

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

WILMA MATHISON, individually and as Plaintiff Ad Litem for)
MELVIN MATHISON, deceased and RUBY BERRY and)
DOUGLAS MATHISON)

Plaintiffs,)

v.)

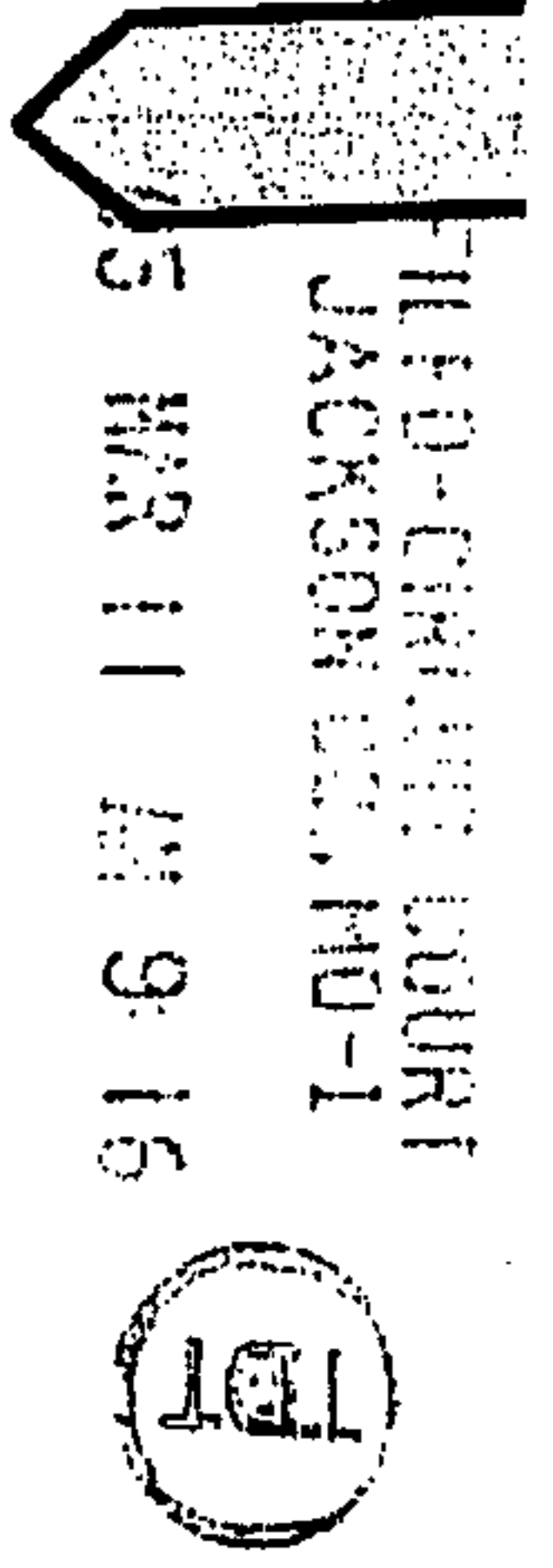
BP CORPORATION NORTH AMERICA INC., et al.)

Defendants

) 04CV230761
) Division 16

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

Plaintiffs, by and through counsel of record, respectfully request that the Court deny Defendants' Motion for Summary Judgment because the case law relevant to toxic tort actions encourages the equitable tolling of the statute of limitations in personal injury and wrongful death cases. More specifically, the statute of limitations in these cases does not begin to run until the plaintiff/decedent was aware of his condition and aware of its cause. Additionally, plaintiffs' petition alleges damages pursuant to RSMo. § 537.090, survivorship claim, which is essentially the decedent's personal injury claim. The claim for damages allows the trier of fact to award damages for the pain and suffering experienced by the decedent between the time of injury and the time of death, and for the recovery of which the deceased might have maintained an action had death not ensued. In support of their motion, Plaintiffs state as follows:



PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiffs seek to recover for the alleged wrongful death of Melvin Mathison. (Plaintiffs' Petition for the Wrongful Death of Melvin Mathison).¹

Response: Admit in part and deny in part. Plaintiffs' petition also includes a survivorship claim based on decedent's pain and suffering pursuant RSMo. § 537.090. Plaintiffs' survivorship claim allows compensation for the pain and suffering experienced by the decedent between the time of the injury and the time of death, and for recovery which he might have maintained an action had death not ensued. . RSMo. 537.090. Plaintiffs' Petition.

