

No. SC91658

IN THE
MISSOURI SUPREME COURT

STATE EX REL. ROBERT MCKEAGE AND JANET MCKEAGE, AND THOSE
SIMILARLY SITUATED,

Relators,

v.

THE HONORABLE MICHAEL J. CORDONNIER,
Circuit Court of Greene County, Missouri, at Springfield

Respondent.

RELATORS' BRIEF

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This writ seeks an Order of Prohibition to prohibit The Honorable J. Michael Cordonnier, Judge of the Circuit Court of Greene County, from restricting the class definition to only those customers improperly charged document fees for boat, ATV and trailer purchases within the state of Missouri. Instead, Relators seek an order requiring the class definition to include all customers who were charged document fees pursuant to the Bass Pro purchase contract, which requires application of Missouri law to all out-of-state sales.

Jurisdiction is proper in this court to compel the undoing of matters wrongfully done, to prohibit Respondent from proceeding improperly in an abuse of discretion, and to prevent irreparable harm to Bass Pro's out-of-state customers. Jurisdiction is proper pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

A. The Underlying Transactions at Issue.

On May 23, 2008, Relators Robert and Janet McKeage purchased a 2008 Tracker Avalanche boat at a Bass Pro Shop's "Tracker Boat Center" in St. Charles County, Missouri. The price of the boat was \$27, 215.20. Listed separately on the Order Acknowledgment and Agreement of Sale document ("sales agreement") drafted by defendant was a seventy-five dollar (\$75.00) fee labeled by defendant as "Document Fees." Please see Exhibit 1, *Order Acknowledgment and Agreement of Sale*.

The document fees were charged by defendant-related entities Bass Pro Outdoor World, LLC, TMBC, LLC, and Tracker Marine Retail, LLC, which are all part of the Bass

Pro organization, which is headquartered in Springfield, Missouri. See Exhibit 33, *Bass Pro Organizational Chart*; Exhibit 34, *Business card of Tracker Boats/Bass Pro Shops*; Exhibit 35, *Tim Eisenhauer Deposition*, at 1-7. Relators will hereinafter refer to these related entities as “defendant,” “Bass Pro,” or “defendant Bass Pro.”

Bass Pro charged the document fees for preparing legal documents, processing legal documents, filing legal documents, explaining the documents, and for attorney costs in drawing up the documents. Exhibit 35, *Tim Eisenhower Deposition*, at 36-40, 46. The documents for which Bass Pro charges include the bill of sale, retail installment contract, the power of attorney, and the Order Acknowledgment and Agreement of Sale. Exhibit 35, *Eisenhower*, at 47; Exhibit 36, *Affidavit of Stokes*, at 1-3. Defendant Bass Pro used identical sales documents to charge document fees nationwide. Exhibits 1-13; Exhibit 19, at 72-73. Defendant charged an improper “document fee” to all customers on consumer boat, ATV and trailer purchases. Defendant admitted it charged its customers whatever amount the market would bear. Exhibit 22, *Deposition of Wayne Stokes*, at 140, 156.

In every state in which defendant Bass Pro sold boats/ATV’s/trailers, defendant required the purchaser to agree to the following provision in the purchase agreement:

“GOVERNING LAW. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAW OF MISSOURI.

The venue for any action or proceeding arising from this Agreement...shall be in Greene County, Missouri.”

Please see Exhibit 1, *Order Acknowledgment and Agreement of Sale*. See also Exhibits 2-12,

Other States' Contracts; Exhibit 19, at 72-73. Relators seek recovery for all persons regardless of state who entered into a contract containing the Missouri choice-of-law provision, under which contract Bass Pro charged its customers an illegal “document fee.”¹ The class claims are brought as “money had and received” improperly under the contract; as committing the unauthorized practice of law; and as violating the Missouri Merchandising Practices Act, R.S. Mo. § 484.010. See, Exhibit 13, Exhibit 27, Exhibit 28, *Plaintiffs' Petitions*. Relators seek the same redress for a class of all of Bass Pro’s customers illegally-charged document fees, who were promised or required to agree that Missouri law applies to all matters arising from the transaction. *Id.* Each claimant was charged an improper document fee under Missouri law, and each is entitled to its return.

B. Procedural Facts of the Case.

The McKeages filed this action in the Circuit Court of St. Charles County, the county of their purchase. Defendant moved to transfer venue, relying on the purchase agreement’s “forum selection clause.” Defendant Bass Pro advised the court that transfer was mandatory because the purchase agreement **required** “the parties to litigate any claim *arising from the Agreement* in Greene County, Missouri.” (emphasis added). Exhibit 14, *Motion to Transfer Venue*, at 2. Bass Pro further represented that, “[a]ll six counts of plaintiffs’ **Petition** ‘*arise*

¹ These claims are based on the rule of law enunciated by this court, in *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 (Mo. 2007); *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697 (Mo. 2008).

from’ the Purchase Agreement,” and therefore, “the Purchase Agreement’s forum selection clause must be given effect.” Please see Exhibit 14, *Motion to Transfer Venue*, at 2, emphasis added. The Circuit Court of St. Charles County agreed and transferred venue to Greene County. Please see Exhibit 16, *Order Granting Transfer*.

After the case was transferred to Greene County, Relators sought class certification of both in-state and out-of-state customers, based on defendant’s contractual choice-of-law provision requiring every dispute arising from any sale to be (a) litigated in Greene County, Missouri, and (b) governed by Missouri law. Relators therefore requested the following class definition:

All persons charged a document fee by defendant for the five (5) years preceding plaintiffs’ filing suit to present, on the sale, lease and/or financing of boats, boat trailers, boating accessories, and/or recreational vehicles, which fees stem from contracts containing Missouri choice-of-law provisions.

Please see Exhibit 17, *Motion for Court Order Certifying Class Action* (emphasis added). In response to this motion, defendant claimed that the representations it made to the court in St. Charles to transfer venue, which were the basis for that court’s order, were false and that plaintiffs’ claims did not arise from the purchase agreement. Please see Exhibit 18, *Suggestions in Opposition to Plaintiffs’ First Amended Motion for Court Order Certifying Nationwide Class Action*. Bass Pro now claims that: “**Not one of these claims arises from the sales agreements.**” Exhibit 15; See also Exhibit 18, at 29-30, 34-35, *Bass Pro’s Suggestions in Opposition to Certification* (wherein Bass Pro re-adopts its position on *Motion*

to *Limit Discovery* and further claims that Relators’ claims do “not relate to enforcement of the sales agreements and thus, the choice-of-law provision should not be applied”). *See also*, Exhibit 19, at 55, 76. Defendant does still concede that the choice-of-law clause “clearly dictates that claims **arising from the agreement** will be subject to Missouri law.” Please see Exhibit 15, *Motion to Limit Discovery to Missouri Transactions and Suggestions in Support*. Thus, defendant has asserted diametrically opposite representations in this case (first, to transfer venue to Greene County; and second, to oppose a national class), obtaining the benefit from both court-made representations:

March 11, 2009: St. Charles County	November 6, 2009: Greene County
<p data-bbox="203 915 737 951">“All six counts of plaintiffs’ Petition</p> <p data-bbox="203 995 737 1031">‘arise from’ the Purchase Agreement.”</p> <p data-bbox="203 1075 461 1110">(Emphasis added).</p>	<p data-bbox="823 915 1396 951">“Not one of plaintiff’s claims arise from</p> <p data-bbox="823 995 1130 1031">the sales agreements.”</p> <p data-bbox="823 1075 1081 1110">(Emphasis added).</p>

See Exhibit 14; Exhibit 15; emphasis added. See also, Exhibit 18, at 29, 35; Exhibit 19, at 55, 76-77.

