Case No. SC92770

IN THE SUPREME COURT OF MISSOURI

VOLKSWAGEN GROUP OF AMERICA, INC.
Appellant,

v.

DARREN BERRY et al.,
Respondents.

APPELLANT'S SUBSTITUTE REPLY BRIEF

Appeal from the Circuit Court of Jackson County, Missouri, at Independence
Honorable Michael W. Manners
Division 2
Circuit Court Case No. 0516-CV01171-01
Court of Appeals, Western District Case No. 73974

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REPLY TO RESPONDENTS' "SUMMARY OF ARGUMENT"

AND "STATEMENT OF FACTS"

This appeal ultimately turns on whether the judicial system can tolerate what took place below in this case regarding the award of attorney's fees. First, all members of the settlement class were clearly advised that only those who experienced certain repairs or failures could claim a payment or benefit and, conversely, those who did not make claims would receive nothing. The same court that issued this mailed notice then compensated plaintiffs' attorneys based on a finding that those who it had told would get nothing were the collective recipients of a "benefit conferred" of $23,000,000. (Resp. Br. 9, 40, 44, 48-52, 70, 82, 88) Not a penny of this "benefit" has been or will ever be paid to those on whom it was found to have been "conferred," but the finding served to rationalize an attorney fee award nearly 25 times the recovery its recipients had secured for their clients. Nothing in any decided case in any jurisdiction comes close to supporting such a result, and it would be hard to imagine a scenario more clearly "so arbitrary and unreasonable as to shock one's sense of justice". Yet that is exactly what affirming either of the outcomes below would promulgate to the bench, bar and, most crucially, the public, as the law of this state. The facts that paint this picture are not in dispute.

The Circuit Court ordered first class mail Notice (Def. Exh. 130) to every identifiable member of the more than 22,000 members of the settlement class in

this case. That Notice, in terms approved by the court as full and accurate and issued in its name, sets forth all benefits conferred by the settlement in plain language. The Notice says that the right "to claim a settlement payment and/or benefit" will be conferred only on persons who actually "experienced a Volkswagen window regulator mechanism failure which was not caused by accident, flood, fire, ..." and who timely file a claim for a reimbursement payment or repair benefit.

The first such disclosure appears on the first page of the Notice, in bold face and 18.5 font size:

If you experienced a Volkswagen window regulator mechanism failure which was not caused by accident, collision, fire, flood or other outside influence, you may be entitled to claim a settlement payment and/or benefit.

Section 7 of the Notice, under the headings **"Settlement Benefits – What You Get"** and the subheading **"What do I get?"** – details the preconditions for a valid claim:

> **Owners/Lessors Who Repaired or Replaced a Factory Installed or Genuine Volkswagen Replacement Part Window Regulator That Failed Within 10 Years of the Date the Vehicle First Went Into Service**
>
> Volkswagen has agreed to pay full reimbursement for any money spent to repair/replace failed original or genuine

Volkswagen replacement window regulators on a Settlement Class vehicle, plus $75 for each documented incident or workshop visit in which one or more window regulator failures were diagnosed, repaired or replaced.

Owners/Lessors Who Experienced a Factory Installed or Genuine Volkswagen Replacement Part Window Regulator That Failed Within 10 Years of the Date the Vehicle First Went Into Service But Have Not To Date Repaired or Replaced the Window Regulator

Volkswagen has agreed to provide free repair or replacement of one or more original or genuine Volkswagen replacement window regulators on a Settlement Class vehicle which failed within 10 years of the date the vehicle first went into service at any authorized Volkswagen dealer within 90 days of the date on which notice of settlement is mailed plus a one-time payment of $75. (*Id.*)

Section 10 of the Notice, under the heading "**What happens if I don't return the claim form or documentation by the postmarked date**?", makes equally clear that these settlement benefits are not available to non-claimants:

If you do not submit a valid claim form or the requested documents by October 11, 2010, then <u>you will not receive any payment</u>. If you do nothing at all (you do not submit a claim form or documentation and you do not exclude

yourself), you will not receive any payment and you will not be able to sue Volkswagen over these claims. (*Id.*)(Emphasis in original)

Thus, apart from this offer to those who actually experienced the problem in suit, which Plaintiffs term "more than complete relief" (Resp. Br. 38), the settlement notice, in accord with the settlement agreement itself (Def. Exh. 117), offers no relief or benefit to other members of the settlement class.

