the City's new minimum wage and the ordinance is

ultimately invalidated. But "[e]conomic loss, on its own, is not an irreparable injury so long as the losses can be recovered." *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013).

In *Kentucky Restaurant Association, Inc. v. Louisville/Jefferson County Metro Government*, No. 2015-CA-000996, slip opinion (Ky. Ct. App. 2015), a local restaurant association argued that businesses would suffer immediate and irreparable injury if they could not obtain an injunction staying the effectiveness of an ordinance increasing the minimum wage. *Id*. at p. 2-3. The restaurant association claimed they would be without recourse to recoup the overpayment of wages to employees if the ordinance was ultimately invalidated. *Id*. at 2-3. The court, however, found that the restaurant association had not shown that the potential overpayments to employees, should the ordinance be struck, could not be recovered. *Id*. at p. 7. Rather, the court found that "absent a showing that any potential overpayments are not recoverable, an adequate remedy at law exists" and found that inconvenience, expense, annoyance in recovering overpayment do not constitute irreparable injury. *Id*. at p. 8. Similarly, here, the expense claimed by plaintiffs does not constitute "irreparable harm" because the expense of paying the higher minimum wage is something that can be adequately compensated in the event that the Ordinance is invalidated.

Aside from increased amounts paid to employees, plaintiffs list a litany of supposed harm to their business interests. For instance, plaintiffs claim the mere threat of the ordinance's existence will cause them to refrain from entering long-term contracts, delay projects, terminate employees and reduce employee hours, and alter business models including locations of operations. Each of these hypothetical actions, even if they came to pass, are simply business choices made by plaintiffs (or their members) to support their own bottom-line. This type of

self-inflicted harm cannot be attributed to the ordinance nor would it justify the issuance of a TRO.[1] *See Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable."); *SMA Life Assur. Co. v. Sanchez Pica*, 771 F. Supp. 15, 17 (D. P.R. 1991) (equitable relief is not available to a "plaintiff who, by choice, created the situation" constituting the grounds upon which it now requests equitable relief); *see also San Francisco Real Estate Investors v. Real Estate Investment Trust of Americ*a, 692 F.2d 814, 818 (1st Cir. 1982); *FIBA Leasing Company, Inc. v. Airdyne Industries, Inc.*, 826 F. Supp. 38, 39 (D. Mass. 1993). Taken to its logical conclusion, plaintiffs' position would have the Court issuing a TRO against the implementation of duly passed ordinances anytime the Board of Alderman adopted a law favoring the interests of its constituent labor force over the economic interests of the business community. Missouri law does not support such an absurd result.

The burden of complying with a local minimum wage that is different than the state minimum wage is not much of a hardship. Businesses must comply with different local regulations all the time, including different tax rates, business license processes, and permit laws.

Businesses also must decide how to manage their operations despite frequent changes in the law. A TRO here will not prevent businesses from having to comply with different local regulations or to plan for their futures. There is no TRO that can prevent plaintiffs from needing

[1] This is also the precise type of individuated harm that the Supreme Court had held does not confer standing to a member organization, like many of plaintiffs, to bring representative claims on behalf of their members. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975). Suits that involve claims of injury that "are not common to the entire membership, nor shared in equal degree" require that each member of the organization must be a party to the suit because "both the fact and extent of injury would require individualized proof." *Id.* Although this reasoning generally arises in cases involving money damages rather than injunctive or declaratory relief, it applies with equal force here because plaintiffs are improperly attempting to rely on individualized financial harm, rather than a common irreparable harm to the class, in support of a TRO.

to plan for how a higher local minimum wage might impact their businesses; plaintiffs will still have to make plans until this lawsuit is finally resolved, regardless of whether an injunction is entered in the meantime.

Likewise, doomsday arguments advanced by some business interests regarding the impact on the future business climate in the City are speculative theories that cannot support the entry of injunctive relief. The extraordinary remedy of injunctive relief may only be awarded upon a clear showing that the plaintiff is entitled to such relief and mere possibility of irreparable harm does not suffice. *Winter*, 129 S.Ct. at 375–76.

Finally, plaintiff cannot establish that it is under an immediate threat as required by Rule 92.02(a). Although the ordinance became effective on August 28, 2015, the City's minimum wage rate will not rise above the rate established by the State of Missouri until October 15, 2015—more than a month from now. There is simply no immediacy that would require the Court's emergency intervention today.

B. Plaintiffs cannot show a probability of success on the merits

To show a probability of success on the merits of their claims plaintiffs must overcome a strong presumption that the ordinance is valid and lawful. *See City of St. John v. Brockus*, 434 S.W.3d 90, 93 (Mo. App. 2014); *City of Kansas City v. Carlson*, 292 S.W.3d 368, 372 n. 3 (Mo. App. 2009). Plaintiffs cannot overcome this strong presumption.

1. The City has the authority to adopt a minimum wage.

Plaintiffs are not likely to succeed in proving that the City lacked authority to adopt a minimum wage ordinance. Under the Missouri Constitution, the City has "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution . . . and are not limited or denied either by the charter . . . or by statute." Mo. Const. art. VI, § 19(a). The General Assembly has the authority to

confer upon any city the power to adopt a minimum wage. *See, e.g., Carlson*, 292 S.W.3d at 371; *Marshall v. City of Kansas City*, 355 S.W.2d 877 (1962).