2. Melvin Mathison died March 29, 1981 (paragraph 31, Petition) and plaintiffs were aware of the fact of death on or about that date.

Response: Admit

3. Suit was filed in this matter on October 21, 2004. (Original file, Department of Judicial Records).

Response: Admit.

PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS

1. Melvin Mathison died at the age of 41, and is survived by his wife and two children. (Petition ¶1).

2. Mathison lived at 221 North Ash Street in Sugar Creek, Missouri from 1970 to 1981. (Petition ¶ 22).

3. From approximately 1904 until 1982, Amoco and its successor corporation, Standard Oil Company operated the facility as an oil refinery and pollutants were released throughout the time of its operation. (Paragraph ¶ 15 & 17).

4. The pollutants released from the facility migrated through the soil and groundwater, causing a plume of pollutants that extends beyond the boundaries of the facility and into the Sugar Creek neighborhood where Melvin Mathison resided. (Petition ¶ 18 & 22).

5. Melvin Mathison's residence was on Ash Street near the facility and near the plume of underground pollutants. (Petition ¶ 23).

6. Melvin unknowingly, was exposed to pollutants from the facility. (Petition ¶ 26).

¹ Defendants "uncontroverted facts" are restated in normal text and plaintiffs' responses are in bold.

7. On or about September 9, 1977, Melvin Mathison developed Hodgkin's lymphoma disease. (Petition ¶ 27).

8. Between 1977 and 1980 the decedent underwent multiple treatments of radiation and chemotherapy. (Petition ¶29).

9. In January of 1981 the decedent was diagnosed with acute myelogenous leukemia ("AML") and he died from the disease on March 29, 1981. (Petition ¶30 & 31).

10. At the time of his diagnoses of Hodgkin's lymphoma and acute myelogenous leukemia ("AML"), and during the duration of his illnesses, Melvin Mathison did not know that the pollutants from the refinery were the cause or had contributed to cause his illness. *Exhibit A*.

11. At this time of the diagnoses of Hodgkin's and AML, and during his illnesses, decedent's spouse and family did not know what caused or contributed to cause decedent's illnesses and/or death. *Exhibit A*.

12. At the time of his death, Melvin Mathison did not know that the pollutants from the Amoco refinery were the cause or had contributed to cause his illness. *Exhibit A*.

13. Furthermore, at the time of his death, decedent's family did not know that the pollutants from the Amoco refinery were the cause or had contributed to cause decedent's illnesses. *Exhibit A*.

14. Plaintiffs did not become aware of the fact that pollutants from the refinery were the cause or had contributed to cause decedent's illnesses and death until they retained counsel in the Spring of 2004. *Exhibit A*.

STATEMENT OF FACTS

Melvin Mathison died at the age of 41, and is survived by his wife and two children. (SUF 1). Mathison lived at 221 North Ash Street in Sugar Creek, Missouri from 1970 to 1981. (SUF 2). From approximately 1904 until 1982, Amoco and its predecessor corporation, Standard Oil Company operated the facility as an oil refinery and pollutants were released throughout the time of its operation. (SUF 3). The pollutants released from the facility migrated through the soil and groundwater, causing a plume of pollutants that extends beyond the boundaries of the facility and into the Sugar Creek neighborhood where Melvin Mathison resided. (SUF 4). More specifically, Melvin Mathison's

residence was on Ash Street near the facility and near the plume of underground pollutants. (SUF 5). Melvin unknowingly, was exposed to pollutants from the facility. (SUF 6).

On or about September 9, 1977, Melvin Mathison developed Hodgkin's lymphoma disease. (SUF 7). At the time of his diagnosis, Mathison did not know the cause of his illness nor did he know of any factors contributing to his illness. (SUF 10) Additionally, Melvin Mathison's family did not know the cause of or what had contributed to cause decedent's illness. (SUF 11) Between 1977 and 1980 the decedent underwent multiple treatments of radiation and chemotherapy. (SUF 8). In January of 1981, decedent was diagnosed with acute myelogenous leukemia ("AML") and died from the disease on March 29, 1981. (SUF 9).

