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INTRODUCTION

The issue in this case now, as it was when this class was certified, is whether the presence of saccharin in fountain diet Coke is a material fact under the Merchandising Practices Act (MPA). If the presence of saccharin is a material issue, and only a jury can decide if the "reasonable" person standard is met on the issue of materiality, then Relator has violated the MPA and damages are presumed.[1] Relator's writ should not be made permanent.

Relator's brief is simply a resubmission of the information that has previously been provided to the Court of Appeals and this Court, with the exception of the additional personal attacks that have been added to its most recent brief. The personal attacks against both Plaintiff's counsel and Respondent are unnecessary and unprofessional. Relator's brief is filled with hypocritical

[1] "The purpose of Missouri's Merchandising Practices Act is to preserve fundamental honesty, fair play and right dealings in public transactions. (citations omitted). By providing a statutory cause of action, the Act eliminates the need for the Attorney General to prove intent to defraud or reliance in order for the court to find that a defendant has engaged in unlawful practices. (citations omitted). . . . Once the court finds that a violation of the Act has occurred or is about to occur, irreparable harm and harm to the public are presumed." *Missouri v. Beer Nuts Ltd*., 29 S.W.3d 828, 837–38 (Mo. App. 2000).

assertions and misstatements of the holdings of various cases. A particularly glaring example of the hypocrisy of Relator's position lies in it stating that the writ should be made absolute to "prevent any further unnecessary burden, expense and inconvenience." (Relator Br. at 39.)

A review of case law indicates that unnecessary burden, expense and inconvenience is primarily directed to cases involving venue issues and other issues for which there would be inadequate appellate review. *See, e.g., State ex rel Union Planters Bank N.A. v. Kendrick,* 142 S.W.3d 729 (Mo., en banc 2004). These concerns do not arise just because a party is unhappy with the results of the appellate process. For Relator to complain about unnecessary expense after paying two of the biggest law firms in the country hundreds of thousands of dollars to file a petition for appeal with the court of appeals, a petition for reconsideration or transfer with the court of appeals, a petition for transfer with this Court, a writ with the court of appeals, and a writ with this Court, all for a case that, according to Relator, involves a class "where the vast majority of class members suffered no cognizable injury," is puzzling. (Relator Br. at 18.) This case could have been tried to a jury of Missouri citizens for less money and in less time than has been spent with Relator's premature appeals, and could have already been concluded long ago.

In reality, the true inconvenience here has been to the people of Missouri, who, because of the efforts of Relator at avoiding disclosure of that information, still do not know that fountain diet Coke contains saccharin. Further, the true

unnecessary expense has been the efforts of Relator to use its vastly superior wealth in an attempt to spend enough money so that it can avoid facing a jury of Missouri citizens. If the "vast majority" suffered no injury, Relator should have been clamoring to have a jury of Missouri citizens decide whether its failure to inform them that fountain diet Coke contained saccharin was a material fact. A trial on that issue could have been concluded months ago for less money, yet for some reason, Relator has taken the tack of attacking the citizens of Missouri as "blackmailers," and characterizing Respondent as someone signing false orders, making untrue statements in his order, and as someone too lazy to do his job. (*See, e.g.*, Relator Br. at 36–37, 40.) All such accusations are false.

Another example of Relator's hypocrisy lies in it arguing, without any support, that the "vast majority" of Class members suffered no damage, when in fact, Relator's own studies show that virtually no one knows of the presence of saccharin in fountain diet Coke, and that if that fact were disclosed Relator would lose millions of dollars in sales, or that a high percentage of people do not believe that saccharin is safe for adults or children. (Respondent's Appendix Under Seal A083-084, A086-A106, A107-A119) The time to reveal the truth to Missouri consumers is now.

STATEMENT OF FACTS

Relator spends several paragraphs discussing and referencing past advertisements for diet Coke. It attaches many such ads as exhibits, implying that somehow those ads informed people that fountain diet Coke contains saccharin.

They do not. A review of those ads reveals that not once is saccharin ever mentioned, and for good reason. Relator's own documents and studies show that if people were aware of the presence of saccharin, it would cost Relator millions of dollars in lost revenue. A086-A106. The ads attached as exhibits by Relator are evidence that virtually no one knows saccharin is present in fountain diet Coke. These efforts to mislead the Court, and the public, with such arguments, when Relator's own documents prove otherwise, illustrate the lengths to which Relator will go to avoid having to disclose to Missourians, in any meaningful way, exactly what they are consuming. The planned deception is apparent by the way the ads read, stating that Nutrasweet is no longer available, yet failing to provide any further explanation. After reviewing the survey set out in A086-A106, showing the loss of revenue if the public knew about saccharin, the reasons for the vagueness become obvious.

Relator inserts argument into its version of the procedural history of this case in order to attack the trial court's decision to refrain from making findings of fact or conclusions of law in support of its class certification ruling. However, the trial court acted properly. No findings of fact or conclusions of law were provided because *Relator did not request them*.[2] Respondent addressed each element of

[2] "Thus, in the absence of a request for findings of fact and conclusions of law, pursuant to Rule 73.01(c) the trial court is not required to make findings or conclusions in support of its class certification, pursuant to Rule 52.08 or

52.08, and held that the predominant issue in the case was whether the omission by Relator of the presence of saccharin was a material fact under the objective, reasonable person standard used in Missouri.

ARGUMENT

Adequate relief can be afforded by an appeal at the end of this case, if Relator even requires one. Moreover, the legislature has set forth the procedure for appealing the granting or denial of class certification under Missouri law, a procedure that Relator has already exhausted. Relator cites to *State ex rel Union Planters Bank N.A. v. Kendrick*, 142 S.W.3d 729 (Mo., en banc 2004), as support for its argument that prohibition is appropriate. (Relator Br. at 19.) The cases, however, could not be more different. In *Kendrick*, class counsel were taking money from one of the defendants and the issue was whether there was a conflict of interest that would preclude the counsel from representing the class. This Court remanded for the trial court to address that issue, not to decertify. Yet no such issue exists in this case. Relator's complaint is that not everyone in the class was damaged and that the class definition is improper. That issue is clearly something that can be addressed on appeal if necessary, and after the trial court has had an opportunity to hear evidence and rule on summary judgment motions prior to a decision on the merits. Additionally, *Kendrick* was decided before the legislature

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§407.025." *Dale v. DaimlerChrysler Corp*., 204 S.W.3d 151, 163 (Mo. App. W.D. 2006).

provided for appellate review, after class certification, and before a merits decision. The only way to prevent the case from moving forward with the conflict in place was by prohibition. No such situation presents itself here, though, as the legislature has set out a procedure for early review of class certification decisions by the appellate court. With the singular issue of the materiality of the omission being the dispositive issue for liability, the adequacy of appellate review at the conclusion of the case is obvious. Consequently, this Court should vacate the preliminary writ, for numerous reasons.