Plaintiffs' claim (Resp. Br. 19) that the settlement in this case "required a substantial change in Volkswagen's business practices," and was "the equivalent of an injunction," is false. There is not a word providing such relief or delineating any such "Settlement Benefit" in the settlement agreement, or the Class Notice. This was a "money only" settlement, offering only cash payment (or no-cost repair benefits) to class members who experienced window failures. The settlement orders nothing other than the payment of these claims and the provision of these repairs (through payments by VWGoA to repairing dealers). The agreement requires no change in company sales, advertising or other business practices, no re-design of window regulators, and no injunctive relief of any kind. (App.Br. 5-7)

As the record establishes, the parties held and expressed radically different views of the size of the population which had experienced failures qualifying for cash payments or repair benefits. Plaintiffs viewed the warranty data and parts sales over time as evidence of that the parts were "Universally Defective" (Resp. Br. 59), a position they seek to maintain despite the dismissal with prejudice of all

claims in this case , while Volkswagen foresaw a maximum settlement exposure not even double what it has paid. (App. Br. 14)

Class Counsel, keenly aware of these facts, cling to the defect claims which are now dismissed with prejudice and seek refuge in semantics. Thus, they seize on the parties' agreement that "class counsel could not have achieved a better result for any class member at trial" (Resp. Br. 45), a concept which pervades their brief from beginning to end. (*Id*. 1, 44, 45, 54, 91) This, however, cannot escape the fact that "for any class member" other than the 130 claimants who actually experienced a window regulator failure or repair and timely sought reimbursement, "the opportunity to claim their entire out-of-pocket damages plus an additional $75 per trip to the repair shop" (*Id.* 36), though more than adequate consideration to support an release of claims, as disclosed in the notice, actually "conferred a benefit" of $0 – again as disclosed in the notice.

There is no question that VWGoA conferred a benefit of $125,261 on the 130 persons to whom it paid that amount. Because there was no judgment fund in this case, this settlement exposure had neither a ceiling nor a floor. However, the notion that VWGoA also "conferred" $23,000,000 of "benefit" on 22,000 non-claiming class members without paying any of them a dime collapses of its own weight. Neither the Court of Appeals' award of 24.6 times the classes actual recovery, nor *a fortiori* the Circuit Court's doubling of that amount, can survive once the $23,000,000 in phantom settlement "benefits conferred" on which both rest has been discarded.

The second pillar of Respondents' position, the insistence that they "established liability" or proved a "defect" in this case (Resp. Br. 38, 60), is both factually inaccurate, and barred as a matter of law. The Settlement Agreement (now incorporated in a final judgment) acknowledges that "Defendant denies all of the material factual allegations and legal claims asserted by the Representative Plaintiffs in the Litigation, including any and all charges of wrongdoing or liability arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Litigation and maintains that these claims have no factual or legal merit." (Def.Exh. #117, ¶ 2.1) There was never any finding in this case of defect, nor could there have been, as this was a matter exclusively for the jury, had the case been tried.

To deflect attention from the facts in this case, Plaintiffs devote the lion's share of their "Statement of Facts" (Resp. Br. 5-20) to a self-serving, one-sided version of the "history" of this litigation. However, their stated rationale for this exercise (p. 5) - that this Court must revisit these matters "to understand the results achieved for the Class and the amount of time and expense incurred by class counsel to achieve these results" - makes no sense. The "results achieved for the Class" are known to the penny, and the Circuit Court's findings as to "the amount of time and expense incurred by Class Counsel," or the raw lodestar dollar value assigned by the Circuit Court to those billed hours, have not been appealed. (App. Br. 14-15) What is at issue on appeal is whether counsel's unchallenged and unappealed "raw

lodestar," even without the 2.0 "multiplier" applied below, is properly recoverable under governing Missouri law, the U.S. Constitution and the facts of this case; as well as the Circuit Court's abuse of discretion by applying a multiplier, which the Court of Appeals properly reversed.

Aside from their legal irrelevance, Plaintiffs' accusations are not even before this Court on appeal. Plaintiffs asked the Circuit Court to enter specific findings of fact concerning VWGoA's alleged improprieties in its fee order, after having devoted a major effort to this subject at the fee hearing. The trial court, however, had first hand knowledge of both sides' conduct the case, and refused Class Counsel's request, finding instead only that "the vigorous defense mounted by Volkswagen was matched by a vigorous prosecution by plaintiffs' counsel." (LF XXXVII 6809.) Plaintiffs did not appeal this finding. The Court of Appeals gave short shrift to this gambit, noting "there is no finding that this was either an exceptional or unanticipated delay." (Op. at 10)

In fact, Plaintiffs invited a "vigorous defense" when they commenced this action in 2005, despite information voluntarily shared by Defendant in 2003 demonstrating why the company never saw either a defect or a cause for concern with the field performance of the subject window regulators. Defendant's view now stands vindicated by the small number of class members who in fact experienced window regulator failure, as shown by the minimal response to the fair reimbursement offer extended in the Settlement.