The City is further empowered to enact all ordinances that promote the health, safety, peace, comfort, and the general welfare of those who live and work here. *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 229 (Mo. App. 1997). Thus the City has the general authority to adopt a minimum wage ordinance unless prohibited by state law. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937).

Moreover, the Charter specifically empowers the City to:

- "regulate all acts, practices, conduct, business, occupations, callings, trades, uses of property and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city," Charter, at § 1(25);
- "prescribe limits within which business, occupations and practices liable to be . . . detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained," Charter, at § 1(26); and
- "do all things whatsoever expedient for promoting and maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufactures of the city or its inhabitants," Charter, at § 1(33).

The City's authority to enact a minimum wage ordinance is, therefore, well-grounded in the City's authority under the Missouri Constitution and the Charter. The City may enact ordinances within this scope of authority without enabling legislation at the state level, and any such ordinance will be presumed to be valid and lawful. *City of St. John v. Brockus*, 434 S.W.3d 90, 93 (Mo. App. 2014); *Smith v. City of St. Louis*, 409 S.W.3d 404, 426 (Mo. App. 2013);

Carlson, 292 S.W.3d at 372 n. 3.

2. The minimum wage is an issue of local concern.

Plaintiffs are not likely to succeed on the merits of proving that the City's decision to ensure fair wages for people who work hard jobs in the City is not an issue that should be of concern to the City. Since laws such as this ordinance helped raise our nation out of the Great Depression, ensuring that working folks have the ability to provide for their families has been one of the primary duties of government at every level. Indeed, municipal governments best understand the dynamics of their own marketplace, and know much better than state or federal governments what regulatory environment would promote the common good within their own city limits. Ensuring that working folks are paid a fair wage should therefore be a key concern to City government. *See RUI One Corp.*, 371 F.3d at 1150 (setting its own minimum wage is a valid exercise of a municipality's police powers).

Governor Jay Nixon has recently acknowledged minimum wage ordinances are appropriate acts by municipal governments. In his letter vetoing House Bill 722, Governor Nixon wrote that policies like the minimum wage are "matters traditionally within the purview of local government." Letter of Jeremiah H. Nixon to the Secretary of State of the State of Missouri, July 10, 2015, *available at* https://governor.mo.gov/sites/default/files/legislative_actions/veto_letters/HB%20722%20veto.pdf. If the state were to prevent a municipality from innovating above the floor set by the state's minimum wage law, the state would be "inject[ing] the heavy hand of state government into issues typically addressed through the local democratic process." *Id.* The Governor went on to explain:

> Missouri is a diverse state. In many instances, local elected officials may be best suited to determine the appropriate—and local—priorities for the citizens who elected them. And, it is important that local governments have the ability to build on the minimum standards that are set at the state level. . . .

> Local elected officials are directly accountable for their actions. If a city passes an ordinance with which the voters disagree, those local officials will be held accountable at the next election. . . . Moreover, the issues impacted by House Bill No. 722 are *local* issues. How is St. Robert affected if St. Louis passes a minimum wage higher than that required by state law? . . .
>
> Local voters ought to have the right to decide these issues. Just as there should be an appropriate allocation of responsibilities between federal and state governments, so too should the precept of local control apply to the relationship between state and local governments.

Id.

Contrary to plaintiffs' self-interested legal position on what should be of concern to the City, the Ferguson Commission cited the City's minimum wage ordinance as an example for the rest of the region. *See* Ferguson Commission Report, at p. 49. In its report, the Commission highlighted the St. Louis-specific data regarding what level of income would be necessary to provide for a family, and praised the ordinance that is now before the Court. *Id*.

In similar situations, courts have upheld local ordinances as the proper exercise of city authority. In *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. banc 1962), plaintiffs challenged Kansas City's anti-discrimination ordinance covering private hotels and restaurants. Clearly, race relations was a matter of state-wide, if not national, importance and impacted interstate commerce. *Id.* at 879. Yet, the Missouri Supreme Court upheld the ordinance as a proper exercise of city power. *Id*. at 884.

3. The City's minimum wage ordinance is not preempted by state law.

Plaintiffs are not likely to succeed in proving that the ordinance is preempted. "The issue of preemption may fairly be divided into two questions: Has the Missouri legislature expressly preempted the area? And, is the city's regulation in conflict with state law?" *Miller v. City of Town & Country*, 62 S.W.3d 431, 438 (Mo. App. 2001). No enforceable state statute expressly

preempts the minimum wage ordinance and the ordinance does not conflict with state law.

i. State law does not expressly preempt a minimum wage ordinance.

Missouri law does not expressly preempt all local wage laws. State law preempts an area of law when the state "has created a comprehensive scheme on a particular area of the law, leaving no room for local control. When state law has so completely regulated a given area of the law, then it is said to be occupied, and preempts any local act." *Borron v. Farrenkopf*, 5 S.W.3d 618, 624 (Mo. App. 1999) (citations omitted). Missouri law does require that employers at least pay a minimum wage, but state law does not provide that the only permissible wage is the state minimum wage. State law does not grant the state the exclusive authority to prescribe a comprehensive wage scheme for all workers, and it does not prohibit or regulate wages that exceed the state minimum wage rate. In short, Missouri has not created a comprehensive regulatory scheme requiring all employers to pay all employees a particular wage.