Throughout his illnesses, at the time of his diagnosis and death, decedent was unaware of the cause of his illness. (SUF 10 & 12) Decedent was also unaware of any factors which did or would have contributed to his illness. (SUF 10 & 12) Additionally, decedent's family did not know the cause or contributing causes for decedent's illnesses and eventual death. (SUF 11 & 13) The family of Melvin Mathison only became aware of the fact that the pollutants from the refinery caused or contributed to cause decedent's illness and death after retaining counsel in 2004. (SUF 14)

ARGUMENTS AND AUTHORITIES

"[W]hen different conclusions may be drawn from the evidence, the running of the statute of limitations is a jury question". *Ray v. Upjohn Company*, 851 S.W.2d 646, 651 (Mo.App. S.D. 1993). Because a jury could easily determine from the evidence that

plaintiffs did not know the cause of decedent's injuries and death until 2004, summary judgment is not appropriate in this case.

The case law in Missouri regarding toxic tort holds that a cause of action does not accrue until "the character of the condition and its cause first 'came together' for the plaintiff". *Id. at 650*. Although several of the cases discussed below involve personal injury claims, they provide excellent guidance in light of the fact that the wrongful death cause of action includes a claim for the pain and suffering endured by the decedent from the time of the illness through his death.

In *Ray*, a worker brought suit seeking damages for injuries to his respiratory system caused by inhalation of fumes from a chemical manufactured and sold by defendant. *Id. at 646*. The court held that although plaintiff first became aware of his injury in 1963, his claim which was filed in 1984 was not time barred. The court relied on *Elmore v. Owens-Illinois, Inc.* 673 S.W.2d 434, 436 (Mo. Banc 1984) in determining that the statute of limitations had not run, specifically relying on the following language:

"Although Mr. Elmore knew as early as 1973 that he had shortness of breath and knew from reading publications of his union, that long-term breathing of asbestos dust caused asbestosis, he did not know that his condition was asbestosis until it was diagnosed by his physician on May 13, 1976. It was not until such diagnosis was made that the character of the condition (asbestosis) and its cause (breathing asbestos dust) first "came together" for the plaintiff". *Ray at 650. (Emphasis added)*

In *Hogan v. Armstrong World Industries*, 840 S.W.2d 230, 234-235 (Mo.App. 1992), a case also alleging asbestos related injuries, the court followed *Elmore*, determining that the statute of limitations did not start running until "the plaintiff was aware of his condition and its cause". *Id.* See also, *Linn Reorganized School District v. Butler Mfg.*, 672 S.W.2d 340, 342-344 (Mo banc 1984); *Krug v. Sterling Drug, Inc.*, 416

S.W.2d 143, 149 -150 (Mo. 1967); *Lockett v. Owens Corning Fiberglass*, 808 S.W.2d 902, 906-908 (Mo. App. 1991); *Kestner v. Missouri Pacific R. Co.*, 785 S.W.2d 646 (Mo.App. 1990). The case law in Missouri clearly holds that in toxic tort cases, the statute of limitations does not begin to run until "the plaintiff is aware of his condition and its cause".

Other states have provided similar rulings as Missouri in toxic tort cases. More specifically, in *Larson v. Johnsmanville Sales Corporation et al*, 399 N.W. 2d 1 (MI 1987), a consolidated action of four asbestos related wrongful death claims, the Court held that the statute of limitations was tolled until the decedents knew of the cause of the injury. In *Swine Flu v. US*, 764 F.2d 637 (9th Cir. 1985), the Court held that a wrongful death claim did not accrue until plaintiff discovered the cause of the decedent's death. Additionally, in *Brown v. DuPont*, 820 A.2d 362 (Del. 2003), foreign nationals whose children suffered birth defects from the mothers' prenatal exposure to fungicide brought claims against the chemical manufacturers. The Delaware Supreme Court held that the statute of limitations for an alleged injury resulting from toxic exposure does not begin to run until the plaintiff had notice that the harmful effects of the toxic exposure caused the injury. *Id.*