There is no authority or policy support for the proposition that a defendant must act as a litigation "doormat", when confronted with expansive nationwide class allegations, seeking punitive damages and injunctive relief, which it views as baseless. Indeed, in this case, Defendant prevailed on the law as to the attempted nationwide class, and now stands vindicated as a matter of fact based on the negligible claims response. VWGoA cannot be faulted for exercising its constitutional right to mount a "vigorous defense" to these claims.

In commencing this lawsuit, Class Counsel misjudged the prospects under Missouri law of certifying their proposed nationwide class governed by Michigan law. When nationwide certification was denied below, they accepted the loss of nearly all of their case without challenge. Class Counsel also wrongly assessed the facts. Defendant's data furnished to Class Counsel before the commencement of this litigation clearly demonstrated the de *minimis* nature of any genuine field problem, a fact now confirmed beyond doubt by the class itself. In fact, as this litigation was progressing, VWGoA was selling only one of each of the four regulators installed on each vehicle every other week for each Missouri dealer (Tr. 644-649) – a usage rate barely sufficient to replace crash-damaged parts. Though defendant was under no obligation to do so, Class Counsel were forewarned of the value of their case. Based on these figures, VWGoA estimated its maximum total reimbursement exposure at no more than $230,000, and shared its estimate with plaintiffs, based on data known to both sides. (Def. Exh. #112, at p. 3.)

Moreover, the records of nationwide parts sales of front window regulators (passenger and driver's side) provided to Class Counsel in April 2003 nearly two years before this litigation commenced (53,367 left and right front regulators over four years) (LF II 337-41) are fully consistent with the larger numbers reflecting additional seven years of 2003 - 2010 sales of both front and rear parts, which became available over time. (210,000 regulators, left, right, front and rear over seven years.) Thus, Plaintiffs' claim (Resp. Br. 10) that they were told in 2003 that "only 53,000 replacement parts had been sold" and learned seven years later from "previously-hidden" parts data that 210,000 regulators had been sold as of 2010, lends no support whatsoever to their claim. Indeed, it confirms that nothing was or could have been "hidden," as the data for the next seven years did not exist when VWGoA revealed what it knew as of 2003.[1] Ultimately, these facts exemplify the analytical errors which led Class Counsel to grossly overestimate the value of this case.

[1] Class Counsel's calculation of a "50% failure rate" from these sales (Resp. Brief 60) in a nationwide fleet of 500,000 vehicles over well beyond a decade of service is flawed. Since each vehicle has four windows, Counsel's gross "rate" is off by 400% to begin with; and it also ignores parts replaced due to external causes, which are expressly excluded from this settlement.

The 22,000 members of the class tendered only 130 claims worth a total of $125,261 for a failure which is memorable, uncomfortable, and costly. This confirms that when Class Counsel decided to file this case in 2005, there was drastically less substance to their claims than they had hoped. Class Counsel misjudged this case both legally and factually.

The proper resolution of this case requires no reexamination, refinement or extension of Missouri law, under which the most critical factor has always been the "result obtained" – which in this money-only claims-made settlement is the amount recovered, no more and no less. Because class counsel's raw lodestar amount significantly exceeds $125,261, this issue could and should have been resolved under *O'Brien,* without three days of hearings and the ensuing appellate dispute spawned by Class Counsel's exorbitant fee request. A clear affirmance of existing law is all that is needed from this Court to prevent future wastes of private and judicial resources such as have occurred in this case over the past two and a half years.

ARGUMENT

I. The award below of $6,174,000 (reduced to $3,087,000 by the Court of Appeals) for recovering $125,621 runs afoul of virtually every fundamental policy delineated by the United States Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), most importantly that "the

most critical factor is the degree of success obtained", which is the law in Missouri, and serves no applicable MMPA policy or purpose.

Class Counsel's plea to this Court to ignore U.S. Supreme Court precedent in ruling on attorney fees is not one which this Court or others in this state have heeded. Indeed, the Missouri courts have consistently cited and relied on *Hensley v. Eckerhart*, *supra*, which has effectively been incorporated into the law of this state as the wellspring of attorney fee jurisprudence, with particular emphasis on its unequivocal teaching that "**the most critical factor is the degree of success obtained.**" 461 U.S. at 436. (Emphasis added) See, e.g., *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989); *Trout v. State,* 269 S.W.3d 484, 488 (Mo. Ct. App. 2008). *Knopke v. Knopke,* 837 S.W.2d 907, 922-23 (Mo. Ct. App. 1992). *Hensley* and its federal and Missouri progeny delineate a set of fundamental doctrines and policies which pervade all fee jurisprudence down to the Court's decision in *Perdue v. Kenny A,* - U.S. -, 130 S.Ct. 1662 (2010). Both decisions below contravene these doctrines and disserve these policies.