First, Respondent did not abuse his discretion in certifying this class,[3] as he rigorously scrutinized the requirements for class certification, and a Missouri jury should be allowed to decide if the omissions of Relator constitute a violation of the MPA. Upon closer examination, the Court will see that Relator is acting from a position of gross deceit. Relator's attempt to mislead continues in its own argument section when it states that "Missouri law is settled that a class is

[3] Importantly, to take away the trial court's discretion, as the only entity with access to all available information, prior to merits discovery and to preempt the trial court's ability to modify, change, or even decertify a class, at this stage, would result in this Court making itself the necessary final arbiter of all class certifications. Relator should be making these arguments to the trial court throughout discovery and through summary judgment motions rather than asking this Court to substitute its decision for the decision of the trial court.

overbroad if it includes persons who suffered no injury." (Relator Br. at 18.) That statement could not be more false. In reality, "a class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant." *Hale v. Wal-Mart Stores Inc*., 2007 WL 1672261, *14. There are almost always individuals in a named class that arguably have suffered no damages, and courts in Missouri have routinely stated that damage issues do not preclude class certification.

Second, there is no evidence whatsoever that Respondent did not conduct a rigorous analysis of the requirements of Rule 52.08. Relator's arguments to the contrary, which fail to mention, *inter alia*, its own neglect in requesting findings of fact or conclusions of law, necessarily fail. Third, Relator's relentless filings before this Court and the Court of Appeals have done nothing but cause an abundant waste of the time, resources and expenses of not just Respondent, but the entire Missouri judicial system. Finally, the amicus brief of the Product Liability Advisory Council, as its name suggests, represents nothing more than an effort at changing Missouri law for the benefit of its 123 member product manufacturers.

I. STANDARD OF REVIEW

The standard of review for class certification is for an abuse of discretion: "A court abuses its discretion only if its ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. It cannot be said that the trial court abused its discretion where reasonable persons could differ with the propriety of its ruling." *Dale*, 204 S.W.3d at 164. In addition,

a court "will err on the side of upholding certification in cases where it is a close question because Rule 52.08(c)(1) provides for decertification of a class before a decision on the merits." *Hale*, 2007 WL 1672261, at *9 (citing *Dale*, 204 S.W.3d at 164). Clearly, Respondent's order, based on Missouri law, is reasonable and indicates careful consideration.

II. RESPONDENT DID NOT ABUSE HIS DISCRETION BECAUSE THE CERTIFIED CLASS IS SUFFICIENTLY ASCERTAINABLE

A. The Class is Ascertainable.

Relator argues that the class is not reasonably ascertainable. However, the same argument was made by the defendant and readily rejected in *Craft v. Phillip Morris Cos.*, 190 S.W.3d 368 (Mo. App. E.D. 2005). The *Craft* court held that "[a]ll Missouri residents who purchased Lights during the relevant time period but who do 'not have a claim for personal injury related to smoking' is an ascertainable defined class. These are objective criteria that do not depend on the consumer's subjective state of mind or the merits of the case." *Id*. at 388. If the class definition in *Craft*, which simply included all purchasers of light cigarettes, was sufficiently ascertainable, then certainly the definition in this case, all purchasers of fountain diet Coke, is likewise sufficiently ascertainable.

As Judge Crane stated in *Craft*, "[a] class is sufficiently definite if it is administratively feasible to determine whether a given individual is a member of the class." *Id.* at 387–88. However, the class "need not be so ascertainable from the definition that every potential member can be identified at the commencement

of the action." *Id.* All Missouri consumers who purchased fountain diet Coke is nearly identical to the class definition in *Craft*, and is equally ascertainable. Further, it is worth noting that this Court has already turned down the opportunity to reject the *Craft* definition. Thus, class membership is not contingent on the state of mind of the individual member and, thus, Relator's attempt to confuse damages with class membership should be rejected.

Whether each and every class member has been damaged is a different issue, and one that can be addressed after the issue of whether Relator violated the MPA is determined. "If it is determined that defendants' conduct violated the MPA and caused some or all of the prospective class members to lose an ascertainable amount of money, the trial court can thereafter consider any individual circumstances or issues that may exist." *Id* .at 383. Relator cites *Hale*, in that "the class, however, must include only those who are injured." (Relator Br. at 20.) But this quote is taken out of context and ignores the real finding in *Hale*, that "**a class may be certified even though the initial definition includes members who have not been injured** or do not wish to pursue claims against the defendant." 2007 WL 1672261, *14 (emphasis added). As such, damages play no role at this point in the litigation.

Additionally, Relator's damages argument would eviscerate the MPA and, indeed, most class actions. Under Relator's reasoning, for all certified classes, the argument could be made that there are some class members who were not damaged, for one reason or another. Of course, the law has been clear for some

time that individual damage issues do not preclude class certification. "In certain instances, an otherwise individualized claim can be proper for class certification if the plaintiffs offer common evidence to prove the elements of that claim." *Craft*, 190 S.W.3d at 381–82. In *Craft,* the defendants similarly argued that the misrepresentation claims of the named plaintiffs required individualized proof and, therefore, were inappropriate for class certification. *Id*. at 382. The *Craft* court rejected that contention, however, because the defendants' liability, as alleged in the petition, went to "the condition and labeling of the product at the time it was sold" and was not "dependent on each consumer's individual smoking behavior." *Id.* Additionally, the *Craft* court explicitly recognized that class-wide damages can be used: "[m]oreover, the trial court's conclusion that it was possible that plaintiff could establish class-wide damages under such a theory through expert testimony does not constitute an abuse of discretion." *Id.* at 385.

Whether damages can be shown on a class-wide basis is a question of fact and is to be determined by the trier of fact, not by the Court. Relator's argument, carried to its logical conclusion, would mean the MPA could never be used for the benefit of a class of Missouri citizens. Fortunately, the law holds otherwise:

> Moreover, all these individual issues relate to damages that can be handled in a random sampling of the class. *See Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1324 (N.D. Ill. 1991). Such a random sampling and statistical analysis will not violate Wal-Mart's due process rights. First, there is no absolute right to individualized determinations of damages. *Id.*

at 1325. Second, a statistical model accounts for individual issues including injury in fact and proximate cause. *Id.* at 1326. Finally, Wal-Mart would have the opportunity to contest the proofs of aggregate methods. *See Id.* at 1327; *Long v. Trans World Airlines, Inc.*, 913 F.2d 1262, 1265 (7th Cir. 1990).

* * *

'The predominance of the common issues is not defeated simply because individual questions may remain after the common issues are resolved, such as questions of damages or individual defenses.' *Craft*, 190 S.W.3d at 383 (citing *Am. Family*, 106 S.W.3d at 488).

Hale, 2007 WL 1672261 at *12.

Relator's attempts at avoiding the consequences and effect of the *Craft* decision, and now *Hale*, is understandable, given that both are contrary to its position and that *Craft* is directly on point. *Craft* applied Missouri law regarding the MPA, addressed every issue raised by Relator in this case, and this Court refused transfer when it had the opportunity for review. *Hale* also addresses most of Relator's arguments, particularly the recognition that a class can be certified even if not all members of the class are damaged. Notably, Relator's argument that the class is not ascertainable because some class members may have had previous knowledge was considered and rejected by the *Craft* court. *See also* Newberg & Conte, NEWBERG ON CLASS ACTIONS, §2.04 (3d ed. 2002) ("[T]here is no need that class members be determinable either at the outset of litigation or at the time

of class notice. In addition, individual class members need not be able to be determined even at the time of final judgment.")