In addition, there is no enforceable state statute that expressly preempts the ordinance. Plaintiffs incorrectly contend that § 67.1571, RSMo., preempts the ordinance. That statute provides that "[n]o municipality . . . shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage." § 67.1571, RSMo. On its face, this statute seems to preempt the City's ordinance. However, § 67.1571 is unconstitutional. *See Missouri Hotel and Motel Associationn v. City of St. Louis*, Case No. 004-02638 (Mo. 22nd Jud. Cir. Ct. July 31, 2001). Of course, "an unconstitutional law is no law," *Ex parte Smith*, 36 S.W. 628, 630 (Mo. 1896), and a public official cannot rely upon an unconstitutional law, *see, e.g.*, *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014); *State of Missouri v. Florida*, Case No. 1422-CC09027 (Mo. 22nd Jud. Cir. Ct. Nov. 5, 2014); *Johnston v. Mo. Dep't of Soc. Services*, No. 0516-CV09517, 2006 WL 6903173, at **4-5 (Mo. Cir. Ct. Feb. 17, 2006).

Acknowledging that § 67.1571 was not enforceable, the General Assembly passed House Bill 722, which provides that "[n]o political subdivision shall establish, mandate, or otherwise require an employer to provide to an employee . . . [a] minimum or living wage rate." Even if House Bill 722 were law,[2] it would not prevent the City from adopting a local minimum wage ordinance because it does not preempt any "local minimum wage ordinance . . . in effect on August 28, 2015." The General Assembly thereby acknowledged that local minimum wage ordinances may be adopted if they are effective on August 28, 2015.

ii. The City's minimum wage does not conflict with other state laws.

The other way an ordinance could be preempted is if it conflicts with state law. The usual test for determining if a conflict exists is whether the ordinance "prohibits what the statute permits" or "permits what the statute prohibits." *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986). Although preemption forbids a conflict with state law, it does not prohibit extra regulations at the municipal level. *Borron*, 5 S.W.3d at 622; *State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 814 (Mo. banc 1946). If an ordinance "merely prohibits *more* than the state statute, the two measures are not in conflict." *Carlson*, 292 S.W.3d at 371 (emphasis in original); *see also Miller*, 62 S.W.3d at 438 ("An ordinance that merely enlarges on the provision of a statute by requiring more than the statute requires creates no conflict between the two."). Courts will "construe ordinances to be upheld 'unless the ordinance is expressly inconsistent or in irreconcilable conflict with the general law of the state.'" *Carlson*, 292 S.W.3d at 373; *see, e.g., Borron*, 5 S.W.3d at 622; *Frech v. City of*

[2] House Bill 722 was vetoed by Governor Nixon on July 10, 2015. *See* Letter of Jeremiah H. Nixon to the Secretary of State of the State of Missouri, July 10, 2015, *available at* https://governor.mo.gov/sites/default/files/legislative_actions/veto_letters/HB%20722%20veto.pdf. Even if it had not been vetoed, House Bill 722 would be invalid for several reasons, including that it contains language, such as the definition of "employment benefits," that is unconstitutionally vague, and it violates the single subject requirement of Article III, Section 23 of the Missouri Constitution.

Columbia, 693 S.W.2d 813, 815 (Mo. banc 1985); *Womach*, 196 S.W.2d at 814.

The applicable section of the state minimum wage law is titled "Minimum wage rate" and sets a required wage rate. § 290.502.1, RSMo. The state statute simply sets a floor for hourly wages—it does not provide that the only permissible wage is the minimum wage, it does not grant the state the authority to prescribe a comprehensive wage scheme for all workers, and it does not prohibit or regulate wages that exceed the state minimum wage rate. The very notion of a "minimum" is a number that is the lowest allowed. A "minimum" does not, by any natural reading of the word, affirmatively prohibit or permit an entity to pay more. It only prohibits an entity from paying less. A local ordinance requiring employers to pay above the minimum wage thus fills in a gap where no state law currently applies. Such an ordinance does not conflict with state law—it merely requires "more than the state statute." *Carlson*, 292 S.W.3d at 371-72. This kind of local supplementation of state laws is nothing new. *See, e.g.*, *Brockus*, 434 S.W.3d at 90; *Frech*, 693 S.W.2d at 813; *Vest v. City of Kansas City*, 194 S.W.2d 38 (Mo. 1946); *Bhd. of Stationary Eng'rs v. City of St. Louis*, 212 S.W.2d 454 (Mo. App. 1948). Similarly, courts in other states have acknowledged that municipal minimum wage ordinances do not conflict with state laws that set an hourly wage floor. *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149, 1159-60 (N.M. Ct. App. 2005); *City of Baltimore v. Sitnick*, 255 A.2d 376, 385-86 (Md. Ct. App. 1969).