At the most basic level, *Hensley* makes clear that the amount of a reasonable attorney fee does not depend on who is signing the check. "Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." 461 U.S. at 434 (emphasis in original). Class Counsel themselves characterize their attorney fees as amounts litigants "otherwise would pay out-of-pocket." (Resp. Br. 92) However, Class Counsel do not, for they

cannot, offer any rationale on which they could demand that the settlement class, individually or collectively, pay "out-of-pocket" $6,174,000 in fees (an average of $280.64 per class member) for recovering $125,621 (an average of $5.71 per class member). See, e.g., *Clymore v. Far-Mar-Co, Inc.*, 576 F. Supp. 1161, 1165 (W.D. Mo. 1983)("this court finds it inconceivable that anyone would pay an attorney approximately $17,000 to defend a judgment of $12,187.78 on appeal.) Under *Hensley*, they cannot submit this bill, even as cut in half by the Court of Appeals, to VWGoA any more than they could ethically tender it to the class for which they recovered $125,261.

The Court of Appeals' lodestar award alone is 24.5 times the final total class recovery. Awarding a "multiplier" on top of that cannot be justified under any doctrine or policy ever put forth by a court in an attorney fee case. To the contrary, as Class Counsel concede, under Missouri law, the lodestar "**Can . . . Be Adjusted Upward or Downward**." (Resp. Br. 22, Point heading II.B)(bold type in original) In refusing the major downward adjustment of the lodestar mandated on the record in this case, the courts below ignored a central tenet of *Hensley* and its progeny – that "the most critical factor is the degree of success obtained." 461 U.S. at 436.

Another guiding tenet of *Hensley* is that "[a] request for attorney's fees should not result in a second major litigation." 461 U.S. at 438; *Dishman v. Joseph*, 14 S.W.3d 709, 718 (Mo. Ct. App. 2000) (quoting *Hensley*). Yet, below, with the actual total class recovery – i.e. the "result obtained" – known to the penny, three days of court

time were dedicated to proving unchallenged hours and rates, in an attempt to convert a lodestar inquiry into a back door sanctions proceeding, highlighted by counsel's speculation from the stand as what an absent expert might have said if he had actually appeared. This was unnecessary and unwarranted.

Class Counsel's would-be nationwide class members outside Missouri, as well as the overwhelming majority of the remaining Missouri class who filed no claim for reimbursement, recovered $0. As to the Missouri class that was certified (1.5% of the nationwide class sought), the settlement affects neither VWGoA's marketing practices nor the design of the subject window regulators, which are identical to those installed when the vehicles were first marketed 18 model years ago. The relief obtained, for one tiny fraction of another tiny fraction of the class sought, is no different from that in a garden variety warranty claim. The MMPA policy of encouraging "private attorney general"-like litigation under a "Merchandising Practices" statute has no application here. Moreover, Class Counsel's repeatedly trumpeted statement that this settlement achieved all they likely could have hoped for at trial (Resp. Br. 19), makes it clear that Class Counsel themselves had substantially lowered their sights during the course of this litigation from the nationwide Michigan law class, punitive damages and injunctive relief sought in their Petition.

II. Plaintiffs concede, as they must, that under Missouri law, the lodestar is subject to downward adjustment in appropriate cases, because the

Missouri courts, following *Hensley v. Eckerhart,* have endorsed the principle that where a plaintiff has achieved only partial or limited success, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount", even if the claims were "interrelated, non-frivolous, and raised in good faith".

Plaintiffs' concession that appropriate cases may call for a downward adjustment from the lodestar (Resp. Br. 22) is in accord with Missouri case law. In *Williams v. Trans States Airlines, Inc.,* 281 S.W.3d 854, 878-80 (Mo. App. 2009), the Court of Appeals, quoting *Hensley,* 461 U.S. at 436, observed that: "The United States Supreme Court has noted that where a plaintiff has achieved only partial or limited success, 'the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount'. The Court of Appeals further noted that this is true even where the plaintiff's claims were 'interrelated, nonfrivolous, and raised in good faith'." [Internal citations omitted.] Although the Court of Appeals found that fees had been improperly reduced by the trial court on plaintiff's successful retaliation claim, it affirmed the denial of fees for her unsuccessful claims. 281 S.W. 3d at 879-80. It would be difficult to conceive of a case more deserving of such an adjustment than this one.