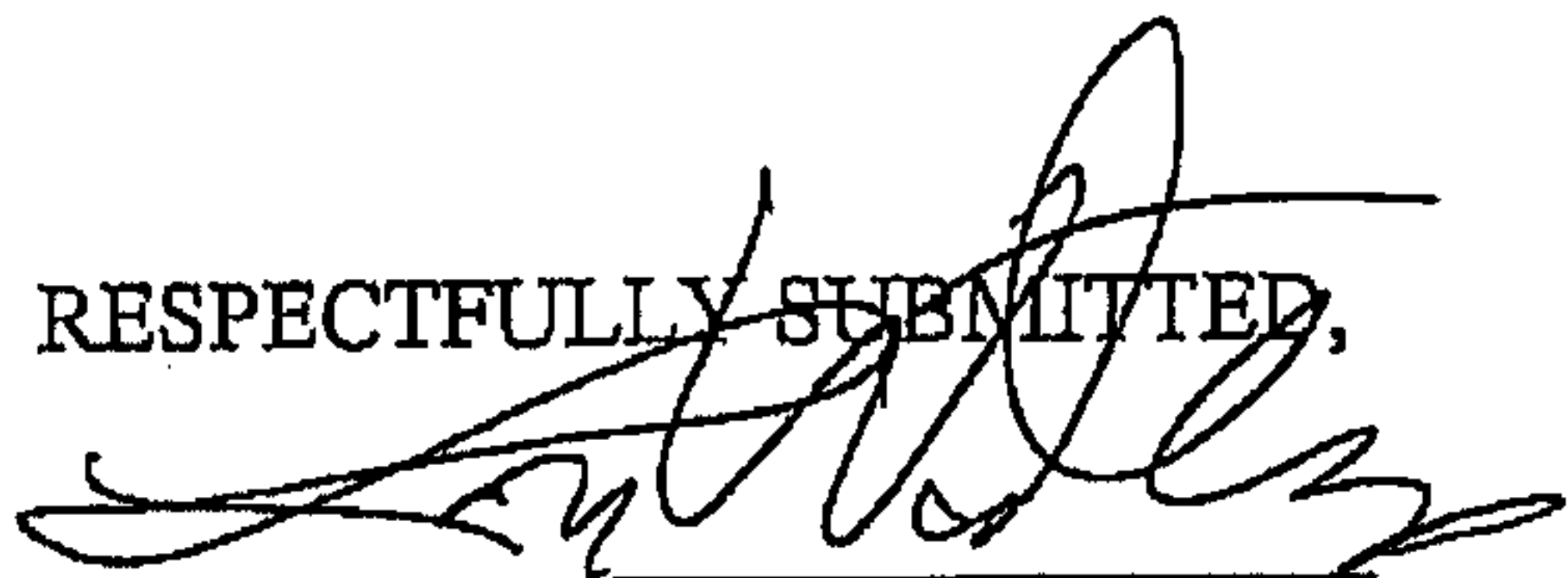
Lastly, in *Debiec v. Cabot Corporation*, 352 F.3d 117 (3rd Cir. 2003), a case involving the wrongful death claims of multiple plaintiffs related to emissions of toxic fumes and chemicals, the Court held that the statute of limitations on the wrongful death claim had not expired. More specifically, the Court held that the statute of limitations did not begin to accrue until the plaintiffs or decedent became aware of the injury and had knowledge of the source of their injury. *Id.*

Toxic torts are special types of claims and usually have very unique facts and circumstances. Federal law addressing toxic tort claims have taken these special facts and circumstances into consideration when determining the accrual of a statute of limitation. While not binding, the Superfund law, which has a generous statute of limitations for toxic tort claims, provides us with valuable insight. *42 USC § 9658*. The federal discovery rule under the Superfund law provides that the statute of limitations does not accrue until “the date the plaintiff knew (or reasonably should have known) that the personal injury was caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” *Id.* The tolling of the statute of limitations for toxic tort claims is an equitable measure to ensure that persons injured by toxic substances can be compensated, even if the cause of their injury is not realized for several years. *Id.*

The cases cited by defendants conveniently do not address statute of limitations as they apply to toxic tort cases. Rather, defendants chose cases which involve an acute injury or death. Defendants are clearly trying to simplify the issue at hand. As noted in the above referenced cases, this is a complex issue, and many factors are to be considered in determining the accrual and tolling of the statute of limitations. The law in Missouri, in other states, and at the federal level all support the tolling of a statute of limitations in toxic tort cases until the plaintiff/decedent was aware of his/her injury and its cause; or as eloquently stated in *Elmore*: “when the character of the condition and its cause ‘first came together’ for plaintiff”.

Accordingly, it is for these reasons that Plaintiffs respectfully request that Defendants’ Motion for Summary Judgment be denied.