The General Assembly's passage of House Bill 722 should remove any remaining doubt that a City minimum wage would not conflict with state law. House Bill 722 specifically contemplates that local minimum wage ordinances may continue to exist, so long as the ordinances are in effect on August 28, 2015. It is well recognized that the General Assembly is not presumed to have intended a "meaningless act." *Murray v. Mo. Highway & Transp.*

Comm'n, 37 S.W.3d 228, 233 (Mo. banc 2001). If any state law prohibited the City from setting a higher minimum wage, then the General Assembly would not have deemed it necessary to pass House Bill 722. This official recognition of existing ordinances setting higher minimum wages than the state law amounts to an acknowledgement that regulation of wages is not uniform throughout the state, thus undermining any suggestion that the minimum wage ordinance would conflict with state law.

Finally, the Court may note that other cities across the country have enacted similar minimum wage ordinances in recent years, including Chicago, Seattle, Louisville, Los Angeles County, and Santa Fe. *See* UC Berkeley Labor Center, *Inventory of US City and County Minimum Wage Ordinances, at* http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/Courts. Federal and state courts have upheld these laws against various types of challenges, including that cities lack the power to require a minimum wage and purported conflicts with state law. *See, e.g., RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. Cal. 2004) (the power to regulate wages and employment conditions lies clearly within a municipality's police power); *Int'l Franchise Ass'n v. City of Seattle*, 2015 U.S. Dist. LEXIS 33744 (W.D. Wash. Mar. 17, 2015) (upholding Seattle's minimum wage ordinance); *Filo Foods, LLC v. City of SeaTac*, 2015 Wash. LEXIS 890 (Wash. Aug 20, 2015) (finding that the city of SeaTac's minimum wage ordinance does not conflict with state statutes); *Kentucky Restaurant Association, Inc., et al. v. Louisville/Jefferson County Metro Gov't*, Case 2015-CA-000996 (Ky. Ct. App. June 30, 2015) (denying plaintiffs' request to enjoin Louisville's minimum wage ordinance and finding that state minimum wage merely sets a floor for wages and that localities may increase the minimum wage when they conclude it serves the public interest in doing so); *New Mexicans for Free Enter. v. City of Santa*

Fe, 138 N.M. 785 (N.M. Ct. App. 2005) (upholding Santa Fe's minimum wage ordinance; rejecting claim that it conflicts with state law). The same analysis applies here. The City is within its power to enact a minimum wage ordinance in response to voters' concerns and local problems, and state law does not prohibit the City from increasing the minimum wage above state law when it serves the interest of the public to do so.

4. The ordinance's emergency clause was effective.

Plaintiffs are not likely to succeed in proving that the ordinance's emergency clause was ineffective. The ordinance recites that it is an emergency measure, a declaration that "is entitled to great weight." *Osage Outdoor Adver., Inc. v. State Highway Comm'n*, 687 S.W.2d 566, 569 (Mo. App. 1984); *see also Bd. of Regents for Ne. Mo. State Teachers Coll. v. Palmer*, 204 S.W.2d 291, 295 (1947) (explaining that an emergency clause may properly have conclusory language).

An emergency exists where a legislative body is required to act by a particular date. *Osage Outdoor*, 687 S.W.2d at 569. In *Osage Outdoor*, Missouri was required to agree to Federal Highway Administration guidelines before March 31, 1972, or face a penalty imposed by the Secretary of Transportation. *Id*. The court held that the federally-imposed deadline of March 31, 1972, "demonstrates the necessity for immediate action by the legislature and prompt enactment of the law" because avoiding the penalty "could only be accomplished by use of an emergency clause." *Id*. at 570. By using an emergency clause, the legislature was able to adopt legislation effective on March 30, 1972, a set of circumstances the court described as "truly . . . an emergency measure." *Id*.

Similarly, this summer, the General Assembly passed House Bill 722, which provides that "[n]o political subdivision shall establish, mandate, or otherwise require an employer to

provide to an employee . . . [a] minimum or living wage rate." If House Bill 722 becomes law, it could apply in a manner that would prevent the City from adopting a local minimum wage ordinance with the exception of any "local minimum wage ordinance . . . in effect on August 28, 2015." By imposing that deadline—a date after which the City of St. Louis would not be able to adopt any local minimum wage ordinance—the General Assembly created an emergency situation that the Board of Aldermen could only address by use of an emergency clause.

Courts have also found emergency conditions to exist where unique social events propel a city to legislate in swift fashion. In 1968, social unrest in Kansas City led the Mayor to appoint "a five-member commission to investigate the causes for the riots and to make recommendations on what could be done to prevent such occurrences in the future." *State ex rel. Tyler v. Davis*, 443 S.W.2d 625, 627 (Mo. banc 1969). That commission "made an extensive investigation and submitted its report on August 15, 1968, making numerous recommendations . . . ." *Id.* One of those recommendations was that Kansas City increase the number of police officers, to finance the city's hospital, to improve the Human Relations Department, and to buttress community centers and recreational facilities. *Id*. at 627-28. Following the commission's recommendations, Kansas City's City Council adopted an ordinance to increase utility taxes, and declared its ordinance to be an emergency measure. *Id*. at 629-30. The Supreme Court upheld the ordinance's emergency clause, explaining that the unique social situations presented an emergency that the City needed to address decisively. *Id*. at 631-32.