Here, as in *Williams* and *Hensley,* plaintiffs' attempt to certify a nationwide class of Volkswagen vehicle owners under Michigan breach-of-warranty law was entirely

distinct from the certified Missouri-only MMPA claim, not merely an "alternate theory" for a claim that later succeeded. Rather, the claim involved a different statute, from a different state, a different legal theory, and on behalf of a class more than 50 times the size of the one ultimately certified. Missouri courts have recognized that MMPA claims are separate and distinct from warranty claims: MMPA claims are tort claims, while warranty claims are contract claims. The claims involve different elements of proof, and different remedies. *Hope v. Nissan North America, Inc.,* 353 S.W.3d 68, 81-92 (Mo.App. W.D. 2011). Thus, contrary to Plaintiffs' assertion (Resp. Br. 68), here the proof was not the same for the MMPA claims, upon which there was a recovery, and the warranty claims under Michigan law, which failed. The "effort" was not the same for the two claims, where the nationwide warranty class was over 50 times the size of the MMPA class. And the relief obtained for the non-Missourians who comprised 98% of the proposed class not only was not "complete"; it was zero. This is not a case in which Plaintiffs obtained relief for the entire class they sought to represent on a tort claim, lost on an alternative warranty theory, but effectively obtained a recovery for all class members. On the contrary, the result here was that the largest portion of the case was lost. With the intervening running of all statutes of limitation, that total loss was effectively on the merits. As a result, over 98% of the nationwide class as to which plaintiffs commenced suit is now time-barred. Accordingly, *Gilliland v. Missouri Athletic Club,* 273 S.W.3d 516, 523-24 (Mo. banc 2009) plainly does not

dictate that counsel's lodestar fee should remain intact, in spite of the total failure of plaintiffs' nationwide claims.

The Circuit Court therefore erred in refusing to reduce plaintiffs' lodestar fees in this case, to reflect Plaintiffs' lack of success on the far larger of their two claims. As the Supreme Court taught in *Hensley*,

> "We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. **A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.**" 461 U.S. at 439-40. (Emphasis added)

Here, Class Counsel's litigation "as a whole" failed to secure compensatory and punitive damages and injunctive relief – indeed any relief whatever – except for owners of some 130 out of 500,000 vehicles. Under *Hensley*, its federal progeny and the unbroken line of Missouri cases adopting their guiding doctrine, significant reduction in the fee award is mandatory for relief so "limited in comparison to the scope of the litigation as a whole." *Id.*

III. The Missouri Courts, like state courts throughout the nation, consistently look to United States Supreme Court precedent on fee awards under fee-shifting statutes, particularly as to the "most critical factor" of the "amount recovered."

Plaintiffs' argument in favor of sustaining a fee award that dwarfs the recovery obtained for class members is largely founded on the straw-man proposition that

Volkswagen seeks a "per se" rule that class counsel's efforts should be measured "…exclusively by the number of class members who exercised their rights under the settlement agreement to full relief and filed claims . . ." (Resp. Br. 2) Volkswagen seeks no such rule. Rather, it asserts that the bedrock doctrines articulated by the U.S. Supreme Court in *Hensley v. Eckerhart*– chief among them, that "**the most critical factor is the degree of success obtained,**" 461 U.S. at 436 (emphasis added) – are also the law in Missouri, and must be applied here. See, e.g., *Trout v. State,* 269 S.W.3d 484, 488 (Mo. Ct. App. 2008). Unfortunately, the Circuit Court disregarded this doctrine and looked instead to a non-existent "potential" recovery, though there was in fact no "potential" recovery beyond the $150,000 maximum the Circuit Court itself found. This contravened the well-established rule that the "**amount recovered**" (emphasis added) must be taken into account in awarding fees, *O'Brien v. B.L.C. Ins. Co.*, *supra*; *Knopke v. Knopke, supra*. Further, even fees which exceed the recovery must "bear some relation" to the amount recovered. Moreover, the Merchandising Practices Act itself states that in cases where the Missouri rule on class actions (Rule 52.08) and Federal Rule of Civil Procedure 23 conflict, the latter takes precedence. R.S.Mo. § 407.025.3; *Dale v. DaimlerChrysler,* 204 S.W.3d 151, 161 (Mo. Ct. App. 2006).

Class Counsel appears to be of the view that were it not for the Court of Appeals' favorable citation of *Perdue v. Kenny A, supra,* there would be no basis for the Court to disallow the fee multiplier applied by the Circuit Court. But as the Court of

Appeals' decision made clear, with or without *Perdue,* the multiplier applied by the Circuit Court would have been ruled improper by application of the principles articulated in *Hensley, Trout v. State,* and other cases, which hold that in determining a resonable attorney's fee, "the most critical factor is the degree of success obtained". (Op. at 11) More broadly, on every dispositive issue presented in this case, including but not limited to the Circuit Court's multiplier award, there is no decided case or doctrine in any jurisdiction which remotely approaches or supports the outcome in the lower courts. The Court of Appeals correctly applied those principles and persuasively disposed of Plaintiffs' and the Circuit Court's legally and factually unsupported "potential recovery" concepts as "largely illusory," (Op. at 11-12) But the Court of Appeals then erred by abandoning those principles, by considering the "potential recovery" as a basis for refusing the substantial downward adjustment in the lodestar which its own analysis would otherwise compel. (*Id*. at 14)

Class Counsel further argue that the Court of Appeals, both in the case at bar and in *Zweig v. Metropolitan St. Louis Sewer District,* -- S.W.3d ----, 2012 WL 1033304 (Mo.App. E.D., March 27, 2012) (transfer granted), erred in following the principles articulated by the U.S. Supreme Court in *Perdue*. But Missouri courts have for more than two decades looked to federal law for guidance on fee awards, and there is no reason for them to stop doing so now.