The certified class at issue here is entirely ascertainable, as the class definition is an objective one. Damage issues can, and will, be addressed later and do not preclude class certification as they can be done on a class-wide basis. In *Craft*, the court upheld the trial court's finding that damages could be proven on a class-wide basis, stating that "it could use logic and common sense to conclude that expert testimony could be adduced to support class-wide damages under a possible theory of damages." *Craft*, 190 S.W. 3d at 368. Of course, class-wide damages are a well-recognized method of calculating damages in class actions. "Virtually all circuits that have considered this issue. . . . have expressly condoned aggregate proofs of damages . . ." *Newberg on Class Actions* §10.05, 10-9. To that end, expert testimony will be used by Plaintiff to calculate class-wide damages. Additionally, under the fluid recovery doctrine, a common fund could be created and proof of damages handled largely through an administrative process or a *cy pres* distribution. *See Buchholz Mortuaries Inc. v. Dir. of Rev.*, 113 S.W.3d 192, 196 n.1 (Mo., *en banc* 2003) (Wolff, J. concurring).

Relator also cites to *Dale* as support for its position regarding ascertainability. (Relator Br. at 19–21.) Relator argued this same issue to the Court of Appeals. It made the argument to the same judge that wrote the *Dale* opinion, issued just one day after the denial of the petition to appeal in this case. Judge Smith, in deciding both cases, did not apply different standards when making his

rulings. *Dale* simply states, consistent with long-standing case law, that the class needs to be objectively defined. Judge Smith found, as did Judge Crane in *Craft*, that a class of "all purchasers" was objectively defined. What the class members' damages are is an issue for the jury to decide, not Relator. The class definition is not dependent on the state of mind of each individual. If a jury finds Relator violated the MPA, damages can be ascertained at that point. As *Craft* and other cases have found, as noted above, damages can be calculated on a class-wide basis. Furthermore, as this Court has stated, damage issues do not preclude class certification. *See State ex rel. Amer. Fam. Mut. Ins. Co. v. Hon. Thomas C. Clark*, 106 S.W.3d 483, 488 (Mo., *en banc* 2003).

B. Reliance is Not a Requirement Under the MPA.

Relator cites cases where the holding was based on whether a class member was deceived, including *Kaiser-Engel v. PepsiCo, Inc.*, No. 042-09307A (Cir. Ct. St. Louis, June 28, 2007), Relator quotes that case to support its argument because Judge Riley simply adopted the *Oshana* reasoning. *See Oshana v. Coca-Cola Co.*, 225 F.R.D. 575 (N.D. Ill. 2005). But, a quick perusal of the quote provided shows clearly that Judge Riley did not understand the MPA, as he stated that "the class would necessarily depend on potential class members state of mind." (Relator Br. at 27.) Even a cursory analysis of the MPA shows that the state of mind of the consumer is not an issue to be considered. The *Kaiser-Engel* court misunderstood the MPA, and the opinion simply adopted *Oshana* without an accurate analysis of the MPA. There is no requirement of deception in the MPA and, because this case

involves an omission of a material fact, deception is not an issue. Missouri law is clear in that the MPA uses an objective test to determine what *"a <u>reasonable consumer</u> would likely consider to be important in making a purchasing decision."* 15 CSR 60-9.010(1)(C) (emphasis added). The only issue is whether the presence of saccharin in fountain diet Coke is a material fact that should be disclosed to consumers, and that decision is to be made by a jury based on the objective, reasonable person standard, not by Relator's distorted presentations.

Relator confuses, as did the *Oshana* court, proximate cause with reliance and attempts to substitute one for the other. The court in *Collara v. R.J. Reynolds*, No. 002-00732, 2003 WL 23139377 (Mo Cir. Ct. 2007) sets forth the difference:[4]

> The Court disagrees, and disagrees specifically with Defendants' statutory interpretation of the causation requirement of §407.025. While the "as a result of" language in the statute does indeed require a causal link or nexus between a defendant's unlawful conduct and a plaintiff's "ascertainable loss," this causal connection is not the strict "proximate cause" requirement that Defendants suggest. Such a requirement would be tantamount to making consumer "reliance" on false representations a necessary element of a private plaintiff's

[4] Respondent understands that the decision of a circuit court is not authoritative precedent for this Court, but its explanation of the difference between proximate cause and reliance is quite cogent and succinct.

> cause of action. That is not the law in Missouri. A plaintiff need not show such reliance. *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. E.D. 1988). Indeed, it is presumed from the statute "that the customer has relied upon the obligation of fair dealing in making his purchase." *Id.* at 637; *see also Antle v. Reynolds*, 15 S.W.3d 762, 765–68 (Mo. App. W.D. 2000) . . . . . Accordingly, the Court believes the specific reason or motivation why individual class members purchased Defendants' Lights cigarettes is essentially irrelevant to the plaintiffs' claims in this cause.

Collara, 2003 WL 23139377 at *2; (A045-A049).

Moreover, although the Class at issue here is proper and sufficiently defined, the trial court is not bound by it and may modify it as the trial court deems necessary. "A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly." *Lang v. Kansas City Power & Light Co.*, 199 F.R.D. 640, 644 (Mo. App. W.D. 2001). Respondent's order even notes that the trial court can modify, change, or decertify as the merits discovery progresses.

Relator's own marketing research demonstrates that Coca-Cola has long known that its uniform marketing practices have made it impossible for consumers to know of the inclusion of saccharin in fountain diet Coke. For example, Coca-Cola's own focus group research revealed that "*there was no awareness*

whatsoever that fountain products had a different sweetener profile than bottle and can soft drinks." (*See* Respondent Appendix Under Seal at A083-A084.) Coca-Cola's 1998 telephone survey found that consumers do perceive a difference between diet Coke in fountain and bottle/can forms, but this difference is due to factors associated with the fountain form, rather than due to the diet Coke sweetener system. (A085.) Further, ***marketing research in 1999 by Coca-Cola concluded that it could lose as much as 13% in sales if the public was made aware of the inclusion of saccharin in fountain diet Coke which would result in the loss of millions of dollars***. (A091-A096.) Of course, it is obvious that there is no way for anyone to know saccharin is present when Relator fails to provide such information.

Relator misinterprets applicable law in arguing that the *Oshana* requirement to show each person was induced to buy is not reliance. Respondent recognized, and stated in his order, that Missouri law does not require a showing of a particular state of mind or that a person was induced to buy or relied upon a misstatement. (A039-A041**)** As Relator well knows, Plaintiff's primary argument focuses on the omission of information, not whether a person saw a particular ad or flyer. "Once the Court finds that a violation of the Act has occurred or is about to occur, irreparable harm and harm to the public are presumed." *Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837–38 (Mo. App. E.D. 2000). "If it is determined that the Defendant's conduct violated the MPA and caused *some* or all of the prospective class members to lose an ascertainable amount of money, the trial

court can *thereafter* consider any individual circumstances or issues that may exist." *Craft v. Phillip Morris Cos.*, 190 S.W.3d 368, 383 (Mo. App. E.D. 2003) (emphasis added). The issue in Missouri is the conduct of Relator and whether that conduct violated the MPA, and *not* whether any particular individual was tricked or deceived by the actions or omissions of Relator.