Thus, in addition to the legislative deadline, the racial and economic inequalities, and the circumstances in the St. Louis region for the past year have presented unprecedented circumstances that require decisive action. The ordinance at issue here was an attempt to address those societal challenges. Thus there are many grounds for the Court to rule that an

"emergency" existed to support the Board of Aldermen's use of an emergency clause in the minimum wage ordinance. Plaintiffs are not likely to prove otherwise.

5. The ordinance's lack of exemptions for employers exempt under the federal or state law does not render the ordinance invalid.

Plaintiffs are not likely to succeed in proving that the ordinance is invalid because it does not exempt employers that are exempt from the federal or state minimum wage laws. To the contrary, federal law permits a municipal ordinance to impose a higher minimum wage on entities that are exempt under federal law. 29 U.S.C. § 218(a) ("No provision of this Act or of any order thereunder shall excuse noncompliance with any . . . municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act . . . ."); *see also* § 290.505.4, RSMo. (state wage laws "shall be interpreted in accordance with the Fair Labor Standards Act, 29 U.S.C. Section 201, et seq., as amended"). Thus, for instance, in *Martinez-Hernandez v. Butterball*, LLC, 578 F. Supp. 2d 816 (E.D.N.C. 2008), the court rejected an employer's argument that it need not comply with a state minimum wage law that imposed obligations in excess of federal law. *Id*. at 820. The court held that the federal minimum wage scheme set forth in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* does not preempt different obligations imposed under state law. *Id.* ("[T]he FLSA does not excuse an employer's non-compliance with higher pay requirements than established by the FLSA."); *see also Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1419 (9th Cir. 1990) (state overtime law that covers seaman is not preempted by federal overtime law that excludes seamen).

Similarly, an exemption under state law does not preclude regulation of the same entity by local ordinance. *Carlson*, 292 S.W.3d 368 (upholding city's smoking ban in places of employment; rejecting claim that ordinance conflicts with state law because ordinance covers entities that are exempt under state law); *see also Baltimore v. Sitnick*, 254 Md. 303 (Md. 1969)

(upholding Baltimore's minimum wage ordinance, even though it covers types of employers that are exempt under state minimum wage law).

Moreover, even if the law were different, plaintiffs would not be likely to succeed in invalidating the ordinance on this basis. Any provision of the ordinance that is invalidated for any reason should be severed from the rest of the ordinance. *See City of St. Peters v. Roeder*, No. SC94379, 2015 WL 4929090, at *8 (Mo. Aug. 18, 2015); *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 229 (Mo. App. 1997) ("The burden is on the party contesting the ordinance to negate every conceivable basis which might support it.").

6. The ordinance does not enlarge duties or liabilities of citizens among themselves.

Plaintiffs are not likely to prove that the ordinance enlarges duties or liabilities of citizens in violation of state law. The ordinance provides that "[i]n addition to all other penalties set forth herein, an Employer may be subject to conditions which will serve to compensate the victim, including that the Employer pay restitution to any Employee in the form of unpaid back wages plus interest from the date of non-payment or underpayment, to the extent allowed by the City Charter and the law."

This language does not create civil liability or a contract, let alone create a civil cause of action. Rather, this language is authorized by and is taken directly from state law, and thus is consistent with state law. Section 479.190.2, RSMo., authorizes municipal judges to order restitution, providing that:

> In addition to such other authority as exists to order conditions of probation, the court may order conditions which the court believes will serve to compensate the victim of the crime, any dependent of the victim, or society in general. Such conditions may include, but need not be limited to . . . Restitution to the victim or any dependent of the victim, in an amount to be determined by the judge . . . .

The type of restitution that a municipal judge may order against an employer for a violation of the minimum wage ordinance is no different than the restitution a municipal judge may order in a trespass case, such as compensation for damage to a victim's property. All that is added to the ordinance is clarification that restitution may include back wages. This language simply clarifies a form of restitution. It does not create liabilities among citizens.

This claim is also not ripe. The language in the ordinance is discretionary. It states that an employer "may" be subject to restitution. Plaintiffs have not alleged that any judge has ordered them to pay such restitution. In addition, the ordinance language includes a caveat—"to the extent allowed by the City Charter and the law." If any entity is ordered to pay restitution in the future, a court may decide if it is allowed by law as applied to real facts. Until that time, plaintiffs seek an advisory opinion, unfit for a declaratory judgment action.

C. The balance of harms weighs against the entry of a temporary restraining order.

"In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat'l Res. Defense Counsel, Inc.*, 55 U.S. 7, 24 (2008). "The balance of harms analysis examines the harm of granting or denying the injunction upon both parties to the dispute and upon other interested parties, including the public." *Towne Air Freight, LLC v. Double M Carriers, Inc.*, 2014 WL 2573315, *5 (E.D. Mo. June 9, 2014). "The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 840 (Mo. 1996). "The 'strong arm of equity' is to be applied with caution and is to be used sparingly." *Keokuk Inv. Co. v. Doerhoff*, 530 S.W. 2d 507, 509 (Mo. App. 1975) (citation omitted). Plaintiffs' failure to demonstrate a likelihood of success on the merits or establish an

imminent threat of irreparable harm, alone, balances the equities in the City's favor. *See Gabbert*, 925 S.W.2d at 840.

Plaintiffs have not carried their burden of establishing that the equities support entering a temporary restraining order. There are thousands of people in the City who will see a sixty cent increase in their pay on October 15, an increase that is estimated to cost the business community only about a half a million dollars. That half million dollars is money, money that could be recaptured if the ordinance is declared void; thus the half million dollars is a reparable injury. In addition to all the other arguments made in this memorandum, these circumstances on their own would support a denial of the TRO motion.

D. The public interest does not favor entry of a temporary restraining order.

Because a TRO is an emergency, extraordinary remedy which may be issued only when necessary to protect a substantial right, the Court must assess its impact on the public. *Johnson v. Springfield*, 239 Mo. App. 749, 755 (Mo. App. 1947).

The Ordinance remaining in effect is in the public interest. As noted above, the Ferguson Commission has called for the minimum wage to be increased as one of the key steps the St. Louis region must take to address the racial inequities and economic disparities that have led to the events over the past year. *See* Ferguson Commission, *Forward Through Ferguson: A Path Toward Racial Equity*, at p. 49, *available at* http://forwardthroughferguson.org/wp-content/uploads/2015/09/Ferguson CommissionReport_091415.pdf (the "Ferguson Commission Report"). In making this recommendation, the Commission noted a recent study by the National Low Income Housing Coalition that found that the average hourly wage needed to afford a basic two-bedroom apartment in St. Louis is $15.69. *See* National Low Income Housing Coalition, *Out of Reach 2015*, *available at* http://nlihc.org/oor/missouri. The current minimum wage at the state level being only $7.65 per hour means that St. Louisans can work full-time and still earn

less than $16,000 per year, falling below the federal poverty level.

While there will be a substantial public benefit to the Ordinance continuing in effect, the plaintiffs will suffer relatively few irreparable consequences if the status quo remains intact. In fact, plaintiffs have not established—as they must—that any of them face a real and certain imminent risk of irreparable harm.

II. Plaintiffs are not entitled to a preliminary injunction because they have an adequate remedy at law.

To show entitlement to injunctive relief, a petition must plead facts that show the plaintiff has no adequate remedy at law. *Glenn v. City of Grant City*, 69 S.W.3d 126, 130 (Mo. App. 2002). "Generally, the phrase 'adequate remedy at law' means 'that damages will not adequately compensate the plaintiff for the injury or threatened injury.'" *Id*. (citing *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. 1999)).

Plaintiffs cannot show that that they have no adequate remedy at law. In fact, they do have an adequate legal remedy because they can recoup any overpayments to employees. In *Kentucky Restaurant Association*, a local restaurant association argued that businesses would suffer immediate and irreparable injury if they could not obtain an injunction staying the effectiveness of an ordinance increasing the minimum wage. *Kentucky Restaurant Association*, slip op. at 2. The restaurant association claimed they would be without recourse to recoup the overpayment of wages to employees if the ordinance was ultimately invalidated. *Id*. The court, however, found that the restaurant association had not shown that the potential overpayments to employees, should the ordinance be struck, could not be recovered. *Id*. at 7. Rather, the court found that "absent a showing that any potential overpayments are not recoverable, an adequate remedy at law exists" and found that inconvenience, expense, annoyance in recovering overpayment do not constitute irreparable injury. *Id*. at p. 8. Plaintiffs therefore fail to show that

they have no adequate remedy at law and are not entitled to a preliminary injunction.

III. If this Court issues the Temporary Restraining Order pursuant to Rule 92.01(d), plaintiffs are required to execute a bond.

In the event that the Court grants plaintiff's motion for a temporary restraining order or preliminary injunction, this Court should require plaintiffs to post a substantial bond. Of course, no temporary restraining order or injunction may be entered "until the plaintiff or some responsible person for the plaintiff, shall have executed a bond with sufficient surety or sureties to the other party." Rule 92.02(d). An order or injunction issued without a bond is void. *Curtis v. Tozer*, 374 S.W.2d 557, 586 (Mo. App. 1964); *see also Ruddy v. Corning*, 501 S.W.2d 537, 539 (Mo. App. 1973) ("The requirement that a bond be executed prior to issuance of a temporary injunction is jurisdictional, and a temporary injunction issued without a bond is void.").

The amount of bond or cash is to be "in such sum as the court shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction or temporary restraining order to the parties enjoined, or to any party interested in the subject matter of the controversy." Rule 92.01(d). The purpose of a TRO bond is to "protect parties who sustain damage as a result of compliance with a temporary restraining order later determined to have been illegally or improperly issued." *Mech. v. Gruensfelder*, 461 S.W.2d 298, 309 (Mo. App. 1970).

Rule 92.01(d) requires the Court to determine an amount "sufficient" to secure the damages occasioned by an injunction prohibiting the minimum wage ordinance from taking effect. In determining a "sufficient" bond amount, the Court should consider the substantial impact that a court order enjoining the ordinance's enforcement would have on the City and on minimum wage workers in the City.

If an injunction is entered, minimum wage workers in the City of St. Louis will forgo a raise of up to $0.60 dollars beginning October 15, 2015. As a group, minimum wage workers would lose up to $501,120 in total wages from Oct. 15 through December 31, 2015 and the City would forgo new earnings tax revenues in the amount of $5,011.[3] Between January 1, 2016 and December 31, 2016, minimum wage workers would forgo an additional $0.75 raise (from $8.25 to $9.00) and would lose up to $12,676,096, while the City would lose up to $126,761 in earnings tax.

Setting a bond that accounts for the minimum wage increase that will be lost by the City's minimum wage workers is particularly appropriate here, given that without such bond the City or its aggrieved workers would be required to institute potentially thousands of actions against plaintiffs, their members, and unrelated third parties to recover the wrongfully withheld wages. The cost of litigating these suits compared to the relatively small amount of damages that would be recovered in any individual suit is a relevant consideration to the Court's determination of the bond amount. *See Buttress v. Taylor*, 62 S.W.3d 672, 682 (Mo. App. 2001) (finding attorney's fees should be part of TRO bond because without it the defendant "might be inclined not to seek an assessment of damages on the bond, believing that the cost of litigating the fee dispute might equal or exceed the damages he or she had incurred in defending the suit for injunction").

IV. The Court should deny the motion for temporary restraining order because the TRO would disrupt the status quo.

On August 28, 2015, the City's Board of Aldermen adopted the minimum wage ordinance, and the Mayor signed it into law. Since then, plaintiffs have sat silently by. They

[3] Calculations have been performed relying on data released by the U.S. Census Bureau and assume that approximately 5,700 employees working in the City currently earn more than $7.65 but less than $8.25 per hour. The City has not included employees making less than the current minimum wage in this calculation.

have not filed a lawsuit, delivered a demand letter, or taken any other step besides doomsday press statements and kvetching. While plaintiffs sat watching, the minimum wage ordinance went into effect. It is now the status quo.

Plaintiffs seek a temporary restraining order that would require the Court to disrupt that status quo. But the very purpose of a temporary restraining order is to preserve the status quo. *State ex rel. Meyers Mem. Airport Committee v. City of Carthage*, 951 S.W.2d 347, 349-50 (Mo. App. 1997). Indeed, plaintiffs must show that "irreparable harm will be done if the status quo is not maintained." *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. 1999).

Plaintiffs ask the Court to prevent an ordinance which is already in effect from continuing to be in effect. Such a request is not a request to preserve the status quo. The status quo is "[t]he situation that currently exists." Black's Law Dictionary 1420 (7th ed. 1999). The "situation that currently exists" is the ordinance continuing to be in effect. *See Worlledge v. City of Greenwood*, 627 S.W.2d 328, 330 (Mo. App. 1982) (reversing issuance of TRO because it "did not preserve the status quo"). The Court should leave the situation that currently exists in place, and deny the motion for temporary restraining order.

V. Plaintiffs' delay in seeking a temporary restraining order has resulted in plaintiffs being barred from a temporary restraining order by waiver and laches.

A. Plaintiffs waived any right to a TRO by delaying any action until today.

Plaintiffs have waived any right to a temporary restraining order that they may have had by their actions and omissions to act since August 28, 2015. Equity will not reverse the intentional relinquishment of a known right. *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 386 (Mo. banc 1989). A party waives a right when the party knew of its right and intentionally relinquished it. *See Pasley v. Marshall*, 305 S.W.2d 879, 882 (Mo. App. 1957). A party's intent to relinquish may be manifested by its conduct or words. *Id*. (finding that plaintiff

impliedly waived her right to proceed by letting a significant amount of time pass without asserting a claim); *see Mackey v. Griggs*, 61 S.W.3d 312, 318-19 (Mo. App. 2001) (finding that acts inconsistent with the right constitute implied waiver and abandonment of the right); *Luesse v. Weber*, 350 S.W.2d 424, 430 (Mo. App. 1961) (finding that plaintiff's acquiescence after he was in a position to enforce a claimed right is "cogent evidence of a waiver and abandonment of the right"). Waiver does not require that the defendant be prejudiced or have altered his position in reliance on the party's relinquishment. *Brown*, 776 S.W.2d at 387.

The City's Board of Aldermen adopted the minimum wage ordinance, and the Mayor signed it into law, on August 28, 2015. Plaintiffs were well aware of its passage on August 28. Since then, however, plaintiffs have sat and watched. Plaintiffs' acquiescence in the ordinance's effectiveness since August 28 amounts to a waiver by plaintiffs of any right plaintiffs may have had to seek a temporary restraining order.

B. Plaintiffs are barred by laches.

Plaintiffs are barred from seeking a temporary restraining order because they knew the facts giving rise to their motion, delayed assertion of those rights for an excessive period, and defendant has been prejudiced by the delay. Under the doctrine of laches, a plaintiff is barred from obtaining equitable relief when the plaintiff knew the facts giving rise to his causes of action, delayed assertion of those rights for an excessive period of time, and the other party suffered as a result. *Scheble v. Missouri Clean Water Comm'n*, 734 S.W.2d 541, 560 (Mo. App. 1987). A court of equity will refuse its aid to stale demands where the party has slept upon his rights. *Missouri Federation of the Blind v. National Federation of the Blind of Missouri, Inc.*, 505 S.W.2d 1, 8 (Mo. App. 1974). This principal has even more force when the injunctive power of the court is invoked. *Id*. To determine whether the doctrine of laches applies, an examination is made of the: (1) the length of the delay; (2) the reasons for the delay; (3) how the

delay affected the other party; and (4) the overall fairness in permitting the assertion of the claim. *Nahn v. Soffer*, 824 S.W.2d 442, 444-45 (Mo. App. 1991); *Scheble*, 734 S.W.2d at 560.

The Ordinance has been in effect since August 28. Much to plaintiffs' chagrin, the sky has not fallen. Probably because no irreparable damage occurred when the ordinance went into effect, plaintiffs have done nothing since August 28. Put simply, plaintiffs have delayed their action until several weeks after the complained-of activity occurred. Moreover, there appears to be no explanation whatsoever for this unreasonably long delay. Because of plaintiffs' delay, the City has prepared to enforce the ordinance, and businesses and employees throughout the City have enjoyed the benefits of the ordinance being in effect. Plaintiffs may not simply pick and choose when they want to march into court to seek a temporary restraining order: there must be an explanation for the delay. There is no explanation. Plaintiffs are barred by laches.

VI. The Court should deny the motion for temporary restraining order because the plaintiffs have not provided adequate notice.

Generally, "no temporary restraining order shall issue without reasonable notice of at least twenty-four hours before the hearing on the motion to the party against whom relief is sought." Rule 92.02(a)(3). Plaintiffs can avoid this general notice requirement if, under Rule 92.02(b)(1), plaintiffs can prove that notice cannot be given or notice would defeat the purpose of the order. Rule 92.02(b)(1). Plaintiffs have failed to establish that notice cannot be given. Plaintiffs have also failed to establish that notice would defeat the purpose of a temporary restraining order.

VII. The Court should deny the TRO motion because plaintiffs lack standing.

Plaintiffs seek a temporary restraining order to prevent harm that they have no standing to protect. Standing is a jurisdictional matter, antecedent to the right to relief, which asks whether the parties seeking that relief have a right to do so. *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo.

2002). If a party lacks standing, "the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Id.*; *Bremen Bank and Trust Co. of St. Louis v. Muskopf*, 817 S.W.2d 602, 608 (Mo. App. 1991).

To establish their standing, every plaintiff must prove that they have a legally cognizable interest in the subject matter and that the party has a threatened or actual injury. *State ex rel. Ryan v. Carnahan*, 960 S.W.2d 549, 550 (Mo. App. 1998). Each plaintiff must be sufficiently affected so as to insure that a justiciable controversy is presented to the court. *Citizens Ins. Co. of Am. v. Leiendecker*, 962 S.W.2d 446, 449 (Mo. App. 1998). Thus, to have standing, the party must have some actual, justiciable interest susceptible of protection through litigation. *Warner v. Warner*, 658 S.W.2d 81, 83 (Mo. App. 1983).

The type of individuated harms that the plaintiffs have alleged are not the kind of harms that confer standing on a membership organization like most of the plaintiffs. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975).[4] Suits that involve claims of injury that "are not common to the entire membership, nor shared in equal degree" require that each member of the organization must be a party to the suit because "both the fact and extent of injury would require individualized proof." *Id.* Plaintiffs are improperly attempting to rely on individualized financial harm, rather than a common irreparable harm to the class, in support of their TRO. Plaintiffs have no standing to pursue such claims.

Moreover, it would be impossible for the Court to determine if any of the associations' members would have standing in their own right without knowing who those members are and how those members would actually be impacted. *See Hunt v. Washington State Apple Adver.*

[4] Missouri law of associational standing is premised on the analysis in *Warth* and *Hunt*. *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 623 (Mo. banc 2011).

Comm'n, 432 U.S. 333, 343 (1977). In addition, direct impacts of the ordinance on the plaintiffs themselves is too attenuated to confer standing. *Missouri State Med. Ass'n v. Missouri*, 256 S.W.3d 85, 88 (Mo. banc 2008).

VIII. The Court should strike the Petition and the affidavits filed by plaintiffs.

Plaintiffs purported to file a Verified Petition and several affidavits. Affidavits must be based on personal knowledge. *May & May Trucking, L.L.C. v. Progressive Nw. Ins. Co.*, 429 S.W.3d 511, 515 (Mo. App. 2014). Many of the statements contained in the affidavits contain statements that are not based on personal knowledge, and the affidavits do not state a basis for personal knowledge of the affiant. Accordingly, the affidavits should be stricken, and the Petition should either be stricken or regarded as not verified by affidavit.

CONCLUSION

The City's minimum wage ordinance was a proper exercise of the City's authority under the Missouri Constitution, state law, and the City Charter. Those 5,700 people working at or near the minimum wage in the City of St. Louis have waived long enough for a modest raise. The Court should deny the plaintiffs' Motion for Temporary Restraining Order.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of September 2015, a true and correct copy of the foregoing document was served upon counsel of record.

/s/ Winston E. Calvert