Class Counsel attempts to portray *Perdue* as a case that a majority of state courts have declined to follow in matters arising under state law. But that simply is not accurate.

Perdue is the latest in the line of cases developing and refining the principles first comprehensively laid down in *Hensley,* and it has been cited as persuasive authority in cases involving state law claims in Pennsylvania (*Braun v. Wal-Mart Stores,* 24 A.3d 875, 975, 976, 980 (Pa. Super. 2011)); Connecticut (*Electrical Wholesalers, Inc. v. V.P. Elec., Inc*., 33 A.3d 828, 831-32 (Conn. App. 2012)); Texas (*El Apple I Ltd. v. Olivas,* 370 S.W.3d 757, 764-65 (Texas 2012)); and Missouri (in the court below, and in *Zweig).* Class Counsel cites only one state law case decided after *Perdue* – an intermediate appellate court decision from New Mexico – that takes a different tack. (Resp. Br. 78)

Moreover, Class Counsel's contention that Missouri courts have rejected U.S. Supreme Court authority on fees is simply wrong. Through repeated and consistent citation by Missouri courts, *Hensley v. Eckerhart* has become the wellspring of this state's governing principles in fee award decisions in cases of virtually all types, e.g., *O'Brien, supra* (state odometer fraud statute); *Mihlfeld & Associates, Inc. v. Bishop & Bishop, L.L.C.,* 295 S.W.3d 163, 175 (Mo. Ct. App. 2009) (enforcement of non-competition agreement); *Williams, supra* (retaliatory discharge); *Trout v. State, supra* (constitutional challenge to campaign finance law); *Pollock v. Wetterau Food Distribution Group,* 11 S.W.3d 754, 774 (Mo. Ct. App. 1999) (Missouri Human Rights

Act); *Melahn v. Otto,* 836 S.W.2d 525, 527-28 (Mo. Ct. App. 1992) (state insurance department administrative proceeding).

These cases confirm that the basic tenets of federal cases such as *Hensley* and *Texas State Teachers' Assn. v. Garland,* 489 U.S. 782 (1989) - particularly those discussed in Point I of this brief – are equally controlling in Missouri cases involving fee-shifting statutes.

IV. *Boeing Co. v. VanGemert,* 444 U.S. 472 (1980), on which Class Counsel and the Circuit Court erroneously rely, by its terms does not apply to "claims-made" settlements such as this one. Here, there is no "judgment amount" or "fund" and the defendant's liability is entirely "contingent upon the presentation of individual claims."

Class Counsel's attempts to deflect attention from the applicable *Hensley* principles and defend the Circuit Court's erroneous reliance on *Boeing v. Van Gemert* (Resp. Br. 50-51) are unavailing. By its express terms, *Boeing* has no application to this case.

In *Boeing,* the defendant, after trial, paid a lump sum judgment into a common fund against which class members submitted claims for predetermined amounts. 444 U.S. at 475-76. The sole issue before the Supreme Court was whether the fee could be calculated from the fund as a whole, or only from the claimed portion. *Id.* at 477. On these facts, the Supreme Court held that the fee award could be calculated based on the entire fund. *Id.* at 477.

The *Boeing* Court expressly distinguished cases like the one at bar: "**Nothing in the court's order made Boeing's liability . . . contingent upon the presentation of individual claims**." 444 U.S. at 481 n.5. (emphasis added). See, e.g., *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 852 (5th Cir. 1998)(*Boeing* inapplicable where claims-made settlement "neither established nor even estimated [Defendants'] total liability") *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007), cited by Class Counsel (Resp. Br. 51), has no application here, because it, like *Boeing,* was a pure common fund case in which a single lump sum was deposited into escrow, from which both class members and their counsel were to be paid.

Since VWGoA's liability under the settlement here is wholly and exclusively "contingent upon the presentation of individual claims," *Boeing* is, by its terms, inapplicable. Even were the common fund analogy to apply, since VWGoA's liability to the class will never exceed $150,000 (LF XXXVII 6809), a true "*Boeing* fee" here would only be in the range of $50-75,000 in order to provide counsel 1/3 of the total "constructive common fund." The Circuit Court's decision, under which 98 cents of every dollar to be paid by VWGoA would be awarded to Class Counsel, errs in holding *Boeing* applicable, and does not even apply *Boeing's* arithmetic correctly. The Court of Appeals' reduction of Class Counsel's take to 96 cents of every dollar paid by VWGoA, is no less erroneous.