RESPECTFULLY SUBMITTED,

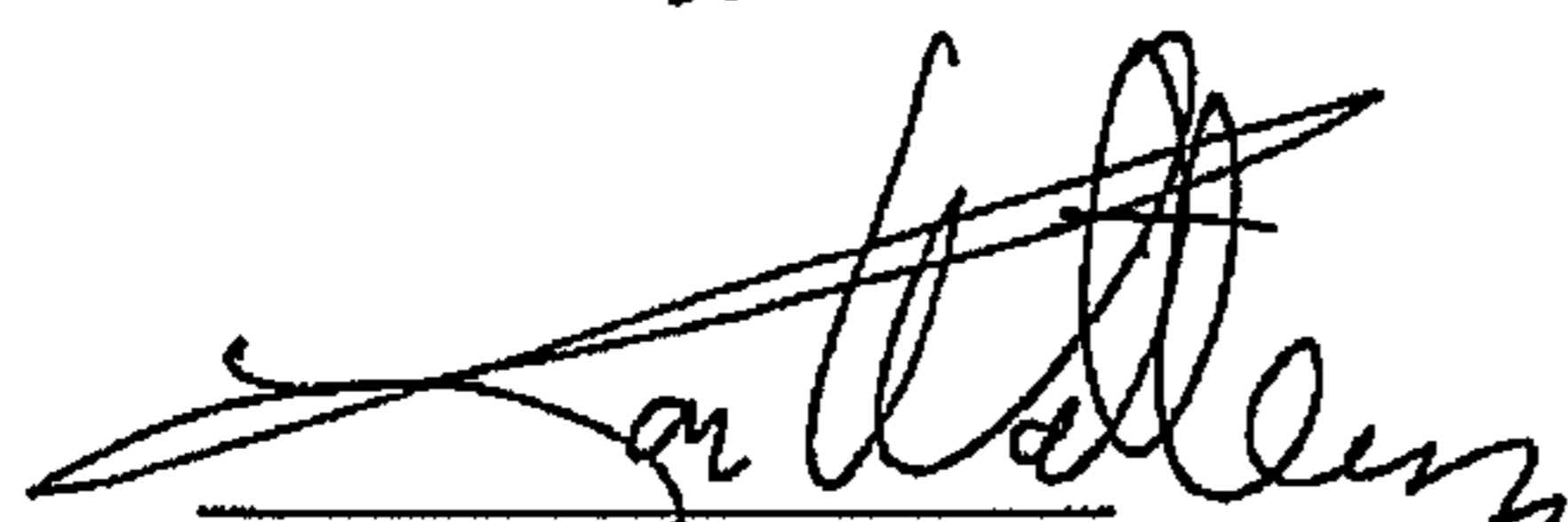


Lon Walters, MO# 44321
The Walters Law Firm LLC
105 East 5th Street, Ste. 401
Kansas City, Missouri 64106
(816) 472-1400
(816) 472-4433 FAX

I hereby certify that a true
and correct copy of the above
and foregoing was mailed
this 11th day of March, 2005
to the following:

Herbert Mondros
1300 North Broom Street
P.O. Box 288
Wilmington, DE 19899-0288

E. Wayne Taff
Sherman, Taff et al
2890 City Center Square
1100 Main
P.O. Box 26530
Kansas City, MO 64196


Attorney for Plaintiff

5. Throughout his illnesses, neither decedent nor his family, including his daughter Ruth Berry, son Douglas Mathison, and I, knew the cause or contributing causes of his illnesses.
6. It is my understanding that the decedent, at the time of his death, did not know that the Pollutants from the Amoco Refinery were the cause or had contributed to cause decedent's illnesses.
7. Furthermore, at the time of his death, decedent's family, including his daughter Ruth Berry, son Douglas Mathison, and I, did not know that the Pollutants from the Amoco Refinery were the cause or had contributed to cause decedent's illnesses.
8. I did not become aware of the fact that the Pollutants from the Refinery were the cause or had contributed to cause Melvin Mathison's illnesses and death until my family retained counsel in spring of 2004.

FURTHER AFFIANT SAITH NOT.

Wilma G. Mathison
 WILMA MATHISON

STATE OF MISSOURI)
) ss.
 COUNTY OF JACKSON)
 PLATE

Subscribed and sworn to before me this 10 day of March, 2005.

Jennifer Booby
 Notary Public
 My Commission Expires:

