

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

THE SAINT LOUIS COUNTY)
COUNCIL, SAM PAGE,)
ERNIE TRAKAS, ROCHELLE)
WALTON GRAY, and HAZEL ERBY,)

Plaintiffs,)

v.)

SUE DANIELS, IN HER CAPACITY AS)
ACTING DIRECTOR OF PERSONNEL,)
Serve: 41 South Central Avenue)
7th Floor)
Clayton, MO, 63105)

and,)

STEVE STENGER, IN HIS CAPACITY)
AS SAINT LOUIS COUNTY EXECUTIVE))
Serve: 41 South Central Avenue)
9th Floor)
Clayton, MO 63105)

and,)

PETER J. KRANE, IN HIS CAPACITY)
AS SAINT LOUIS COUNTY)
COUNSELOR,)
Serve: 41 South Central Avenue)
9th Floor)
Clayton, MO 63105)

Defendants.)

Case Number:

Division Number:

PETITION FOR DECLARATORY JUDGMENT

COME NOW Plaintiffs St. Louis County Council; Sam Page, the St. Louis County Councilman for the Second District of the County of St. Louis, Missouri and the Chair of the County Council of the County of St. Louis; Ernie Trakas, the St. Louis County Councilman for

the Sixth District of the County of St. Louis, Missouri; Rochelle Walton Gray, the St. Louis County Councilwoman for the Second District of the County of St. Louis, Missouri; and Hazel Erby, the St. Louis County Councilwoman for the First District of the County of St. Louis, Missouri; and state:

Parties

1. Plaintiff St. Louis County Council is the St. Louis County legislative body described by Article II of the St. Louis County Charter.
2. Plaintiff Sam Page is the duly elected and serving County Councilman for the Second District of the County of St. Louis, Missouri and Chair of the County Council of the County of St. Louis, Missouri. He brings this suit in that capacity.
3. Plaintiff Ernie Trakas is the duly elected and serving County Councilman for the Sixth District of the County of St. Louis, Missouri. He brings this suit in that capacity.
4. Plaintiff Rochelle Walton Gray is the duly elected and serving County Councilwoman for the Fourth District of the County of St. Louis, Missouri. She brings this suit in that capacity.
5. Plaintiff Hazel Erby is the duly elected and serving County Councilman for the First District of the County of St. Louis, Missouri. She brings this suit in that capacity.
6. Defendant Sue Daniels is the Acting Director of Personnel for the County of St. Louis, Missouri, and is sued in that capacity.
7. Defendant Steve Stenger is the duly elected County Executive for the County of St. Louis, Missouri, and is sued in that capacity.
8. Defendant Peter J. Krane is the duly appointed County Counselor for the County of St. Louis, Missouri, and is sued in that capacity.

Introduction

9. This lawsuit arises out of an attempt by the St. Louis County Executive to interfere with the County Auditor's work in auditing the executive branch of County Government. The County Charter provides that the County Council shall appoint the County Auditor and hire the Auditor's staff. But the County Executive and his appointees have been interfering with that process by frustrating efforts by the Auditor to hire auditing staff. As a result of that interference, the County Auditor has been prevented from performing the extensive audits of the executive branch that are called for in the Charter. The County Executive's interference results in a dispute that presents important issues that this Court must resolve to give judicial branch protection to the functional and vigorous mechanism for official oversight of the County government. This lawsuit seeks to enforce the separation of powers and checks and balances that exist in the County Charter, which the executive branch must not deliberately frustrate.

CLAIMS FOR RELIEF

Count I – Necessity of Staffing of Office of the Auditor

10. Plaintiffs St. Louis County Council, Sam Page, Ernie Trakas, Rochelle Walton Gray and Hazel Erby (referred to collectively herein as "Plaintiffs") incorporate by reference ¶¶ 1 through 9, above.

11. Pursuant to § 55.010, R.S.Mo, *et seq.*, St. Louis County ("County") is required to have a County Auditor, with the duty to, *inter alia*, audit the accounts of all officers and employees of the County. § 55.030, R.S.Mo.

12. In addition, at all times relevant hereto, County Charter § 2.210 provided that the County shall have an Auditor, with duties to include:

- a. From time to time review the accounting system of the county and recommend to the council such changes as deemed necessary for greater economy and efficiency in the administration of public funds;
- b. Audit the accounts and records of accountable officers and employees of the County giving due regard to generally accepted principles of auditing, including consideration of the effectiveness of the accounting system, internal audit and control and related administrative practices in all county offices;
- c. Investigate all matters relating to the receipt, disbursement, and application of public funds;
- d. Make such other investigations and reports in relation to fiscal matters as shall be directed by the council;
- e. Whenever he deems it necessary to any investigation, examine the parties, witnesses, and others on oath or affirmation touching any matter or circumstance in such examination.

13. The above-described duties are necessary functions and critical to the proper operation of the County government.

14. The duties to be performed by the County Auditor are too expansive to be accomplished by the County Auditor acting alone; it is necessary that he have the assistance of qualified, full time employees.

15. The County Charter recognizes that the Auditor cannot perform his duties acting alone, in that County Charter § 2.210, at all times relevant hereto, has provided that the County Auditor shall manage his office and appoint the employees therein under the County merit system.

16. At all times relevant hereto, County Charter § 2.200 provided that the County Council has the responsibility of appointing the County Auditor.

17. Acting pursuant to its responsibilities under the County Charter, the County Council appointed the current County Auditor, Mark A. Tucker, effective February 28, 2017.

18. Furthermore, the County Council duly passed a budget for the County's fiscal year ending December 31, 2017 and in order to allow the County Auditor to perform his statutory responsibilities, the Council specifically provided for two County Auditor staff positions and appropriated funds to be spent to provide compensation for the employees who would occupy them.

19. Even if all County Auditor staff positions provided for were filled, the County Auditor's Office would still be an understaffed outlier, nationwide and regionally, due to its low manpower in relation to its workload.

20. According to a study by the Association of Local Government Auditors published in October, 2016 titled, "Benchmarking, Best Practices, and Salary Survey" with participants from cities and counties across the nation (including St. Louis City), 75% of respondents have audit staffs of 3-15 and 40% of respondents had between 6-10 on the staff.

21. Likewise, St. Charles County, with a population of 390,000 and a 2017 operating budget of approximately \$320 million, has an audit staff of four.

22. In addition, an audit of County government by the accounting firm Brown Smith Wallace recommended that the County hire additional staffing in the auditor's office.

Professional audit standards also require multiple auditors be involved to promote transparency and accountability.

23. Consequently, it is critical that all County Auditor staff positions be filled for the proper functioning of the County Auditor's Office.

24. The office of the County Executive and the County's Acting Director of Personnel have the responsibility to staff the office of the County Auditor so that it may perform its important and required governmental functions.

25. Since on or about March 9, 2017, the County Council, through its administrative director, has repeatedly requested that the County Executive and the Acting Director of Personnel fill the open staff positions in the County Auditor's Office.

26. To date, the Acting Director of Personnel and the St. Louis County Executive Administration, with the knowledge and support of the St. Louis County Executive, has obstructed the interview and hiring process for budgeted audit staff and otherwise refused to fill open staff positions in the County Auditor's Office.

27. As a direct result of the St. Louis County Executive's obstruction of the County Auditor's hiring process, the County Auditor has no employees on staff, with the direct and proximate result that the ability of the Auditor and his office to perform its functions has been substantially impaired.

28. As specified by County Charter § 2.200 et seq., the County Auditor and his office are under the direction and supervision of the County Council, which is the legislative branch of the County government.

29. The actions of the County Executive described above contravene core separation of powers principles emanating from Art. II, § 1 of the Missouri Constitution, in that the executive branch must cooperate with the legislative branch and refrain from taking action that would substantially impair the ability of the legislative branch to perform its important governmental functions.

30. The refusal of the County Executive and the County's Acting Director of Personnel to fill the open County Auditor's Office staff positions also thwarts and nullifies the appropriation of funds by the County Council that was made for the purpose of ensuring that the County Auditor's Office is appropriately staffed; the foregoing refusal constitutes a gross abuse of discretion.

31. There exists a real and substantial dispute between the Plaintiffs, on the one hand, and the County Executive and the County's Acting Director of Personnel, on the other, regarding whether the County Executive has authority to refuse to expend the funds appropriated by the County Council for staffing the County Auditor's office, and thereby significantly impair the ability of the County Auditor to perform his critically important functions.

32. Plaintiffs have no adequate alternative remedy at law.

WHEREFORE, Plaintiffs request that the Court enter its judgment declaring that Steve Stenger, County Executive for the County of St. Louis and Sue Daniels, Acting Director of Personnel for the County of St. Louis, have affirmative duties, arising under Art. II, § 1 of the Missouri Constitution, and due to the above-described appropriation of monies, to fill open positions in the St. Louis County Auditor's Office, and that this Court grant them such further relief as the Court deems just including, but not limited to, an award of their attorneys fees and litigation expenses.

Count II - Declaratory Judgment As To Council's Entitlement To Independent Counsel

33. Plaintiffs incorporate by reference ¶¶ 1 through 32, above.

34. The County Counselor is the County's attorney and counselor at law. Under the County Charter, the County Counselor is in charge of and conducts all of the civil law business of the County, its departments, divisions, offices, officers, boards and commissions. The County Counselor therefore ordinarily must provide legal services and advice to both the County Executive and the County Council.

35. Pursuant to County Charter § 5.020, the County Counselor is appointed by the County Executive and holds office at the pleasure of the County Executive.

36. Because the Plaintiffs, on the one hand, and the County Executive, on the other, have opposing interests in the disputes described herein, the County Counselor has a conflict of interest that precludes him from representing the County Council and Plaintiffs with respect to any of these disputes.

37. Consequently, on October 3, 2017, the County Council adopted Resolution 6228, 2017, a copy of which is attached hereto as Exhibit A ("Resolution").

38. The Resolution declares that a conflict of interest exists between the County Counselor and the County Council, and requests that the County Counselor appoint the law firm of Bick & Kistner, PC, James P. Bick, Jr., and Elkin L. Kistner ("Proposed Special Counsel") as special counsel to the County Council for purposes of pursuing judicial relief regarding the dispute over the staffing the County Auditor's Office. See Exhibit A.

39. The Resolution further requested that the Proposed Special Counsel be compensated at the rate of \$225 per hour. See Exhibit A.

40. Plaintiffs Sam Page, Ernie Trakas, Rochelle Walton Gray and Hazel Erby voted in favor of the Resolution.

41. At all times relevant hereto, St. Louis County Code § 110.040 was in full force and effect, which provides:

The County Counselor may employ or contract with special counsel to represent and advise the County with respect to any bond issue, borrowing of money in anticipation of collection of taxes and revenues, any matter wherein a department, division, office, officer, board, commission or other agency or body of the County government is involved in a dispute with the County or any other matter requiring the services of special counsel. The compensation of any special counsel shall be fixed by the County Counselor and shall be paid out of the appropriation for the Division of Law, the department, division, office, officer, commission, agency or fund concerned. Any counsel so employed shall devote to the service of the County only such portion of his time as shall be necessary for the performance of his duties.

42. The core separation of powers principles that emanate from Art. II, § 1 of the Missouri Constitution require the County Executive Branch to reasonably cooperate with the County legislative branch --- the County Council --- to supply it with independent legal counsel when there is a conflict between the two branches on an important legal matter, as is the case here, to ensure that the legislative branch can act responsibly and vigorously in the advocacy of its positions as to the matters in conflict.

43. On October 4, 2017, the County Counselor wrote to the law firm of Bick & Kistner, PC, James P. Bick, Jr. and Elkin L. Kistner, stating his opinion that the Resolution has no legal effect and indicating that no County funds would be appropriated for the services of Proposed Special Counsel. A copy of the County Counselor's letter is attached hereto as Exhibit B.

44. The County Counselor has affirmatively advised that he will not cooperate in providing special counsel to the County Council with regard to the dispute regarding the staffing

of the County Auditor's Office, and will not otherwise respond cooperatively with respect to retention of independent counsel for the County Council.

45. There exists a real and substantial dispute between the Plaintiffs and the County Counselor as to whether the County executive branch, including the County Counselor, must cooperate with the legislative branch to supply special counsel to the Plaintiffs in this situation.

46. Plaintiffs have no adequate alternative remedy at law.

WHEREFORE, Plaintiffs request that the Court enter its judgment declaring that the County Counselor is obligated by Art. II, § 1 of the Missouri Constitution and County Code § 110.040 to retain Bick & Kistner, P.C., as requested in the Resolution, and that this Court grant Plaintiffs such further relief as the Court deems just including, but not limited to, an award of their attorneys fees and litigation expenses.

BICK & KISTNER, P.C.

By: /s/ Elkin L. Kistner

James P. Bick, Jr. #34322

Elkin L. Kistner #35287

Sean M. Elam #56112

101 South Hanley Road, Suite 1280

St. Louis, Missouri 63105

Telephone: (314) 571-6823

Facsimile: (314) 727-9071

E-mail: jim@bick-kistner.com

E-mail: elkinkis@bick-kistner.com

E-mail: smelam@bick-kistner.com

Attorneys for Plaintiffs

R-1
10/3/17

RESOLUTION NO. 6228, 2017

Introduced by Councilmember _____ Page _____

R E S O L U T I O N

WHEREAS, recent media reports have raised concerns by the citizens of St. Louis County that more oversight is needed of St. Louis County Government; and

WHEREAS, the May 13, 2013 Quality Assessment Review of the St. Louis County Auditor's Office has recognized a need for more auditing staff stating: "Sufficient staffing of the internal audit activity, which allows efficient and effective operation, is crucial to provide the most benefit to all stakeholders. During surveys of County management, one item consistently mentioned for improvement was additional staffing so that the Auditor's Office could expand their services. Also, based on comparisons with other governmental audit activities, the staff appears to be incommensurately small for the size of the organization"; and

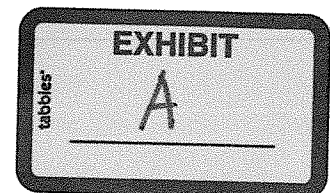
WHEREAS, the Association of Local Government Auditors (ALGA) published a study in October 2016 titled, "Benchmarking, Best Practices, and Salary Survey" with participants from cities and counties across the nation including St. Louis City which concluded that 75% of respondents have audit staffs of 3-15 and 40% of respondents had between 6-10 on the staff; and

WHEREAS, St. Charles County, with a population of 390,000 and a 2017 operating budget of approximately \$320 million has an audit staff of six (6) in the department; and

WHEREAS, the office of the St. Louis County Auditor is created by § 55.010 of the Revised Statutes of Missouri and § 2.200 et seq. of the St. Louis County Charter, and the duties and powers of that office are described therein; and

WHEREAS, the St. Louis County special countywide audit report requested by the St. Louis County Executive and published on December 29, 2015 states on page 20 of the report the need for

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additional auditing staff in the St. Louis County Auditor's Office;
and

WHEREAS, the St. Louis County Council has included in St. Louis County's 2017 budget a line item for the funding of several County Auditor staff positions, and appropriated funds to be spent to provide compensation for the employees who would occupy them;
and

WHEREAS, the St. Louis County Executive Administration has a responsibility to staff the office of the St. Louis County Auditor so that it may perform its important governmental functions; and

WHEREAS, the St. Louis County Council through its Chairman and County Clerk has repeatedly requested the County Administration to complete the staffing of the Auditor's Office and expend the appropriated funds accordingly; and

WHEREAS, the St. Louis County Executive Administration, with the knowledge and support of the St. Louis County Executive, has obstructed the interview and hiring process for budgeted audit staff; and

WHEREAS, as a direct result of the St. Louis County Executive's obstruction of the County Auditor's hiring process, the County Auditor has only one employee on staff, thus impairing the Auditor's ability to perform its functions;

NOW, THEREFORE,

BE IT RESOLVED BY THE COUNTY COUNCIL OF ST. LOUIS COUNTY, MISSOURI,
AS FOLLOWS:

SECTION 1. The County Council declares that a dispute exists between it and the St. Louis County Executive with regard to the St. Louis County Executive's duty to cooperate with the County Council in providing adequate staff to the office of the St. Louis County Auditor.

SECTION 2. The County Council intends to seek judicial relief to direct that the County Executive proceed with the hiring of sufficient audit staff and any other budgeted positions in the legislative branch of County government.

SECTION 3. The County Council declares a conflict of interest exists for the office of the County Counselor with regard to the above dispute.

SECTION 4. The County Council relieves the County Counselor of the duty to provide bifurcated representation to both the plaintiff and defendant County Executive branch of government in this dispute, and requests that, pursuant to St. Louis County Revised Ordinances 1974 as Amended, Section 110.040, the St. Louis County Counselor appoint the law firm of Bick & Kistner, PC, James P. Bick, Jr. and Elkin L. Kistner as special counsel to the St. Louis County Council for purposes of pursuing the judicial relief described above, with said special counsel to be compensated at the rate of \$225 per hour.

SECTION 5. The County Council petitions for access to County Council funds for legal expenses as invoices are presented as prescribed by the County and accepted County protocols.

ADOPTED: October 3, 2017

ATTEST: 
ADMINISTRATIVE DIRECTOR


CHAIR, COUNTY COUNCIL

APPROVED AS TO LEGAL FORM:

COUNTY COUNSELOR

Steven V. Stenger
County Executive

Saint Louis
COUNTY
COUNTY COUNSELOR

Peter J. Krane
County Counselor

October 4, 2017

Mr. James P. Bick, Jr.
Mr. Elkin L. Kistner
Bick & Kistner
101 S Hanley Rd #1280
Clayton, MO 63105

Sent via U.S. Mail and email to jim@bick-kistner.com and elkinkis@bick-kistner.com

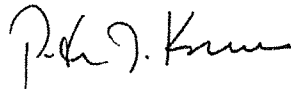
RE: St. Louis County Council Resolution #1, October 3, 2017, Engagement of Outside Counsel

Dear Messieurs Bick and Kistner:

As you are likely aware, the St. Louis County Council adopted a resolution, Resolution # 1, on October 3, 2017, in which four members of the Council purported to relieve me of my duties as the County Counselor and to seek the appointment of you and your firm as counsel to represent the Council in a matter related to filling merit-system, executive branch positions in the Auditor's office.

Please be advised that the resolution is merely a statement of the desires of four members of the Council and does not have any legal effect. The Council has no authority to enter into contracts and no payment authority. Furthermore, no funds will be appropriated for your services. Therefore, if you do in fact provide any legal representation to any members of the Council, you do so at your own economic peril. See *F.W. Disposal S., LLC v. St. Louis Cty. Council*, 266 S.W.3d 334 (Mo. Ct. App. 2008).

Sincerely,



Peter J. Krane
County Counselor

PJK/pm