V. Even if, *arguendo,* a Court could properly consider "potential benefit" in determining attorney's fees, Plaintiffs have not shown that the $23,000,000 figure here is anything more than a mere phantom, totally unsupported by competent evidence.

Plaintiffs' brief fails to come to grips with the Court of Appeals' dismissal of hypothesized "potential recovery" as a factor in valuing a settlement as "largely illusory," on the basis of which it properly rejected the multiplier awarded by the Circuit Court. (Op. at 11-12) However, Plaintiffs do endorse the Court of Appeals' abandonment of that position as applied to lodestar fees, resulting in the simultaneous evaluation of the settlement at $125,261 for multiplier purposes, but $23,000,000 when bestowing a lodestar award nearly 25 times the settlement valuation. Plaintiffs make no serious effort to address this indefensible dichotomy in the Court of Appeals' approach, but instead seek to defend their improper and inadmissible evidentiary "showing" on the subject at the fee hearing.

The sole "evidentiary" basis for Plaintiffs' (and the Circuit Court's) grossly inflated $23 million valuation of the class settlement in this case is the phantom testimony of a purported expert in this case. This individual did not take the stand, and his expert opinions were never put into evidence via affidavit or any other means. He "appeared" at the hearing only through inadmissible, self-serving, second-hand hearsay comments by plaintiffs' counsel. The effort to rationalize this as admissible testimony from an attorney on the value of fees (Resp. Br. 83) must

be rejected. Class Counsel's extensive testimony as to the hours expended and rates charged to arrive at the lodestar drew no objection, and was the foundation for the Circuit Court's raw lodestar findings, which were not appealed. But the effort to smuggle another witness's opinion on the merits of the case (i.e. how many failures had actually occurred) is another matter entirely. Indeed, had Class Counsel been competent to testify as to such ultimate issues in this case, in any capacity, he would have been disqualified as counsel. See Supreme Court Rules of Professional Conduct Rule 4-3.7, which generally prohibits an attorney simultaneously serving as advocate and witness at a trial; *State Farm Mut. Ins. Co. v. DeCaigney,* 927 S.W.2d 907, 912 (Mo.App. W.D. 1996); *State v. Mason,* 862 S.W.2d 519, 521 (Mo.App. E.D. 1993). One can imagine the argument Class Counsel would make had defense counsel taken the witness stand to present their version of Mr. Lange's expert opinions. Even if there were some "potential" recovery beyond the $150,000 maximum payout found by the Circuit Court, the trial court had absolutely no basis to find this number to be $23,000,000.

In any event, the actual undisputed claims experience in this case belies this fantasy. Among over 22,000 class members, 130 had experienced failure and filed claims, averaging close to $900 per claimant. Given the testimony of representative plaintiffs that window failure was both memorable and expensive for them (App. Br. 13), it is utterly implausible even to speculate, as the phantom $23,000,000 valuation would require, first, that class members, all 22,000 of them, paid an

average of over $1,000 each to repair inoperable windows on their vehicles, but, second, that all but 150 of these 22,000 persons (99.3% of the class) either were unaware of this experience and its associated expense, or neglected to ask for their money back or claim a free repair benefit, when they could do so based solely on a sworn statement.

This case is not one in which the relief offered is a small voucher that may be credited toward future purchases or repairs, or some *de minimis* cash payout for an injury of which the victim was unaware at the time (e.g., an overcharge or "hidden fee"). Automotive cases where eligible class members may have approximately $1,000 at stake in paid repair expense are a different matter, as defense witness Lange testified from personal experience. Tr. 655-57. Indeed, Class Counsel had every reason to know this.

Plaintiffs attempt to minimize the significance of *Parkinson v. Hyundai Motor America,* 796 F.Supp.2d 1160 (C.D. Cal 2010), where the average reimbursement was $1,181, *id.* at 1171, and with that amount of relief at stake, 1,200 out of an estimated 2,900 experiencing the problem (over **41%** of eligible class members) in suit filed claims. *Id.* at 1167 n.2 and 1170. Plaintiffs correctly observe that the *Parkinson* court noted the claims rate was "high by typical class action standards". *Id.* at 1175 n.12. And indeed, it should have been. Simply put, it is readily understandable that the *Parkinson* lawsuit involved a higher than average claims rate, because anyone filing a claim stood to recover over $1,000. That is much the

same as in our case, in which the average claimant recovered approximately $900. Under the circumstances, a much higher than average percentage Volkswagen class members who experienced window failures (like the Hyundai owners in *Parkinson*) would be expected to claim approximately $1,000 that is theirs for the asking -- provided only that they actually experienced the problem in suit.