As the trial court recognized, the issue of whether the omissions of Relator, which are identical for all Class members, is a violation of the MPA, is the predominant issue. Relator's own studies show that a high percentage of people have concerns about consuming saccharin. A recent survey indicates that when asked a question about whether saccharin was safe for adults to consume, a high percentage disagreed, and when asked if it was safe for children, an even higher percentage disagreed. (A107-119.)

This information is the real reason Relator is attacking the trial court's order, as Relator knows that notice to the Class will put the truth before the public, a truth it wants to conceal for unjust profit. There may be no better corporation in the world at marketing its product than Relator, and there is no doubt that Relator is very aware of what consumers know and what they are thinking. It knows that consumers believe, because they have no reason not to, that diet Coke is diet Coke is diet Coke—that the ingredients listed on the can and bottle are the ingredients contained in the fountain version. The refusal to provide information about the difference in the products in a **readily available** form shows that Relator knows exactly what it is doing by letting consumers believe that all diet Coke is the same.

As previously noted, the defendants in *Craft* made the same arguments as Relator makes here. Among those arguments were that you must look at what each class member thought, what each one knew, and what each person did. *Craft* determined that each of those arguments did not prevent class certification. While the advertisements about aspartame in canned and bottled diet Coke led to consumers assuming fountain diet Coke was the same as the advertised products, it is not that representation that is the basis for this case. Rather, as Relator well knows, and despite its attempts to argue otherwise, it is the omission of a material fact that is the focus, and that omission is the same for all class members. Respondent found, after careful consideration, that the question concerning whether the actions and omissions of Relator were violations of the MPA is the predominant issue, and that it outweighed any of the individual issues raised by Relator. "The predominant issue need not be dispositive of the controversy or even be determinative of the liability issues involved." *State ex rel. Amer. Fam. Mut. Ins. Co. v. Hon. Thomas C. Clark*, 106 S.W.3d 483, 488 (Mo., en banc 2003).

C. Relator's Citations to Authority are Grossly Misleading.

Not only are Relator's arguments misplaced, but so is its reliance on the case law it cites. For example, Relator cites to *Dumas v. Albers Medical, Inc.*, 2005 U.S. Dist. LEXIS 33482 (W.D. Mo. Sept. 7, 2005), *Saey v. CompUSA, Inc.*, 174 F.R.D. 448 (E.D. Mo. 1997), *Suter v. Crawford*, 2007 WL 188451 (2007), and *Hale v. Wal-Mart Stores Inc.*, 2007 WL 1672261 (2007), in support of its argument that the certified class is not sufficiently ascertainable. A quick glance

at these cases, however, reveals the errors in Relator's references. In *Dumas*, class certification was denied because there was no way to determine which class members purchased real Lipitor as opposed to a counterfeit version of the drug. No such problem exists here, however, as all fountain diet Coke contains saccharin, and all class members purchased the same product, a fact which Relator has not disputed. *Saey* is readily distinguishable for the same reason. The court there found that some individuals may have received an unopened computer, and would thus fall outside the class definition sought by the plaintiff. Additionally, the holding of the court was that the plaintiff failed to satisfy the numerosity requirement because the named plaintiff might have been the only class member. Here, numerosity is not an issue and whether or not a member of the public falls within the class definition is a simple matter, as anyone who purchased fountain diet Coke received a product containing saccharin.

Similarly, in *Suter*, a case concerning the construction of a new correctional facility that would house two females per room, there was no fraudulent conduct whatsoever, whereas here, Relator has consistently omitted the fact from consumers that its fountain diet Coke contains saccharin. Under the MPA, this constitutes fraudulent conduct, and as Plaintiff has repeatedly demonstrated, it was perpetrated against all consumers on a uniform basis. Finally, in *Hale*, Relator has extracted one sentence that it repeats over and over while ignoring the rest of the case. And that sentence is taken out of context, as the rest of *Hale* does not support Relator's position; rather, *Hale* specifically holds that a class may be certified

even if not all class members have been injured.

Relator makes much of the fact that some Class members may have purchased fountain diet Coke with full knowledge that it contains saccharin. (Relator Br. at 24.) Relator makes such statements with absolutely no evidence in support while ignoring Relator's own documents, documents which it has requested be filed under seal,[5] and which show the actual number of such individuals is miniscule, at best, given Relator's unending campaign to conceal from the public the fact that fountain diet Coke contains saccharin. Furthermore, the most recent instance in which Relator disclosed to the public that fountain diet Coke contains saccharin was in a 1983 press release—approximately 24 years ago. In light of this bold admission on Relator's part, it necessarily follows that a substantial portion of the Class never saw this press release, as they had yet to be born.

Relator also refers to "plaintiff Pennington's own expert." (Relator Br. at 31.) Such reference is curious given that there have been no experts named in this case and Pennington has not hired any experts, nor commissioned any survey. Relator's efforts at delay have prevented the case from moving into the merits stage where naming experts would be required. Again, Relator attempts to

[5] It should be noted that any prior privilege of confidentiality afforded to Relator's internal documents has been effectively eviscerated by its lack of candor to the Court.

mislead by mingling events from other cases with this one. Thus, Plaintiff's "expert" has not "conceded" anything.

This is not a case about misrepresentation, but rather about fraud through omission. Consequently, the question is not whether Class members were individually deceived based on some affirmation on behalf of Relator. The issue is whether a reasonable person would find it material that fountain diet Coke contains saccharin, a fact that Relator has concealed from consumers. Such a question is one to be resolved by the trier of fact—a jury—and can be applied to all members of the Class on a class-wide basis and the Class, as defined, is ascertainable.

III. RESPONDENT DID NOT ABUSE HIS DISCRETION AND HE CONDUCTED A RIGOROUS ANALYSIS OF THE REQUIMENTS OF RULE 52.08

A. Respondent Conducted a Rigorous Analysis Before Granting Class Certification.

Relator cites numerous cases that discuss applying a "rigorous analysis" before determining if the prerequisites for class certification have been satisfied, as if these cases had some bearing on this case. The requirement is not new and it was applied by Respondent in this case. Additionally, the cases cited by Relator provide little guidance as they merely recite the "rigorous analysis" requirement. Relator provides little "summaries" after each case cite that appear to tie together the rigorous analysis requirement with the holding of the court. Unfortunately, a

closer reading of the cases shows that there is little relationship between the two. For example, in *Hervey v. City of Little Rock*, the court decertified the class **after trial**, but before a decision on the merits. 787 F.2d 1223 (8th Cir. 1986). There was no discussion of a rigorous analysis other than the mention that it was a requirement prior to certification. The other cases cited by Relator are similar situations with the implications that the holdings were related to a lack of "rigorous analysis" when they were not.

In a similar vein, Relator cites numerous cases regarding not accepting the allegations in the petition as true. (*See* Relator Br. at 34.) Again, these cases have no bearing on this case. Respondent did not just accept anything, but rather carefully reviewed the voluminous filings by both sides. Relator also cites the Manual for Complex Litigation, suggesting that there should be findings of fact. Relator repeats this argument ad nauseum despite knowing that such are not required unless requested, and as this Court well knows, Relator failed to request them.

The trial court conducted a comprehensive, thoughtful and careful analysis prior to deciding to certify the Class. Plaintiff submitted her memorandum in support of class certification on November 17, 2004. (A01-A021.) Relator submitted a response on April 15, 2005. Plaintiff then submitted a reply on May 13, 2005. (A022-A038.) Subsequent to the conclusion of briefing, Defendant submitted additional legal authority on June 23, 2005 and October 12, 2005. Plaintiff submitted additional authority on August 30, 2005. Oral argument was

heard on December 9, 2005, and the order was entered on February 9, 2006. (A039-A041.) Clearly, the trial court had voluminous information before it, and when the court signed an order stating that it "fully considered" and "carefully reviewed" all available evidence, the veracity of the court should be assumed and personal attacks on the court's honesty and integrity solely because it ruled against Relator should not be tolerated. The trial court should be granted the presumption that when it states it conducted a careful analysis and applied full consideration, that it indeed did so.[6] All the briefs contained facts and legal arguments in support of each side's respective positions. All issues and legal requirements were thoroughly and extensively briefed with both sides submitting various documents and exhibits in support of their respective arguments. Everything Relator is presenting to the Court in the current briefing was presented to, and reviewed by, the trial court and the Court of Appeals (three times).

At the close of oral argument in front of the trial court, Respondent requested that each side submit a proposed order for him to consider. As this Court is aware, such practice is common among judges because of budgetary limits, shortage of staffing, and the overall heavy workload of the courts. Neither then nor at any other time, did Relator request that the trial court issue findings of fact and

[6] And subsequent to that briefing, Relator filed a petition for appeal with the Court of Appeals. Respondent's brief in opposition was filed, *see* A0050-A071, as was her response to this Court's request for briefing on jurisdiction. (A072-A082.)

conclusions of law. Respondent indicated that after his full review and careful study and consideration of all the information that had been presented to him, he would enter an order. Relator even brought in out-of-state counsel from one of the largest law firms in the United States to argue the motion.

Both parties submitted proposed orders. (A042-A043 (Relator's proposed order)). Neither side submitted findings of fact and conclusions of law. Several weeks later, Respondent entered his order.

Relator continues to imply that Respondent lied in his order certifying the class in this case. Relator states that "Respondent did not conduct the rigorous analysis required by law." (Relator Br. at 36.) Such accusations fly in the face of the order issued by the court that stated "After careful review of the filings and the oral argument." (A039-A041.) The court further stated that it had fully considered all responsive pleadings, as well as having had a hearing on the motion. While Relator may wish that Respondent had done no analysis, the court's order says otherwise. And, in fact, Relator's own proposed order it submitted to Respondent stated "upon full consideration of the facts and law." (A042-A043.)

Relator also argues that the order certifying the class is somehow deficient because it did not address arguments made by Relator. Despite there being no such requirement, the order sets out the findings of the court that all the elements for class certification were satisfied and, in the elements contested by Relator, sets out the specific facts involved and the reasons for the court's findings. The order states that all filings and oral argument were reviewed and carefully considered.

There is no reason the court should repeat Relator's argument when it states that all of Relator's positions were fully considered and carefully reviewed. The hypocrisy of Relator's accusation is evident when one looks at the proposed order submitted by Relator for Respondent's consideration. *Id*. Not only did Relator's proposed order state that the court gave full consideration to the facts and law, it failed to address any of the Plaintiff's arguments, had no findings of fact and had none of the items Relator claims makes the current order deficient.

Relator's only basis for its allegation that Respondent deliberately made false statements in his order is that Relator is dissatisfied with the order. Relator offers no evidence of a lack of rigorous analysis other than its dissatisfaction with Respondent not signing Relator's proposed order. If the trial court had signed Relator's order, with no findings of fact or conclusions of law, would that be proof that the trial court blindly signed an order with no thought or careful deliberation? Relator only now complains because the trial court did not sign its order.

The thrust of Relator's argument to this Court is that because Respondent did not agree with other jurisdiction's decisions, then he must have done nothing but sign a proposed order without any thought or judgment of his own. Contrary to Relator's accusations, Respondent did his own careful analysis of Missouri law, rather than merely agree with the conclusions of judges in other jurisdictions under the control of different laws. This is obvious when analysis is made of the out-of-state decisions touted by Relator compared to the law in Missouri. Reaching his own conclusions rather than accepting some other court's reasoning is indicative

of careful analysis, not the opposite. The trial court deserves better regard than is suggested by Relator in its brief.

Relator states that the order "is comprised of unsupported legal conclusions," and alleges an "absence of any findings of fact or explanations by Respondent." (Relator Br. at 36, 37.) But that argument is refuted by simply reviewing the order. The order states that the numerosity, adequacy, and commonality requirements were uncontested. Was Respondent to address why Relator did not contest those elements? The order then states that the typicality requirement is met because the question of whether the omission by Relator of the presence of saccharin is a material fact is typical for the class. (A039-A041) Interestingly, Relator at no time raises the typicality issue in its brief. The order further states that the question of whether Relator violated the MPA is the predominant question in the case. Such a conclusion is almost mandatory, though, because the resolution of that question will resolve the issue of liability in the case. It is clearly the predominant issue.

Additionally, the class can be certified for the issue of liability even if some class members have suffered no damage at all. *Rosario v. Livaditas,* 963 F. 2d 1013, 1017 (7th Cir. 1992) (certifying a class even though some class members may have suffered no damages at all); *Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1105 (5th Cir.1993) (holding that defendant's argument against class certification was "meritless and, if accepted, would preclude certification of just about any class of persons alleging injury from a particular action. These persons are linked

by this common complaint and the possibility that some may fail to prevail on their individual claims will not defeat class membership."); *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 623 n.1 (5th Cir. 1999) (same and citing *Forbush*); *Daniel v. American Bd. of Emergency Med.*, 269 F. Supp. 2d 159, 189–90 (W.D. N.Y. 2003) (holding that not all class members need be injured and the plaintiff can use experts to establish damages on a class-wide basis rather than individual basis, and citing cases with similar holdings). *Gordon v. Boden*, 586 N.E.2d 461 (Ill. App. Ct. 1991)(certifying a class of all purchasers of the defendant's orange juice even though "the class is composed of a large number of unidentified individuals whose claims cannot be substantiated").

Finally, despite Relator's efforts to confuse class definition with damages, Missouri law is clear that "a class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant . . . and the question of injury to individual class members is deferred until after resolution of the common questions." *Hale v. Wal-Mart Stores Inc.*, 2007 WL 1672261, *14 (Mo. App. W.D. 2007); (Relator's Appendix at A0340-0355.) Accepting Relator's position that unless every class member can prove damages there cannot be a class would eviscerate the MPA, as it is unlikely that, especially in a case involving deceptive business practices, deceptive advertising, or the omission of material facts, that there would ever be a case when everyone is fooled. Relator's position would mean that unless everyone

is fooled there could not be a class. Clearly the MPA was not written with such an insurmountable standard in mind.

B. Respondent's Class Certification Order Recognizes that the MPA Does Not Require Reliance.

Respondent's order notes that there may be individual damage issues but that they do not preclude class certification, and that the court may revise, modify or decertify the class as the case progresses.[7] Respondent also notes that the Illinois court's basis for its ruling was that each person would have to prove they were deceived. The certification order stated, and it was a quote from the Illinois decision in *Oshana,* that the Illinois court found that plaintiffs would have to prove that "deceptive marketing induced each class member to purchase fountain diet Coke," and, that such proof was impossible. *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 582 (N.D. Ill. 2005). Not only did the court in *Oshana* make that statement, but it also found that "class members would be required to show they were misled, deceived, tricked, or treated unfairly. Class membership implies a state of mind element". *Id*. at 581. The MPA specifically rejects such a state of mind requirement, as well as any requirement to show that the marketing induced a purchase.

[7] "We will err on the side of upholding certification in cases where it is a close question because Rule 52.08(c)(1) provides for decertification of a class before a decision on the merits." *Hale*, 2007 WL 1672261, *8.

While Defendant can argue that the requirement to show that each person was induced to buy is not reliance, common sense says otherwise. Respondent recognized, and stated in his order, that Missouri law does not require a showing of a particular state of mind or that a person was induced to buy or relied upon a misstatement. The law is clear in Missouri that such is not the case, and so, Respondent found that the Illinois ruling in *Oshana* conflicted with Missouri law.

Despite various exercises in semantics, Relator really just takes issue with the fact that a Missouri judge did not just rubber stamp an out-of-state decision, and instead, made his own ruling based on Missouri law, not Illinois law. Relator argues that reliance is not part of the Illinois decision, but when the *Oshana* court stated that class members would be required to show they were misled, deceived, tricked, or treated unfairly and that Class membership implies a state of mind element with each individual class member having to show that any deception or omission by the defendant induced a purchase, the *Oshana* court, no matter how it was labeled, was requiring reliance. Further, out-of-state appellate decisions do not constitute controlling precedent in Missouri courts, especially when the out state decision is a one line denial of class certification, as was the case in the Kansas decision referenced by Relator. *See United Fire & Cas. Co. v. Tharp*, 46 S.W.3d 99, 105 (Mo. App. 2001).

Respondent followed Missouri law and recognized that in Missouri, an individual's state of mind is not an issue, and that the question is whether a reasonable, objective person would find the information to be material. *Hess v.*

Chase Manhattan Bank, USA, N.A. 220 S.W.3d 758 (Mo. 2007) (MPA regulations define "material fact," in pertinent part, as "any fact which a *reasonable consumer* would likely consider to be important in making a purchasing decision . . . ." 15 C.S.R. 60-9.010(1)(C) (. . . . *Reliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1*) (emphasis added). Further, the question of whether Relator's omission was material is for the finder of fact at the merits stage. *See, e.g., Meriwether v. Publishers: Geo. Knapp & Co.,* 123 S.W. 1100, 1102 (Mo. 1909) ("it will be a question for the jury whether the omission is material"). The obvious reason for Relator's willingness to try five times to get this court and the Court of Appeals to stop the case from moving forward is because it does not want a jury to make that decision.

Further evidence that the individual state of mind inquiry required by the *Oshana* court is not applicable in Missouri, and is the reason Missouri law is different, is made clear by reviewing the statute at issue here. The statute expressly states: "Any act, use or employment declared unlawful by this subsection violates this subsection whether committed *before, during or after* the sale, advertisement or solicitation." 407.020.1 RSMo. (emphasis added). A plain reading of the statute, not to mention common sense, dictates that if the violation occurs *after* the sale, then reliance, or analysis of an individual's state of mind, is certainly not required because the consumer would have already purchased the product. This is an important distinction and is in strict conformity with the regulations

promulgated pursuant to the MPA, which make clear that intent and reliance are ***not*** elements of the MPA:

> **15 CSR 60-9.110 Concealment, Suppression or Omission of Any Material Fact in General**
>
> (1) Concealment of a material fact is any method, act, use or practice which operates to hide or keep material facts from consumers.
>
> (2) Suppression of a material fact is any method, act, use or practice which is likely to curtail or reduce the ability of consumers to take notice of material facts which are stated.
>
> (3) Omission of a material fact is any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her.
>
> (4) ***Reliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1., RSMo.***

15 CSR 60-9.110 (emphasis added).

> **15 CSR 60-9.020 Deception in General**
>
> (1) Deception is any method, act, use, practice, advertisement or solicitation that has the tendency or

capacity to mislead, deceive or cheat, or that tends to create a false impression.

(2) ***Reliance, actual deception, knowledge of deception, intent to mislead or deceive, or any other culpable mental state such as recklessness or negligence, are not elements of deception as used in section 407.020.1., RSMo*** (*See State ex rel. Danforth v. Independence Dodge, Inc*., 494 SW2d 362 (Mo. App., W.D. 1973); *State ex rel. Ashcroft v. Marketing Unlimited*, 613 SW2d 440 (Mo. App., E.D. 1981); *State ex rel. Webster v. Areaco Investment Co*., 756 SW2d 633 (Mo. App., E.D. 1988)). ***Deception may occur in securing the first contact with a consumer and is not cured even though the true facts or nature of the advertisement or offer for sale are subsequently disclosed.*** *Exposition Press, Inc. v. F.T.C*., 295 F.2d 869 (2d Cir. 1961).

15 CSR 60-9.020 (emphasis added).

15 CSR 60-8.020 Unfair Practice in General

(1) An unfair practice is any practice which —

(A) Either—

1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

2. Is unethical, oppressive or unscrupulous; and

(B) Presents a risk of, or causes, substantial injury to consumers.

(2) ***Proof of deception, fraud, or misrepresentation is not required to prove unfair practices as used in section 407.020.1., RSMo.*** (See *Federal Trade Commission v. Sperry and Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972); *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (N.C. 1981); see also, Restatement, Second, Contracts, sections 364 and 365).

15 CSR 60-8.020 (emphasis added).

As is clear from the above, Missouri law differs from the way the *Oshana* court interpreted Illinois law. Significantly, the *Oshana* case stated that in Illinois, "[t]he Consumer Fraud Act provides: Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, **with intent that**

others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act." *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 584 (N.D. Ill. 2005).

Further, the *Oshana* court held that "each individual must provide evidence of his or her knowledge of the deceptive acts and purported misstatements. (citation omitted). This showing requires an individual analysis of the extent to which Coca-Cola's marketing played a role in each class member's decision to purchase fountain diet Coke. Without determining what each member heard, saw, or knew, it is impossible to assign liability." *Id* at 586. There is no requirement in Missouri that anyone have any knowledge of deceptive acts or that they played a role in a decision to purchase. In Missouri, under the MPA, the focus is on the defendant's action, not the thoughts of a consumer. Everything about the opinion in *Oshana* points out the differences between what the court required in that case and what the law is in Missouri. Those differences make it clear that Missouri law is different, and Respondent's statement in the certification order is accurate, as *Oshana* is inapplicable in Missouri.

C. Relator Failed to Request Findings of Fact or Conclusions of Law From Respondent.

As an additional effort to support its allegation that Respondent did no analysis, Relator offers the "proof" that there are no findings of fact or conclusions of law. Relator advanced this argument to the Court of Appeals, as well as this Court, despite full knowledge of the law that says no findings or conclusions are required unless requested. *Dale,* 204 S.W.3d at 163. Relator never requested such, and should not now complain when there are none. It is inexcusable that Relator would now disparage Respondent for Relator's own negligence.

Relator also touts the Kansas court's denial of class certification. Interestingly, Relator does not provide this Court with the order from the Kansas Court. (*See* A044.) The Kansas Court made no findings of any kind, made no statements, failed to provide even minimal information as to what it found did not satisfy Kansas law, and instead issued a one sentence order that the motion was denied.[8] The detailed order of Respondent setting out each element required for class certification and a finding as to whether or not it was met is not sufficient for Relator in Missouri, but a one sentence order that gave it what it wanted in Kansas was. Apparently, the need for detailed information only applies when Relator loses. It would seem that if findings of fact and conclusions of law were as vital as

[8] Relator continues to quote the commentary of the Kansas court and quotes the musings of the court while ignoring the actual order. A review of the actual order shows no findings and nothing to indicate the reason the court denied certification; the musings of the court do not constitute an order.

Relator now argues, that it would have (a) requested them, and (b) at least put them in its proposed order. Clearly, it was not an issue until the class was certified, and Relator should not now be allowed to complain about the absence of such findings. *See, e.g., Johnson v. Moore*, 931 S.W.2d 191, 195 (Mo. App. 1996) (holding that a party cannot complain on appeal of any alleged error in which, by his or her own conduct at trial, he or she joined in or acquiesced to).

D. Respondent did not Abuse his Discretion in Granting Class Certification.

Relator alleges that because Respondent utilized a draft order prepared by Plaintiff, that is evidence of a lack of analysis, and cites the *Massman* case in support, stating "contrary to this Courts admonition in *Massman*." (Relator Br. at 37.) In *Massman*, this Court expressed some caution, in that "[a]dvocates are prone to excesses of rhetoric and lengthy recitals of evidence favorable to their side but which ignore proper evidence or inferences from evidence favorable to the other party." *Massman Constr. Co. v. Missouri Highway & Transp. Comm'n*, 914 S.W.2d 801, 804 (Mo., *en banc* 1996). A review of the order in this case, however, shows no excess of rhetoric or lengthy recitals of evidence favorable to any side.

The standard of review for class certification is for an abuse of discretion. "A court abuses its discretion only if its ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. It cannot be said that the trial court abused its discretion where reasonable persons

could differ with the propriety of its ruling." *Dale*, 204 S.W.3d at 164. Respondent's order indicates a great degree of careful consideration. Because the focus of the MPA is on the defendant's actions, not the plaintiff's, the issue of whether the omission of the presence of saccharin is a material fact under the MPA is clearly the predominant issue, as it is applicable to the entire class.

Relator also complains that Respondent's order does not "offer even a cursory explanation as to how the plaintiff satisfied her burden of establishing that the class was ascertainable and that common issues predominate." (Relator Br. at 37.) While the order does not set out the thought process of the Court, it clearly provides sufficient information regarding those issues.

> The 'predominance' requirement . . . does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues. The predominant issue need not be dispositive of the controversy or even be determinative of the liability issues involved. The need for inquiry as to individual damages does not preclude a finding of predominance. A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.

State ex rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 488 (Mo. 2003) (internal citations omitted). Respondent's order states that the predominant common issue is whether the omission by Relator is a material fact under the MPA.

There could not be a more common issue, for if Relator prevails on this issue, the case is over.

As for ascertainability, the class definition only needs to be objective. "A sufficiently definite class exists to justify class certification, if its members can be ascertained by reference to objective criteria." *Dale*, 204 S.W.3d at 178. In this case, the class definition is anyone who purchased fountain diet Coke; such a definition is objective. In fact, it is nearly identical to the definition in *Craft v. Philip Morris Cos.*, 190 S.W.3d 368 (Mo. App. 2005), where the class definition included anyone who purchased light cigarettes. The definition was also reviewed by Judge Smith, the author of the *Dale* opinion, and found to be sufficiently objective.

Based on the foregoing, Respondent did not abuse his discretion and issued his order only after a rigorous analysis.

IV. RELATOR'S REPEATED FILINGS TO BOTH THE MISSOURI SUPREME COURT AND COURT OF APPEALS HAVE WASTED VALUABLE TIME, RESOURCES, AND EXPENSES

Relator alludes to the avoidance of "further unnecessary and expensive litigation," but has nevertheless forced Respondent to spend countless hours filing brief after brief in opposition to its repeatedly denied attempts at getting the trial court's well-reasoned class certification order reversed. (Relator Br. at 42, 43.) Moreover, Relator would have the Court believe that should this case ultimately

go to trial, any resulting verdict would effectively cripple its ability to remain a financially viable company, characterizing the decision to go to trial as "an all-or-nothing" prospect. (Relator Br. at 41.) To suggest that this case could have such an effect on a multi-billion dollar corporation is beyond absurd. Relator's approach to date in defending this case has focused on prejudicially delaying the inevitable, and it is now time for such undue delay to come to an end so that this case can proceed on the merits.

If Relator is "convinced that it has done nothing wrong," and that its "probability of ultimately prevailing is high," then Relator has no cause for concern. (Relator Br. at 41.) Relator should simply withdraw its current petition to the Court, which would finally allow this case to proceed towards a resolution. If the assertions made by Relator are accurate, it should have no apprehensions about putting the "facts" in front of a jury of Missouri citizens to let them determine if it has violated the MPA. In fact, any trial in this case likely would have already concluded by now, had Relator not been relentlessly petitioning this Court and the court of appeals for a reversal of the class certification order over the past two years. And despite Relator's position that it has "done nothing wrong," its entire argument on this point is that the Court should reverse the class certification order *because* Relator will otherwise be forced to settle this case, which it says it is highly likely to win. Such inconsistent rationales, though, reveal the sheer weakness in Relator's argument. Relator's real concern in this case is with the public discovering the truth about its fountain diet Coke products, in that

they contain saccharin.

Relator's remarks that Plaintiff and Plaintiff's counsel, not to mention the millions of Missouri consumers that Relator has been misleading all these years, are attempting to "blackmail" it into a settlement are disturbing, to say the least. (Relator Br. at 40.) Relator's reprehensible conduct towards Plaintiff and Missouri consumers is the issue here, and Relator's attempts at passing the blame for its conduct to them echoes its desperation at this stage of the litigation. Relator knows that many consumers would object to consuming a chemical that until recently was a listed carcinogen and that some scientists still consider such. Saccharine is also a well known allergen that can trigger migraines and other reactions. Missouri citizens deserve to know that the fountain diet Coke is not the same as canned and they deserve to know what chemicals they are ingesting.

Relator apparently is taking issue with the entire judicial process. When a party inflicts harm on another, the process is in place for a remedy to be reached and accusing those who seek a remedy for being wronged as "blackmailers" indicates the true agenda of Relator. Relator does not want to allow "regular" people to hold it accountable for its actions. The true burden here lies in Relator's numerous attempts at stifling the rights of Missouri consumers through its repeated filings concerning the trial court's well-founded class certification order, an order which has been repeatedly upheld as appropriate.

Moreover, Relator's argument on this point involves more of the same, misleading use of case law that it has consistently set forth to the Missouri courts.

For example, Relator cites *In re Bridgestone/Firestone,* 288 F.3d 1012 (7th Cir. 2002), for the argument against overcompensation of class members. Yet the case actually dealt with the certification of *nationwide* class actions, dealt with complex choice of law rules, and involved multiple products that only selectively failed based on a multitude of reasons. *Id.* at 1015–18. Relator also ignores the fact that the issue of compensating Class members can be addressed after the merits of the case have been decided, not to mention the option of obtaining a fluid recovery, whereby proof of damages could be handled through an administrative process or *cy pres* distribution. *See Buchholz Mortuaries Inc. v. Dir. of Rev.*, 113 S.W.3d 192, 196 n.1 (Mo., en banc 2003) (Wolff, J. concurring). Similarly, in *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996), also relied on by Relator, at issue was the sheer high stakes of a mass tort class action involving cigarette smokers. This case, on the other hand, is a far cry from a mass tort class action and, thus, such concerns do not exist in this context.

In Missouri, "Rule 84.22 prohibits this court from issuing a writ of prohibition where an appeal will afford adequate relief." *State ex rel., Garden View Care Center v. Missouri Health Facilities Review Comm.*, 926 S.W.2d 90 (Mo. App. 1996). As Rule 84.22(a) states, "[n]o original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court." The certification of a class, which is reviewed for abuse of discretion, is clearly not an irreparable harm or a question of significance that is not subject to judicial review. In this case, the

trial court, after the close of discovery (and merits discovery has not even begun) can modify the class or even decertify it if the record and evidence requires it. Everything about this case can be reviewed by the appellate courts of this state, including this Court, during the normal appellate process. Any action now, by this Court, allows Relator to bypass the appellate process that binds every other party in this state and will, for all practical purpose, void the current statutes, rules and case law regarding appellate review of class certification and other decisions. Relator is soliciting special and unequal treatment. The law abhors such privilege and lack of fairness.

The procedural safeguards afforded by statute and Mo. Sup. Ct. R. 52.08(f), which provide for interlocutory review by the Court of Appeals of class certification rulings, were put in place to the alleviate risks of unnecessary burden, expense, or inconvenience that Relator raises. Of course, those issues are directed at something more serious than being unhappy about a court ruling that can be reviewed at the end of the case. (Relator Br. at 40.) Relator simply disagrees with the trial court's class certification order and the Court of Appeals' rejection of its petitions for interlocutory review. The proper course of action at this point is to allow this case to proceed on the merits, as Relator's attempts at burdening Respondent with its relentless efforts towards wasting the time, resources, and expenses of both Respondent and the Missouri state court system have gone on long enough. The interlocutory review process pursuant to Rule 52.08 has afforded more than adequate relief to Relator. The path to truth for consumers

should be burdened no more.

V. THE AMICUS BRIEF'S OVERREACHING, GENERALIZED APPROACH TO THIS LITIGATION UNDERSCORES ITS BIASED AND UNFOUNDED RECOMMENDATIONS TO THE COURT

The amicus brief of the Product Liability Advisory Council, Inc. ("Amicus"), which is an "association with 123 corporate members . . . representing . . . American and international product manufacturers," is based on a series of incorrect statements to the Court, which are not born out by the full and complete record of this case, and is, at best, fully contrived and agenda driven. (Amicus Br. at 5.) This fact is quickly made clear by its patent misstatement of law contained in footnote 5 of its brief. (Amicus Br. at 23 n.5.) In *Craft*, the court did not "disregard additional elements the defendant argued that the plaintiff class would also be required to prove—actual reliance and deception—simply because plaintiff had not pleaded them," as the Amicus notes. *Id.* Rather, the *Craft* court held that the issue of reliance and deception was "not properly part of this class action certification analysis . . . [and] is an issue that should be resolved in the context of a motion to dismiss, a motion for summary judgment, or at trial." *Craft v. Phillip Morris Cos.*, 190 S.W.3d 368, 384 (Mo. App. E.D. 2005). The same holds true in this case.

With its agenda-based approach and its focus on mere generalities, it attempts to substitute its private agenda for the long established precedent in this

state, the judgment of the legislature as represented in the MPA, and, most importantly, in this context, the position and judgment of this Court and the other courts of the state. This is most readily evidenced by the Amicus's recitation of the numerous cases in which the Missouri Court of Appeals has affirmed orders granting class certification. (Amicus Br. at 12–13) (citing *Hale v. Wal-Mart Stores, Inc.*, No. WD 66162, 2007 WL 1672261 (Mo. App. W.D. June 12, 2007); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. W.D. 2006); *Doyle v. Fluor Corp.*, 199 S.W.3d 784 (Mo. App. E.D. 2006); *Craft v. Phillip Morris Cos.*, 190 S.W.3d 368 (Mo. App. E.D. 2005)).

Contrary to its assertions, this multitude of affirmed class certification orders *is* the point. Where the Amicus argues that there is a need for "further, more explicit direction from this Court," what the Amicus is really saying is that this Court should alter the well-established law of this state, so as to favor the positions of its members. (Amicus Br. at 23.) This alone demonstrates the Amicus's obvious dissatisfaction with the current state of the law, much like Relator's. However, as is the case with Relator, the Amicus cannot ignore Missouri law, which, as noted above, compels that the class certification order in this case be upheld.

Furthermore, there is no indication that the trial court failed to conduct a rigorous analysis, as the Amicus similarly attempts to argue. (Amicus Br. at 14–15.) In fact, the opposite is quite true, as illustrated above, in that the trial court conducted a fair, balanced analysis of both parties' positions and the law, before

arriving at its decision to grant Plaintiff's motion for class certification. Surely, had the trial court denied Plaintiff's motion in favor of Relator, and had the trial court simply adopted Relator's proposed certification order, there would certainly be no Amicus before this Court urging it to conduct a more rigorous analysis.

The Amicus brief is no different than the desperate filings of Relator, as they both seek one thing—no class actions and a powerless consumer fraud statute, so that citizens of this state and others are deprived of extant lawful protections against overreaching and unlawful conduct.

CONCLUSION

Because Relator's request is contrary to established Missouri law and for the reasons set forth above, Respondent respectfully requests that this Court vacate the preliminary writ of prohibition and direct that this case proceed under the rules and procedures of the trial court.

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Attorney for Respondent

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed via U.S. postage prepaid mail on September 14, 2007, addressed to:

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The Honorable W. Stephen Nixon
Circuit Judge, Division 5
Jackson County Courthouse
308 W. Kansas
Independence Missouri 64050

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Attorney for Respondent