In the end, where this case may fall in terms of "response rates" in class settlement is immaterial. The "result achieved" in each case is unique to each case and, in this case, is known to the penny. Here, 130 Class members received $125,261, through the payment by VWGoA of exactly that amount. Nowhere in the Settlement Agreement or the Class Notice was anyone else offered any other "benefit." Class counsel did not recover, and Volkswagen did not "confer," a single dime of benefit to any class member except those to whom it paid money or provided repairs.

Class Counsel (e.g. Resp. Br. 59) speculates that the claims rate in this case resulted largely from "delay", which they wrongly attribute to Volkswagen. But in fact, as the Court of Appeals found, "although the litigation lasted approximately five years, there is no finding that this was either an exceptional or unanticipated delay." (Op. at 10) In any event, regardless of how various settlement efforts may have fared from time to time (a subject on which VWGoA has its own views, which are no more in point here than Plaintiffs'), there is no evidence, and not even the possibility of plausible speculation, under which the passage of time from 2007 to 2010 could

reduce the claims on a vehicle population first sold between 1994 and 1999 by 99.3%, i.e. from $23,000,000 to $125,261.

Class Counsel's argument, in sum, boils down to this: when a small number of people recover a small amount of money, Counsel may nevertheless claim to have achieved an outstanding result and be entitled to huge fees, even though they failed to achieve anything for 98.5% of the class for which they brought suit. This is contrary to the Missouri courts' mandate that a fee award "bear some relation to the damage award", that the "degree of success…i.e., the amount recovered [be] taken into account in the amount of attorneys' fees awarded." *O'Brien, supra; Knopke v. Knopke,* 837 S.W.2d at 922-23. As Class Counsel correctly concede, the needed adjustment to provide "some relation" between fees and amount recovered can be downward. (Resp. Br. 22) In this case, the lodestar not only can be but must be substantially adjusted downward.

VI. Constitutional rights are typically articulated and defined by the courts in cases without prior direct precedent. The fact that no court decision anywhere has ever entered a fee award remotely comparable to that below is not a barrier, but an incentive, to the due process inquiry which invalidates this outcome.

The Court of Appeals' decision would take nearly $3.1 million from Defendant (the Circuit Court decision, nearly $6.2 million) and give it to Plaintiffs' counsel for achieving a settlement worth some $126,000. It does so by finding a "potential"

recovery that is nowhere to be found in the parties' settlement and cannot and will not ever be recovered and which the Court of Appeals itself rejected as "largely illusory" in its opinion. (Op. at 12) The award contravenes applicable law and has no basis in fact. Such an arbitrary redistribution of wealth – an insupportable windfall to Plaintiffs' attorneys – plainly violates due process of law.

Class Counsel claim that their fee is immune from constitutional scrutiny as a matter of private contract. (Resp. Br. 92) This is counter to fact, as the one item in the settlement which was not contractually agreed was the amount of attorney fees, which was expressly committed to the judicial system for resolution in the event of disagreement. There is nothing in the agreement which prescribes or suggests that the courts were to resolve the issue of "reasonable attorney fees" other than according to law, including applicable Constitutional doctrines.

Class Counsel's broadest response is that there is no binding precedent directly on point. But that is not surprising, as no known court decision has ever awarded a lawyer's fee so grossly disproportionate to the actual class payout as in this case. Established constitutional doctrines and principles are often applied to previously unseen situations, given the unpredictable fact patterns under which persons may confront each other hand the court system. Indeed, the Supreme Court of Michigan (the state whose law Class Counsel sought to apply to their unsuccessful putative nationwide class) has recently observed that the due process doctrines in *State*

Farm would clearly reach even putative "compensatory damage" awards untethered to reality.

> "While State Farm dealt with punitive damage awards, the due process concerns articulated in State Farm are arguably at play regardless of the label given to damage awards. A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"

Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 400 n 22 (Mich. 2004). By the same token, the ostensibly "compensatory" fee award, which is a component of damages under fee-shifting statutes, can, as below, transgress the limits set by *State Farm.*

In short, the rarity or sophistication of a constitutional violation is no defense to a constitutional challenge. Indeed, the extreme result in this case is so dangerous precisely because it has never before been attempted, and if upheld, may spawn similar constitutional affronts.

CONCLUSION

Just as plaintiffs' counsel can properly reap the harvest of genuine and meaningful victories, they should not be bailed out when a less successful case bears minimal fruit. Similar outcomes should not be encouraged or rewarded by grossly excessive recoveries for such modest "achievements."

For the foregoing reasons, the decision of the Circuit Court should be reversed, and this Court should reduce and remit the award to an amount which bears a

reasonable and permissible relation to the amount recovered, which is the only "result achieved" by Class Counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE (Rule 84.06(c))

The undersigned hereby certifies, pursuant to Rule 84.06(c), that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the requirements of Missouri Supreme Court Rule 84.06(b); and (3) contains 7,738 words, as calculated by the Microsoft Word software used to prepare this brief.

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