At the class certification hearing, defendant explained its inconsistent positions by stating in essence that it was not considering class certification when it represented to the St. Charles court that all of plaintiffs’ claims arose from the sales agreement. Please see Exhibit 19, *Transcript of Summary Judgment/Class Certification Hearing*, at 76:5-77:5. After the hearing, Respondent certified a class and sub-class, limited only to “contracts entered into within the State of Missouri” as follows:

All persons charged a fee by a defendant on or after January 21, 2004, in whole or in part for the preparation of documents, upon the sale, lease and/or financing of a boat, trailer, boating accessory and/or recreational vehicle which fees stem from a contract entered into within the State of Missouri.

Please see Exhibit 20, *Order Granting Certification of Class Action* (emphasis added). The class certified does not contain all purchasers with whom Bass Pro contractually promised the protection of Missouri law, regardless of the state of purchase. The class certified does not contain out-of-state purchasers, despite defendant's judicial admissions in this case that: "all 6 counts of plaintiffs' petition 'arise from' the purchase agreement"; and that the agreement "clearly dictates that claims arising from the agreement will be governed by Missouri law." Exhibit 14, *Motion to Transfer Venue*; Exhibit 15, *Motion to Limit Discovery to Missouri Transactions and Suggestions in Support*.

Pursuant to Rule 84.035, Relators filed a petition for permission to appeal the class definition certified by Respondent. This petition was denied by the Southern District on February 22, 2011. Exhibit 23, *Southern District Order*. In this court, Relators filed petition for original remedial relief pursuant to Rules 84.035(j), 94 and 97, seeking this court's issuance of a Writ of Prohibition and Mandamus. Exhibit 24, *Petition for Writ and Suggestions in Support*. This court granted a preliminary Writ of Prohibition on May 31, 2011, requesting cause why Respondent should be ordered to do anything other than amend the class "to include in the class all Plaintiffs regardless of the state in which the transaction occurred." Exhibit 32, *Supreme Court Order Preliminary Writ*.

On June 21, 2011, the parties again appeared before Respondent on Relators' *Motion to Amend Class Certification to Comply with Preliminary Writ*, which Respondent denied. Exhibit 25, Motion to Amend Class; Exhibit 26, Respondent's Order.

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM EXCLUDING FROM THIS CLASS ALL OUT-OF-STATE PURCHASERS THAT WERE CHARGED DOCUMENT FEES WHILE PURCHASING BOATS, TRAILERS OR ATV'S BECAUSE DEFENDANT IS JUDICIALLY ESTOPPED FROM ASSERTING THAT MISSOURI LAW DOES NOT GOVERN THESE CLAIMS IN THAT DEFENDANT SOUGHT AND RECEIVED RELIEF IN THIS CASE BASED UPON ITS JUDICIAL REPRESENTATION THAT ALL OF RELATORS' CLAIMS ARISE FROM THE PURCHASE AGREEMENT WHICH CONTRACTUALLY PROMISES AND REQUIRES THAT MISSOURI LAW APPLY

Cases:

In re Contest of Primary Election Candidacy of Fletcher, 337 S.W.3d 137

(Mo. App. 2011)

New Hampshire v. Maine, 532 U.S. 742 (U.S. 2001)

State ex rel. Kel Cor, Inc., v. Nooney Realty Trust, Inc., 966 S.W.2d 399 (Mo.

App. 1999)

Galaxy Steel & Tube, Inc, v. Douglass Coal & Wrecking, Inc., 928 S.W.2d 420

(Mo. App. S.D. 1996)

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM EXCLUDING FROM THIS CLASS ALL OUT-OF-STATE PURCHASERS THAT WERE CHARGED DOCUMENT FEES WHILE PURCHASING BOATS, TRAILERS OR ATV'S BECAUSE DEFENDANT'S CHOICE-OF-LAW CLAUSE WHICH PROMISES AND REQUIRES APPLICATION OF MISSOURI LAW MUST BE ENFORCED IN THAT:

A. THERE IS A REASONABLE BASIS FOR THE CHOICE OF MISSOURI LAW AND DEFENDANT FAILED TO MEET ITS BURDEN TO PROVE THAT APPLICATION OF MISSOURI LAW VIOLATES A FUNDAMENTAL POLICY OF A STATE WITH A MATERIALLY GREATER INTEREST IN RESOLVING RELATORS' CLAIMS

B. BASS PRO DRAFTED THE LANGUAGE REQUIRING THAT CUSTOMERS AGREE TO THE RIGHTS OF MISSOURI LAW, SO QUESTIONS OF INTERPRETATION AND CONSTRUCTION IN THE PURCHASE AGREEMENT ARE RESOLVED AGAINST BASS PRO

C. APPLICATION OF MISSOURI LAW TO ALL OF RELATORS'

**CLAIMS ENFORCES THE PARTIES' REASONABLE
EXPECTATIONS**

**D. THE CONTRACT LANGUAGE SELECTED BY DEFENDANT IS
BROAD AND THEREFORE ENCOMPASSES ALL CONTRACTUAL
AND NON-CONTRACTUAL CLAIMS RELATED TO THE
AGREEMENT**

Cases:

Bauer v. Farmers Inc. Co., 270 S.W.3d 491 (Mo. App. W.D. 2008)

Hall v. Sprint Spectrum, 876 N.E.2d 1036 (Ill. App. 2007)

A.G. Edwards & Sons, Inc., v. Smith, 736 F. Supp. 1030 (D. Az. 1989)

Sachs Electric Co. v. HS Construction, 86 S.W.3d 445 (Mo. App. 2002)

ARGUMENT

I. STANDARD OF REVIEW FOR ALL POINTS

It is well settled that a writ of prohibition will issue under three circumstances: “ ‘[T]o prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.’ ” *State ex rel. McDonald’s Corp. v. Midkiff*, 226 S.W.3d 119, 122 (Mo. banc. 2007) (citation omitted); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc. 2001) (writ of prohibition will issue “to avoid irreparable harm to a party”). Respondent’s ruling is an abuse of discretion because the ruling is inapposite to established Missouri law. Further, the out-of-state purchasers will suffer irreparable harm, because class certification is their only practical recourse given the size of the claim, and for many, their statutes of limitations will likely have run.

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM EXCLUDING FROM THIS CLASS ALL OUT-OF-STATE PURCHASERS THAT WERE CHARGED DOCUMENT FEES WHILE PURCHASING BOATS, TRAILERS OR ATV’S BECAUSE DEFENDANT IS JUDICIALLY ESTOPPED FROM ASSERTING THAT THESE CLAIMS ARE NOT GOVERNED BY MISSOURI LAW IN THAT DEFENDANT SOUGHT AND RECEIVED AFFIRMATIVE RELIEF IN THIS CASE BASED UPON ITS JUDICIAL REPRESENTATION THAT ALL OF RELATORS’ CLAIMS AGAINST DEFENDANT ARISE FROM THE PURCHASE AGREEMENT WHICH CONTRACTUALLY PROMISES AND

REQUIRES APPLICATION OF MISSOURI LAW

Missouri courts vehemently protect the integrity of this state's judicial system. Our courts do so not only through professional standards but also through strict adherence to the doctrine of judicial estoppel. This doctrine preserves the dignity of our courts by preventing a party from making clearly inconsistent judicial representations. Bass Pro obtained venue transfer based on its judicial representation that all of plaintiffs' claims arise from the contract. Bass Pro now attempts to defeat certification of all of its customers' claims, regardless of purchase state, by arguing the opposite, *i.e.*, that none of its customers' claims arise from the contract which requires application of Missouri law. Under the long-recognized doctrine of judicial estoppel, Bass Pro is estopped from changing its initial position that all of Relators' claims arise from the sales agreement. As such, Bass Pro's contractual choice of Missouri law applies to all customer sales, regardless of where the purchase occurred. All purchasers charged illegal document fees are entitled to the protection of Missouri law, regardless of purchase state. The integrity of our courts require it.

"Missouri has long recognized the doctrine of judicial estoppel." *State ex rel. Kel Cor, Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 403 (Mo. App. E.D. 1998). Judicial estoppel applies to prevent litigants from benefitting from inconsistent positions in legal proceedings. *Shockley v. Director, Div. of Child Support Enforcement*, 980 S.W.2d 173, 175 (Mo. App. E.D. 1998). "Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not

thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who's acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 742-43 (2001). "Judicial estoppel does not require reliance or prejudice before the party may invoke it (because) it protects the integrity of the judicial process." *Jeffries v. Jeffries*, 840 S.W.2d 291, 293 (Mo. App. E.D. 1992). The purpose is to preserve "the dignity of the courts and insure order in judicial proceedings." *Edwards v. Durham*, 346 S.W.2d 90, 101 (Mo. 1961).

The Western District recently reiterated the long-recognized doctrine of judicial estoppel, in *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137 (Mo. App. 2011). There, the trial court disqualified candidate Michael Fletcher from an election based solely on the doctrine of judicial estoppel, and the Western District affirmed. The basis for applying the doctrine was that Fletcher represented in federal court pleadings in California that he was "domiciled" in California; then, claimed he was a Missouri "resident," in order to run for public office in Missouri. *Id.* at 141. The court held that even though Fletcher's initial stance was not taken under oath, Fletcher was judicially estopped from claiming he was a Missouri resident, inasmuch as the two positions were "clearly inconsistent" and "at best disingenuous and self-serving." *Id.* at 143-44. The court once again explained the doctrine as very much alive and necessary to preserve the integrity of our profession. *Id.* In barring Fletcher from claiming he was a Missouri resident, the court explained:

"The application of the doctrine of judicial estoppel instills confidence in our

judicial system that one party will not be allowed to take ‘clearly inconsistent legal positions on any given day according to that party’s whims.’ ”

Id. at 144. The court judicially estopped Fletcher from running, even though Fletcher claimed mistake and presented “consistent and very persuasive evidence in support of his new position.” *Id.* at 143-45. In fact, the trial court noted it “would have felt compelled to determine Mr. Fletcher is in fact a resident of Kansas City, Missouri, but for the doctrine of judicial estoppel.” *Id.* at 140. Nonetheless, the court held that the doctrine is essential “to ensure the integrity of the judicial process,” and estopped Fletcher from claiming Missouri residency. *Id.*

Likewise here, Respondent should have invoked the doctrine to prevent defendant Bass Pro from taking a “clearly inconsistent” position that was wholly “self-serving,” contrary to its contractual promise to its customers, and contrary to the benefit of its out-of-state customers’ bargain. Defendant Bass Pro’s opposite arguments were as follows:

March 11, 2009: St. Charles County	November 6, 2009: Greene County
“All six counts of plaintiffs’ Petition ‘arise from’ the Purchase Agreement.”	“Not one of plaintiff’s claims arise from the sales agreements.”

Please see Exhibit 14; Exhibit 15, emphasis added. See also Exhibit 18, at 29-30, *Bass Pro adopting its opposition to nationwide discovery in opposition to certification*; and see Exhibit 19, at 55, 76-77. Bass Pro should have been bound by its initial representation that “(a)ll six counts of plaintiffs’ Petition ‘arise from’ the purchase agreement.” Any other ruling denigrates rather than preserves “the dignity of the courts.” *Edwards*, at 101.

Defendant must have believed that its representation on venue transfer was 100% true and accurate. Otherwise, it would not have forced the additional expense and inconvenience of transfer on its customers. Moreover, defendant admittedly changed its position 180 degrees solely to escape certification of its out-of-state customers' claims. Please see Exhibit 19, Transcript of Hearing, at 76:5-77:5, wherein Bass Pro explained: "(A)t that point in time the case was not a nationwide – not a nationwide putative class. They weren't seeking any sort of nationwide class at that time." *Id.* Missouri law binds defendant to its initial representation that all of plaintiffs' claims arise from the purchase agreement.

Defendant also admits that if the claims arise from the sales agreement, then the choice of Missouri law controls all claims. Exhibit 15, wherein Bass Pro concedes "the language clearly dictates that claims arising from the agreement will be subject to Missouri law." *Id.* The provision used with Bass Pro's customers nationwide provides:

"GOVERNING LAW. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAW OF MISSOURI. The venue for any action or proceeding arising from this Agreement...shall be in Greene County, Missouri."

Please see Exhibit 1, Order Acknowledgment and Agreement of Sale; see also Exhibits 2-12, Other States' Contracts; Exhibit 19, at 72-73. Defendant having admitted that (a) "(a)ll six counts of plaintiffs' petition 'arise from' the Purchase Agreement," and (b) "the language clearly dictates that claims *arising from the agreement* will be subject to Missouri law," all customer claims are clearly governed by Missouri law. See Exhibit 14; Exhibit 15. Bass Pro

is estopped from claiming otherwise.

As the *Fletcher* court held, even were defendant Bass Pro able to present “consistent and very persuasive evidence in support of (its) new position” that none of plaintiffs’ claims arise from the agreement², the law estops Bass Pro from making the argument. *Fletcher*, at 140. This protects the integrity of our judiciary, and prevents lawyer jokes from becoming lawyer facts. Relators request: (a) nothing more than what Bass Pro has admitted, and (b) enforcement of the parties’ contracted-for choice-of-law provision on the same basis as Bass Pro enforced its venue clause. Missouri law applies to all Bass Pro customer claims, regardless of the state in which the customer bought her boat, ATV or trailer, and was charged document fees.

Here, Missouri law governs all customers’ claims, and consequently, all customers regardless of the state of contracting are entitled to be members of the class. See *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d 151, 164, 175 (Mo. App. 2006) (explaining, “The fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance,” and the court “should err in favor of, and not against, allowing maintenance of the class action.”); *State ex rel. Amer. Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 486-87 (Mo. 2003) (finding the trial court had “abused its discretion in certification of the class with respect to insureds whose contracts are subject to the laws of

² For the reasons set forth below, Relators believe it is clear defendant cannot provide persuasive evidence of this.

states other than Missouri,” illustrating that the class should include those governed by the same law); *Ysbrand v. Daimler Chrysler*, 81 P.3d 618, 628 (Ok. 2003) (certifying class of customers nationally and explaining, “The advantage of adjudicating the common issues in a single proceeding far outweighs the logistic demands of class treatment”). See also, *Eisel v. Midwest Bank Centre*, 230 S.W.3d 335 (Mo. banc 2007) (illegal charging of document fees proper for class certification); *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008) (same). Respondent abused his discretion by precluding out-of-state customers from the class. As a result, out-of-state purchases face the irreparable harm of having no practical remedy given (a) the amount of individual money at issue, and (b) that many customer claims will likely be barred by the statute of limitations.

Bass Pro’s opposition to class certification is textbook conduct that requires judicial estoppel. In an often cited statement of the doctrine, the United States Supreme Court set forth three guiding considerations in applying judicial estoppel:

“First, a party’s later position must be “clearly inconsistent” with its earlier position....Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position....A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

New Hampshire v. Maine, 532 U.S. at 750-51 (2001) (citations omitted). The court explained that the principles are not requirements but rather represent three considerations

weighed. *Id.*

All three of these principles are firmly rooted in the facts of this case, and trumpet the need to judicially estop Bass Pro's conduct. Namely, (1) Bass Pro's position in opposition to a class of all its customers is "clearly inconsistent" with its earlier position when it affirmatively sought and received venue transfer, (2) Bass Pro succeeded in persuading the court to accept its earlier position when it obtained transfer of venue from plaintiffs' chosen forum to Greene County, and (3) Bass Pro derives an unfair advantage from these opposite judicial representations, inasmuch as defendant is twice rewarded for contradictory representations related solely to their current financial interests, not truth. Defendant's sole argument against certification of all its customers is undeniably a position "clearly inconsistent" with one previously taken in this case. *In re Contest of Primary Election Candidacy of Fletcher*, at 143-44; *Maine*, at 750-51. This is exactly what judicial estoppel prohibits. Respondent abused his discretion in failing to apply the doctrine.

Missouri courts consistently apply this doctrine to prevent abuse of the judicial system, like Bass Pro's in making a clearly inconsistent representation on class certification. In *State ex rel. Kel Cor, Inc., v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 404 (Mo. App. 1999), the court estopped defendant from trying to ratify a stock purchase after defendant previously claimed the purchase was "improper" and void. In *Vorhof v. Vorhof*, 532 S.W.2d, 830-31 (Mo. App. 1975), the court judicially estopped a wife who first claimed an alimony award was "contractual" and not subject to modification from later claiming the alimony was "decretal." In *Jeffries v. Jeffries*, 840 S.W.2d 291, 294 (Mo. App. 1992), the court judicially

estopped ex-husband from claiming a child was not his, despite husband asserting “it was conclusively shown that he is not the biological father,” because husband previously represented in a separation agreement that he was the child’s biological father. These cases make clear that Missouri courts do not tolerate Bass Pro “playing fast and loose” with the judiciary, making representations divorced from prior admissions and truth. Just as these courts held these parties to their prior positions, Bass Pro should be held to its prior position that all of plaintiffs’ claims arise from the contract requiring Missouri law.

Similarly, in *Galaxy Steel & Tube, Inc. v. Douglass Coal & Wrecking, Inc.*, 928 S.W.2d 420 (Mo. App. S.D. 1996), the court applied the doctrine to prevent a party from talking out both sides of its mouth. The trial court entered an order of execution against Douglass. Douglass moved to quash the order on jurisdictional grounds, which the trial court overruled. *Id.* at 421. Then, Douglass later moved in a second petition to quash the order on mootness grounds, which the trial court granted. The court of appeals overturned the trial court, holding Douglass was estopped from arguing on his second petition that the court’s ruling was moot, because Douglass’ prior action seeking relief was inconsistent with his mootness claim. *Id.* at 423-24. Even though the trial court rejected plaintiff’s prior argument, the Court of Appeals nevertheless held plaintiff could not benefit from later adopting a contrary position in the case. *Id.* at 423-24. The court discussed the absolute need to preserve the integrity of the judicial process, holding that in Missouri, “a party will not be permitted to take a position in regard to a matter which is directly contrary to, or inconsistent with one previously assumed by him.” *Id.* Addressing the trial court decision to grant relief

based on a position inconsistent with plaintiffs' prior argument, the court said, "No one is entitled to that." *Id.* at 424.

Here, Bass Pro's conduct goes much further than that estopped by the *Douglass Coal* court. Not only did Bass Pro take diametrically opposite positions but defendant received the benefit of both of its clearly inconsistent representations. Bass Pro obtained a favorable ruling based on its judicial admission that "all of plaintiffs' claims" arise from the agreement. Then, defendant received a favorable ruling from Respondent by claiming its prior representation was false. As the *Douglass Coal* court held, "No one is entitled to that." *Douglass Coal*, at 424. Missouri courts prohibit sophistry, not reward it.

Defendant should have been estopped from claiming that not one of Relators' claims arise from the contract, after having benefitted from the argument that all of plaintiff's claims arise from the agreement. With all claims arising from the contract which requires and promises application of Missouri law, all customers' claims nationwide are governed by Missouri law. Furthermore, all customers seek the same relief, and the entire class is thus manageable; as such, out-of-state purchasers who were charged document fees should be members of the class. *State ex rel. Amer. Family v. Clark*, 106 SW3d 483, 486 (Mo. 2003); *Dale v. Daimler*, 204 SW3d 151, 164, 175 (Mo. App. 2006); *Ysbrand*, at 628 (Ok. 2003).

Respondent abused his discretion in failing to: (a) judicially estop defendant from taking clearly inconsistent positions in order to exempt its out-of-state customers from the class; (b) apply Missouri law to all customers' claims; (c) estop defendant from arguing none of Relators' claims *arise from* the agreement, after defendant received affirmative relief on

its representation that all of Relators' claims *arise from* the agreement, and (d) provide Bass Pro's out-of-state customers class protection. Pursuant to Respondent's ruling, defendant has been rewarded for playing "fast and loose" with the courts; for taking positions unrelated to truth and related only to their pecuniary interests; and for making (and benefitting from) not only inconsistent but diametrically opposite arguments and claims in Missouri courts. To preserve the integrity of the judiciary, Missouri courts do not allow this. Missouri law applies to all claims regardless of where the contract was signed, and out-of-state purchasers are entitled to the protections of Missouri law. *Clark*, at 486-87; *Dale*, at 175.

Respondent's Order is also manifestly erroneous, because it establishes a fundamental legal inconsistency governing this case. Under the Respondent's Order, putative class members whose transactions occurred outside the state of Missouri must (1) pursue any action against defendant in Greene County, Missouri, because the class claims' arise from the purchase agreement; yet must (2) litigate under another state's law because the same claims (apparently) do not arise from the purchase agreement. This likewise squanders judicial resources, inasmuch as there could be fifty (50) different class actions that must be brought in Greene County, Missouri, based on harms stemming from the same contract.

This court should enter a permanent Writ of Prohibition to (a) cure Respondent's abuse of discretion in ruling contrary to Missouri law, and (b) avoid the irreparable harm to out-of-state customers who given the amount of the individual harm will have no viable remedy absent class treatment, and whose statutes of limitations may otherwise (have) run.

III. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING

RESPONDENT FROM EXCLUDING FROM THIS CLASS ALL OUT-OF-STATE PURCHASERS THAT WERE CHARGED DOCUMENT FEES WHILE PURCHASING BOATS, TRAILERS OR ATV'S BECAUSE DEFENDANT'S CHOICE-OF-LAW CLAUSE WHICH PROMISES AND REQUIRES APPLICATION OF MISSOURI LAW MUST BE ENFORCED IN THAT:

A. THERE IS A REASONABLE BASIS FOR THE CHOICE OF MISSOURI LAW AND DEFENDANT FAILED TO MEET ITS BURDEN TO PROVE THAT APPLICATION OF MISSOURI LAW VIOLATES A FUNDAMENTAL POLICY OF A STATE WITH A MATERIALLY GREATER INTEREST IN RESOLVING RELATORS' CLAIMS.

Missouri honors parties' contractual choice of law. To defeat the contractual choice of Missouri law, Bass Pro had the burden to demonstrate that (1) the state whose law should apply has a "materially greater" interest than Missouri in resolving the issues, and (2) applying Missouri law would contravene a "fundamental policy" of that state. Bass Pro made no such showing, and Respondent made no such finding. As such, the choice-of-law provision is valid and governs all class members' claims. Courts around the country applying the same analysis have found reversible error when the trial court fails to apply the choice-of-law provision across the putative class. Respondent's arbitrary territorial limit on the class was devoid of Missouri choice-of-law analysis and was an abuse of discretion.

(1) Missouri Enforces Choice-of-law Agreements Between the Parties to a Sales Contract, Unless Application is Contrary to a Fundamental Policy of a State with a Materially Greater Interest in the Transaction.

“Missouri recognizes that contracting parties may choose the state whose law will govern.” *Tri-County Retreading, Inc. v. Bandag*, 851 S.W.2d 780 (Mo. App. 1993). “A choice-of-law provision in a...contract is generally enforced.” *Stone v. Crown Diversified Industries*, 9 S.W.3d 659 (Mo. App. 1989). A contractual choice-of-law provision “will be applied...unless application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.” *Bauer v. Farmers Inc. Co.*, 270 S.W.3d 491, 497 (Mo. App. W.D. 2008); *Restatement (Second) Conflicts of Law* § 187, subpart (b). “To be fundamental, a policy must . . . be a substantial one.” *Id.* at Comment on Subsection (2).

Defendant utterly failed to meet its burden of demonstrating that application of Missouri law contravenes the “fundamental policy” of another state with a “materially greater” interest in resolving the class issues.³ To nullify the contracted-for choice of

³ Defendant did not argue that Missouri lacked a “substantial relationship to the parties or the transaction” nor that “there is no other reasonable basis for the parties’ choice [of Missouri law]” under subpart (a) of § 187. There is no way they could.

Missouri is substantially related to all claims of the putative class in that: (1) Bass Pro’s

Missouri law in the purchase agreements, Bass Pro had the burden to prove each state whose law would have applied absent the parties' choice of Missouri law had a "materially greater interest" in resolving the dispute, and that the application of Missouri law violates a "fundamental policy" of each such state. For example, for Respondent to rule that Missouri law does not apply to transactions occurring in Wisconsin, Bass Pro was required to demonstrate (a) Wisconsin has a "materially greater" interest in resolving the issue than Missouri, and (b) applying Missouri law to the transactions violates a "fundamental policy" of Wisconsin. The same rule applies for every other state. *Restatement (Second) Conflicts of Law* § 187 (1988); *Bauer*, at 497-98. In other words, Bass Pro had this burden for every state whose law it claims should apply. Bass Pro demonstrated this for no state.

In *Bauer v. Farmers Insur. Co.*, 270 S.W.3d 491 (Mo. App. 2008), the Western District laid out this burden, to void a contracted-for choice-of-law provision. The court considered what constitutes a "fundamental policy" of another state, so as to nullify a choice-of-law provision under *Restatement (Second) Conflicts* § 187 (1988). *Bauer*, a

principle place of business and corporate headquarters is in the state of Missouri, (2) defendant's chosen venue for resolving all claims arising from the agreement is in Missouri, (3) defendant's improper conduct – the decision to charge a separate document fee and accounting therefore – took place in Missouri, and (4) defendant does business across the country and reasonably requires every customer nationwide be subject to the uniform law of Missouri.

Kansas resident with a Kansas automobile policy, was injured in an automobile collision in Springfield, Missouri. *Id.* at 492. The Kansas policy provided that stacking of underinsured motorist coverages was governed by the state of the occurrence, and thus, by Missouri law. *Id.* Bauer asserted he was entitled to stack his two underinsured motorist policies under Missouri law. In response, defendant Farmers claimed Bauer could not stack because under the *Restatement (Second) Conflicts* § 187(b) analysis (applied in Missouri), Kansas law prohibits stacking. *Id.* at 496-97. Farmers argued Kansas law should apply because “the anti-stacking policy of Kansas is so loaded with essential public policy concerns that it can be called ‘fundamental.’ ” *Id.* at 498. The Court of Appeals disagreed, explaining that the hurdle to prove that application of Missouri law contravenes a “fundamental policy” of another state (with a materially greater interest), is a high one. *Id.* at 498-99. The court explicitly held that Kansas’ explicit prohibition on stacking underinsured motorist policies was not fundamental. The *Bauer* court explained:

“The fact that Kansas adopted a policy via the legislative route does not necessarily mean that the policy is a ‘fundamental policy.’ To think otherwise would be to dilute the commonly understood meaning of the word ‘fundamental,’ which we all know is not synonymous with ‘important.’ ”

Id. at 498. While recognizing that Kansas *may have* had a greater interest in resolving the underinsured issue for a Kansas resident with a Kansas insurance policy, the court held that because Kansas’ anti-stacking law was not fundamental, the law chosen by contract, *i.e.*, Missouri law, applied. *Id.*

In this case, Bass Pro never made a showing that Missouri law would violate the “fundamental policy” of any state with a materially greater interest than Missouri in resolving the issues. Thus, defendant did not meet its burden, and the choice of Missouri law is enforceable across the class of Bass Pro customers. Bass Pro having agreed that (a) “all six counts of plaintiffs’ petition ‘arise from’ the purchase agreement,” and (b) “the language clearly dictates that claims arising from the agreement will be subject to Missouri law,” the application of Missouri law to all customers’ claims should be undisputed. Since Missouri law applies to all claims, all customers, regardless of where they signed their contracts, should be members of the class. See *State ex rel. Amer. Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 486-87 (Mo. 2003).

In order for the court to nullify the Missouri choice-of-law provision found in every customer agreement, Respondent had to find that: (1) another state’s *lack* of the equitable money had and received claims was a “fundamental policy” of the state; (2) another state’s *lack* of an UPL statute was a “fundamental policy” of that state, and/or (3) that a particular state’s variation from Missouri’s UPL statute was also “fundamental policy” for purposes of the *Restatement* analysis. See *Bauer*, 270 S.W.3d at 497. The failure of another state to yet address these consumer protections cannot be considered fundamental. In fact, as the *Bauer* court held, even when another state has enacted a contrary standard, such standard often does not rise to the level of a “fundamental policy.”

Strictly applying the standard to the facts, Bass Pro was further required to show that these other states had a “fundamental policy” in their citizens getting none of the benefits,

but rather only the burdens, that Missouri law provides. Of course, no state has such a “fundamental policy” interest. Rather, all states’ interests are that their citizens be protected to the full extent of Missouri law. This is particularly true, when Bass Pro has required these states’ citizens (as purchasers of Bass Pro’s boats, trailers and ATVs) be bound by Missouri law, and have their disputes decided in a Greene County, Missouri court. Looked at another way, these states have an interest in their citizens getting the full protection of Missouri law that those citizens were promised, and for which they bargained. Bass Pro failed to meet its burden, and thus, Missouri law controls the putative class.

A number of courts around the country have considered similar claims under the *Restatement (Second) Conflicts* § 187 (1988) framework. These courts reiterate the onerous burden required to prove the chosen law contravenes a “fundamental policy” of the state bearing a materially greater interest in the transaction. As the *Restatement* comments indicate, for an opposing law to be “fundamental” requires proof that the law encompasses “substantial” public policy. *Restatement (Second) Conflicts* § 187, at Comment Subsection (b)(2). In fact, Bass Pro recognized this “heavy burden” to invalidate *any* contractual provision. It argued on venue transfer that the party seeking to convince the court to nullify a contractual clause “bears a ‘heavy burden’ in convincing the court that he or she should not be held to the bargain.” Exhibit 14, *Defendant’s Suggestions in Support of Transfer*, at 2. On choice of law, Bass Pro clearly could not meet its admittedly “heavy burden” to prove that Missouri law is “contrary to a fundamental policy of (each) state which has a materially greater interest” in resolving the issue. *Bauer*, at 497.

In the recent case of *1-800-GOT-JUNK v. Sup. Ct. of L.A.*, 116 Cal. Rptr. 3d 923 (Cal. App. 2010), the California court considered choice-of-law analysis under this framework. Like Bass Pro did with the Missouri choice-of-law clause it drafted, Got-Junk included a Washington choice-of-law provision in its franchise agreements with customers nationwide, then opposed the provision. The court identified the two issues for determination as “(1) whether a reasonable basis existed for the inclusion of the Washington choice-of-law provision in the franchise agreement; and (2) if so, whether California public policy precludes application of the parties’ chosen law.” *Id.* Applying nearly identical legal principles under *Restatement (Second) Conflicts of Law* §187 as Missouri courts apply, the court held:

“We begin with the basic premise that choice-of-law provisions are enforceable...(and) even if the chosen state has no substantial relationship to the parties or the transaction, the choice-of-law provision is enforceable if a reasonable basis exists for the parties’ choice.”

Id. at 931-32, emphasis. The court held that because Got-Junk entered into agreements nationwide, much like Bass Pro does with its out-of-state customers, there was reasonable basis for requiring uniform application of Washington law “given that state’s proximity to Got Junk’s headquarters in Vancouver, Canada.” *Id.* at 926. The court further explained that to nullify the choice-of-law provision, it was defendant Got-Junk’s burden to prove “both that the chosen law is contrary to a fundamental policy of California and California has a materially greater interest in determination of the issue.” *Id.* at 937. Defendant Got-Junk

tried to meet its burden that Washington law contravened a “fundamental policy” of California law by comparing the two states’ differing franchise laws. *Id.* at 935-37. A comparison of the laws showed that the contracted-for law of Washington provided the non-drafting franchisee “far greater protection” than California law. *Id.* at 936. The court held that the agreement thus contravened no fundamental policy of California, explaining:

“California public policy is not offended if the franchisor contractually obligates itself...(to) giving a franchisee superior protection.”

Id. at 936. The court held that because the choice-of-law clause enhanced the non-drafting party’s protections, “the choice-of-law clause is valid.” *Id.*

Missouri law provides Bass Pro customers a remedy for the harms suffered, and no state’s public policy is offended by its citizens receiving the full protections of Missouri law. No state’s *absence* of these protections can be considered “fundamental policy.” To the extent Missouri law exceeds the protections that any of these states provide, the choice-of-law clause written by Bass Pro must be enforced. Quite simply, no state has a fundamental policy in preventing its citizens from receiving the full protection of Missouri law, where a Missouri company hails its state’s citizens into Missouri courts and requires they agree to Missouri law, in order to buy Bass Pro products. Moreover, Bass Pro has completely failed to meet its burden to prove any state has a “fundamental policy” that its citizens get only the burden, and no benefit, of Missouri law.

In *Perma-Liner Industries, Inc., v. U.S. Sewer & Drain, Inc.*, 630 F. Supp. 2d 516, 522 (E.D. Penn. 2008), a manufacturer sued a former employee and a competitor alleging a

number of claims stemming from the contract. The claims included trade infringement, tortious interference and unfair competition. *Id.* The contract at issue contained a Florida choice-of-law provision, but the defendant noted that absent the contractual choice-of-law clause, Pennsylvania law would govern the dispute. *Id.* Like Missouri (and most states), Pennsylvania courts engage in *Restatement (Second) Conflicts* §187 (1988) analysis, requiring the objecting party to demonstrate the chosen law conflicts with a “fundamental policy” of a state with a “materially greater interest” in resolving the issue, in order to void the contracted-for choice of law. *Id.* at 522-23. There, Florida law contravened Pennsylvania law that continuation of at-will employment cannot be consideration for a contract. *Id.*

As required to nullify the choice of Florida law, the *Perma Liner* defendants argued that Pennsylvania at-will employment law was a “fundamental policy” of Pennsylvania. The court summarily rejected defendants’ argument, holding that “this policy difference is not fundamental...the Restatement’s section (b) is not implicated and the choice-of-law provision is enforceable.” *Id.* Likewise here, no state has a “fundamental policy” interest in its citizens being fleeced of the benefit of their bargain.

Quite simply, Bass Pro did not identify for Respondent, and cannot identify for this court, any jurisdiction with a “materially greater interest” than Missouri in regulating a Missouri business that requires every customer nationwide come to Missouri courts to settle disputes. Defendant did not identify for Respondent, and cannot identify for this court, any jurisdiction with a “fundamental policy” that its citizens (a) not get the protections for which

they contracted, and (b) be hailed into Missouri courts to have Missouri law apply only when financially beneficial to the drafting party, Bass Pro. These were Bass Pro's burdens. Bass Pro did not overcome them.

The choice of Missouri law governs all claims, regardless of where the transaction occurred. Respondent's territorial limitation was based on no choice-of-law analysis, and was an abuse of discretion. All Bass Pro customers who were charged document fees in a contract containing Missouri Choice of Law should be class members and receive the protections that Missouri law provides under the contract.

(2) In Class Action Cases, Contractual Choice-of-Law Clauses are Presumed Enforceable.

"Missouri courts honor contractual choice-of-law clauses." *Rheem Mfg. Co., v. Progressive*, 28 S.W.3d 333 (Mo. App. 2000) (citing *Stone v. Crown*, 9 S.W.3d 659, 666 (Mo. App. 1999)). The "(p)rime objectives of contract law...may best be attained in multi-state transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby." *Restatement (Second) Conflicts of Law* Section 187, Comment on Subsection (2).

In *Hall v. Sprint Spectrum*, 876 N.E.2d 1036 (Ill. App. 2007), Sprint appealed the trial court's certification of a 48-state class action, for all persons Sprint charged a fee pursuant to a contract containing a Kansas choice-of-law provision. *Id.* In considering defendant Sprint's argument, identical to Bass Pro's, that the contractual choice-of-law provision not

apply “extraterritorially” to enforce a Kansas consumer protection statute, the court responded,

“Sprint’s choice-of-law provision states that the agreement should be governed by the law of Kansas...The fact that Kansas law might not otherwise apply is irrelevant, because the parties chose to apply Kansas law.”

Id. at 1041. Bass Pro made the same argument that Respondent could not apply Missouri law “extraterritorially.” Exhibit 19, at 29,39. Bass Pro’s argument misses the point. As the *Hall* court explained,

“(T)he issue is not the territorial application of the Kansas Consumer Protection Act but whether the parties chose to apply Kansas law to govern the validity of the provisions in their contract. The fact that Kansas law might not otherwise apply is irrelevant because the parties expressly agreed that Kansas law would apply.”

Id. at 1042, emphasis.

Likewise here, the issue is not the territorial application of Missouri law. Rather, the issue is that Bass Pro required its customers submit to Missouri law and promised the protection of this state’s law. The parties agreed on Missouri law. Whether Missouri law would otherwise apply is irrelevant.

In *Hall*, Sprint, much like Bass Pro, also argued that plaintiff’s claims were non-contractual and thus, the choice-of-law provision Sprint drafted should not apply. The *Hall*

court properly rejected this argument. The *Hall* court explained that the fact “that a contract penalty is illegal and unenforceable is itself fundamentally a creature of contract law.” *Id.* at 1042. The court continued,

“(Plaintiff’s) various claims do not reflect differing sources of the law so much as alternative theories whereby she and the other class members can bring an action to enforce the same underlying legal principle that comes from contract.”

Id. at 1043. The Court of Appeals thus affirmed the trial court’s 48-state class action, applying Kansas law to all class members’ claims, by deferring to the chosen law and enforcing it. *Id.* at 1048. Similarly here, Missouri law should apply to all class claims, in that Relators are enforcing legal rights arising from a contract that chose Missouri law.

Since out-of-state customer claims are subject to Missouri law, these customers have a right to be members of the class. *See, Dale* at 164; *Ysbrand* at 628. Certification of all customers also conserves judicial resources, inasmuch as it eliminates having fifty (50) different cases in a Greene County, Missouri court based on the exact same contract. *Clark*, at 489. Respondent should be ordered to define the class by uniform application of the chosen law, regardless of the state of the transaction, just as the *Hall* court did.

In *Schlesinger v. Superior Court*, 2010 WL 3398844 (Ca. App. 2010), the California Court of Appeals recently found that the trial court had abused his discretion in failing to certify a (nationwide) class action defined by the parties’ contracted-for California choice-of-

law provision. *Id.* at *1. Just like Bass Pro in this case, the corporate defendant in *Schlesinger* required every purchaser to agree to a forum selection clause and choice-of-law provision, based on the state of defendants' principal place of business. *Id.* at *1.

After suit was filed, the corporate defendant in *Schlesinger* realized that its choice-of-law requirement subjected it to suit by a class of its nationwide customers. It then argued that "it would be arbitrary and unfair to apply California law to claims of out-of-state class members...." *Id.* at *5. The *Schlesinger* court disagreed with the corporate defendant, noting with disfavor that defendant "argues that although it required its customers throughout the country to agree to California choice-of-law and forum selection...out-of-state customers...should not be able to sue under California law."

Id. at *7. The court:

"reject(ed) Ticketmaster's claim that out-of-state customers should not be part of the putative class. Ticketmaster set the terms by requiring all its customers, regardless of their state of residence, to agree not only that California law would apply to their claims, but also that suit could only be brought in a court located in California."

Id. at 8. Thus, the court presumed the chosen law was enforceable, finding that *Ticketmaster* was held to the law it contractually required.

In identical conduct, Bass Pro "set the terms by requiring all its customers, regardless of their state of residence" agree that Missouri law applies in a Missouri courtroom,

Schlesinger, at * 7-8. Presumably, Bass Pro did not do so to make litigation for the customers it wrongs financially impossible and inconvenient. Rather, the contracts Bass Pro wrote are enforceable agreements, drafted to guarantee uniform law and consistent results for itself and its customers nationwide. The choice of Missouri law is presumed enforceable. Just as the *Schlesinger* and *Hall* courts enforced the provisions nationwide, Bass Pro's Missouri choice-of-law provision is likewise enforceable, regardless of where the contract was signed. As those courts held, this requires certification of all customers, regardless of state.

Pro & Davis Land. v. Hertz Equip. Rental Corp., 2008 WL 5218267 (D. N.J. 2008) also stands on all fours with this case. In *Hertz*, plaintiffs brought a nationwide class consumer protection case under New Jersey's consumer protection laws, just as Relators seek to protect all of Bass Pro's customers here. *Id.* at *5. There, Hertz's conduct occurred throughout the country. However, the agreements giving rise to plaintiffs' consumer protection claims contained New Jersey choice-of-law provisions indicating the agreement was "governed by" New Jersey law, much like Bass Pro's purchase agreements are "governed by" Missouri law. *Id.* Defendants argued that plaintiffs' claims were unmanageable due to the application of varying state laws, which the court rejected. *Id.* at *5-6. The court deferred to, and summarily enforced, the contracted-for law of New Jersey, certified a nationwide class, and explained:

"(T)here are no choice-of-law issues because New Jersey law will apply to the

class members...plaintiff's claims stem from the lease agreements signed by representative plaintiffs and presumably the entire class. Defendant's standard form agreement contains a choice-of-law clause designating the law of New Jersey as the law that governs."

Id. at *6. Similarly here, all of Bass Pro's transactions, regardless of state, are solidified in its "form agreement" containing a choice-of-law clause designating Missouri law as the law that governs. Just as New Jersey law governed the nationwide class members' claims in *Hertz*, Missouri law governs all of Bass Pro's customers' claims here. Bass Pro's "standard form agreements contain a choice-of-law clause designating the law of (Missouri) as the law that governs." *Id.* As the *Hertz* court held, this explicit designation is presumed enforceable; and thus, governs all claims, regardless of the site of contracting. All customer claims throughout the country are thus governed by Missouri law, and all such customers are entitled to the protections of the class.

Bass Pro's arguments, and Respondent's decision excluding out-of-state customers charged document fees pursuant to the agreement governed by Missouri law, ignore the parties' choice-of-law provision, which is presumed enforceable. Bass Pro made no showing that a state other than Missouri has (a) a materially greater interest in governing these transactions, nor that (b) application of Missouri law violates a "fundamental policy" of such state. Bass Pro was required to prove both, for any state whose law it says should apply. Respondent's territorial limitation was devoid of any choice-of-law analysis, and was an

abuse of discretion. A number of courts around the country have held that when a corporation subjects its purchasers to a chosen law, the choice of law is valid and enforceable. Likewise, the choice of Missouri law is valid and enforceable here. As such, Missouri law governs all of Bass Pro's customer transactions, and all such customers are entitled to the protections of the class, regardless of state. Respondent's ruling excluding out-of-state customers from the class is therefore improper, contrary to Missouri law, and an abuse of discretion.⁴

B. BASS PRO DRAFTED THE LANGUAGE REQUIRING THAT CUSTOMERS AGREE TO THE RIGHTS OF MISSOURI LAW, SO QUESTIONS OF INTERPRETATION AND CONSTRUCTION IN THE PURCHASE AGREEMENT ARE RESOLVED AGAINST BASS PRO

Bass Pro required that all its customers, regardless of their state, agree that Missouri law be applied in a Missouri courtroom. When the clause it drafted and required became

⁴ The error of Respondent's ruling is shown in the following example: A Kansas City, Missouri resident who is charged an illegal document fee when he purchases a boat at Bass Pro's Olathe, Kansas store for use solely on Missouri lakes would not be included in the certified class, despite the controlling agreement having a Missouri choice-of-law clause and a Greene County, Missouri venue provision. Rather, he would be required to bring his claim in Greene County, Missouri subject to the law of some unknown, non-Missouri state.

financially inconvenient, Bass Pro then claimed the clause was too vague to apply. Bass Pro cannot benefit from its drafting failures. All doubts are resolved against Bass Pro, as drafter of the purchase agreement, and in favor of out-of-state customers' right to the protection of Missouri law.

In Missouri, disputes in a contract's language are interpreted against the drafter. *Greenberg v. Saha*, 84 S.W.3d 474 (Mo. App. 2002); *Mo. Rental & Leasing v. Walker*, 14 S.W.3d 638 (Mo. App. 2000); *Trimble v. Pracna*, 167 S.W.3d 706 (Mo. 2005). Courts do not, and should not, permit the *drafter* of a choice-of-law provision, to challenge that provision, when the provision is contrary to the drafter's interests. *Schlesinger v. Superior Court*, 2010 WL 3398844 (Cal Ct. App. Aug. 31, 2010); *A.G. Edwards & Sons, Inc., v. Smith*, 736 F. Supp. 1030 (D. Az. 1989); *Tractor & Farm Supply, Inc. v. Ford New Holland*, 898 F. Supp. 1198 (W.D. Ky. 1995).

“Doubtful language in a contract should be interpreted most strongly against the drafting party.” *17A Am. Jur. 2d Contracts* § 343. “(A)ny contract of adhesion, a contract entered without any meaningful negotiation by a party with inferior bargaining power, is particularly susceptible to the rule that ambiguities will be construed against the drafter.” *11 Williston on Contracts* § 32:12 (2009). “To the extent that a contract is ambiguous, it is to be construed strictly against the party by whom, or in whose behalf, the contract was prepared or the ambiguous language was used, and liberally in favor of the other party.” *17A C.J.S. Contracts* § 337 (2009).

Defendant Bass Pro, as drafter of the agreement language, had no standing to challenge their own words as lacking “concise language.” See, Exhibit 18, at 32; Exhibit 19, at 48-50. Rather, to the extent the contract language is vague as defendant claims, it must be interpreted against drafter Bass Pro and in favor of providing Bass Pro’s customers the full protections of Missouri law. *Mo. Rental & Leasing*, at 641-42. Bass Pro tries to interpret what it now claims is ambiguous language in its favor. This is opposite basic contractual interpretation. *Id.* Quite simply, Bass Pro cannot benefit from its drafting failures. Thus, the lack of concise language is interpreted against Bass Pro, and all of its customers get the protections of Missouri law.

The case of *A.G. Edwards & Sons, Inc. v. Smith*, 736 F. Supp. 1030 (D. Az. 1989) is particularly on point. Plaintiff, a securities firm and drafter of the underlying customer agreements, brought suit against securities investors for fraud under Arizona law, despite a choice-of-law provision it drafted requiring Missouri law for contract disputes. *Id.* at 1031. Defendant opposed application of Missouri law, arguing that Missouri law applied based on the fact that the “customer agreements entered into by the parties all stipulated that Missouri law would control.” *Id.* at 1035. The court recognized the inherent contradiction in the drafter challenging the provisions it drafted, concluding:

“It would be disingenuous to allow plaintiff to disregard its own choice-of-law provision whenever plaintiff believes it would be advantageous to do so....”

Id. at 1036. Here, as with *A.G. Edwards*, Bass Pro argued against the choice-of-law provision it drafted because it became advantageous to do so, and Respondent let it. Bass Pro argued that its failure to draft “concise language” precluded Missouri law from applying to plaintiffs’ “non-contract claims.” Exhibit 18, at 32 (Bass Pro claims “there is no concise language); see also, Exhibit 19, at 48-50 (same). This type of conduct – defendant (a) arguing against the choice-of-law clause it drafted, and (b) taking opposite positions when convenient – is contrary to basic contract law that disputes in a form contract be resolved against the drafter.

To the extent Bass Pro failed to use “concise language” in its agreements, it cannot benefit from its failures. Respondent’s order rewarding the conduct was erroneous. Defendant Bass Pro should be precluded from taking such a “disingenuous” stance, just as the *A.G. Edwards* court prohibited the securities firm from doing so. *A.G. Edwards*, at 1036. Instead, contractual provisions are interpreted against Bass Pro, and in favor of the non-drafting class, to give those out-of-state purchasers the protections that Missouri law provides. Missouri law governs all customer claims, and all Bass Pro customers charged illegal document fees are thus entitled to the protections of the class, regardless of their state of contracting. *Dale*, at 164, 175; *Clark*, at 486-87. This court should make permanent the requested writ.

The court in *Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198 (W.D. Ky. 1995), considered a similar situation, noting that:

“[o]ddly enough, Defendant urges the court to ignore the choice-of-law provision in the agreement that *it* drafted and to apply Kentucky law when deciding the matter.”

Id. at 1202. The court declined defendant’s request to ignore its choice-of-law provision, reiterating that questions of contract construction are resolved against the drafter of the provision. That court held:

“If any ambiguities in a contract are to be construed strictly against the drafter, the court does not consider binding Defendant by its own provisions to be much of a logical leap...Plaintiff should be entitled to rely on the signed agreement. Finally, public policy in Kentucky favors parties’ freedom to contract for substantive rights.”

Id. at 1203 (citations omitted) (emphasis added). The *Tractor and Farm Supply* court came to this conclusion without the additional conduct seen in this case, where Bass Pro has previously advocated in a manner diametrically opposite its current position. Clearly, Respondent should not have considered “binding (Bass Pro) by its own provisions to be much of a logical leap.” *Id.* Binding Bass Pro to its own contractual provisions was required. To the extent the choice-of-law language lacks conciseness, or is ambiguous as to non-contract claims, this ambiguity must be resolved against Bass Pro.

The foundation of Bass Pro’s opposition to class certification, which Respondent accepted, was based on an objection to language it drafted (and an argument opposite its

prior judicial representations). Courts should hold corporate drafters of form agreements to the choice-of-law provisions they force their customers to adopt. Although defendant now claims that it no longer believes all of Relator's claims arise from the contract governed by Missouri law, it has at minimum admitted an ambiguity. Under the law, any ambiguity on the issues must be resolved against Bass Pro, and in favor of the class. *Mo. Rental & Leasing* at 641-642; *Greenberg* at 476.

The Respondent trial court erred by interpreting the parties' choice-of-law provision in favor of the drafter, rather than in favor of protecting out-of-state purchasers in the non-drafting class. As a result, Missouri law governs all claims, and this court should enter the requested writ.

C. APPLICATION OF MISSOURI LAW TO ALL OF RELATORS' CLAIMS ENFORCES THE PARTIES' REASONABLE EXPECTATIONS

To ensure uniformity of result with all of its customers, Bass Pro drafted Missouri choice of law and Greene County, Missouri venue into every customer contract. Every customer agreed to Missouri law, was promised Missouri law, and reasonably expected the protection of Missouri law. Every Bass Pro customer, regardless of his state of contracting, is entitled to have his reasonable expectations enforced.

Missouri "courts seek to enforce the reasonable expectations of the parties garnered not only from the words of a standardized form imposed by its proponent, but from the

totality of the circumstances surrounding the transaction.” *Hartland Computer Leasing Corp., Inc.*, 770 S.W.2d 525 (Mo. App. 1989). “The principle of reasonable expectations as it applies to an adherent of a form contract, therefore, has validity because it removes the fiction of a negotiated assent and places the adherent in ‘the typical life situation’ to determine the purpose of the contract.” *Estrin Construct. Co., Inc., v. Aetna Casualty & Surety Co.*, 612 S.W.2d 413 (Mo. App. 1981).

“Under Missouri law and the *Restatement Conflicts of Law* §187, (courts) will give effect to the reasonable expectations of the parties to the Agreement and apply the law of the state chosen by the parties.” *Davidson & Assoc., Inc., v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164 (E.D. Mo. 2004). The reasonable expectations doctrine applies if the contract “contains an ambiguity *or* is a contract of adhesion.” *Zelman v. Equity Mut. Insur. Co.*, 935 S.W.2d 673, 675 (Mo. App. 1996). “Reasonable expectations are determined not by what the form recites but by the actual context in which the transaction is conducted.” *Estrin Construct.*, at 424 (quoting *Contracts & Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 538 (1971)). “(P)rotect(ing) the justified expectations of the parties...make(s) it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.” *Restatement of Conflicts of Law* §187, Comment on Subsection (b)(2).

The court’s decision in *Sachs Electric Co. v. HS Construction*, 86 S.W.3d 445 (Mo. App. 2002) illustrates the importance of the reasonable expectations doctrine in Missouri. In *Sachs*, plaintiffs brought quantum meruit claims against defendants, for work plaintiffs

performed on land in Texas. *Id.* As between the parties at issue, there was no contract and thus, no controlling choice-of-law provision. *Id.* at 457. However, the court found persuasive the fact that the *subject parties* had entered into contracts containing Missouri choice-of-law provisions with *third parties* on the job at issue. *Id.* The court then applied Missouri law to all disputes between the subject parties, explaining, “those provisions are a strong indication of the contracting parties’ justified expectations of which state’s law was going to apply to the obligations arising as a result of those contracts.” *Id.* at 454, emphasis.

The *Sachs* court held that even though the parties at issue had made no effective choice of law between themselves, Missouri law applied to all of the parties’ claims – including plaintiffs’ non-contractual claims – which stemmed from the work performed. *Id.* The court held this result flowed from the parties’ *justified expectations*.

The *Sachs* decision trumpets the import of the reasonable expectations doctrine, as the court applied reasonable expectations much more broadly than the issues here. In this case, the parties’ *justified expectations* are abundantly clear, because: (a) Bass Pro requires a Missouri choice-of-law provision in every contract with every customer regardless of state, (b) Bass Pro has admitted the Missouri choice-of-law provision applies to all claims arising from the contract, (c) Bass Pro has admitted that all of Relators’ claims “arise from” the contract, (d) Bass Pro benefitted from its judicial representation that all of Relators’ claims arise from the contract, and (e) Bass Pro brings every customer dispute to Greene County, Missouri.

Bass Pro customers reasonably expect that Bass Pro is justified in requiring all its customers bring claims under Missouri law in a Greene County, Missouri courtroom. Customers reasonably expect this ensures uniformity of law and result for Bass Pro, and for them. It is not reasonable for Bass Pro to now claim it requires all claims be brought in Greene County, Missouri, applying fifty (50) different laws to claims arising from the same contract. Customers' reasonable expectations that Missouri law apply go far beyond the facts of *Sachs*. There is only one reasonable expectation – application of Missouri law to all of Relators' claims, regardless of where they signed their contract. Moreover, defendant cannot rationally contest these reasonable expectations. The defendant defined what is reasonable, when it admitted “all six counts of plaintiffs' Petition arise from the purchase agreement” and that “the law very clearly dictates that claims arising from the agreement will be subject to Missouri law.” Exhibit 14; Exhibit 15. Respondent abused his discretion in failing to enforce those reasonable expectations.

The California Supreme Court in *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148 (Cal. 1992) made this exact point. In *Nedlloyd*, the California high court considered a Hong Kong choice-of-law clause found in the parties' agreement. *Id.* at 1152-53. Just as the purchase agreements indicate they are “governed by” Missouri law, the *Nedlloyd* agreement provided, “This agreement shall be governed by...Hong Kong law.” *Id.* at 1153, emphasis. The court held that “*all* disputes arising out of the transaction or relationship” were governed by Hong Kong law, because:

“the most reasonable interpretation of (the parties’) actions is that they intended for the clause to apply to all causes of action arising from or related to their contract.”

Id. at 1153, emphasis. The court explained:

“We seriously doubt that any rational businessperson...would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.”

Id. at 1154. Similarly, no rational person would believe that Bass Pro intended that the laws of fifty (50) jurisdictions would apply to disputes arising from the same contract. Rather, Bass Pro wrote Missouri choice of law and Greene County, Missouri, venue requirements into all customer contracts nationwide, in order to require uniform application of Missouri law in a Missouri court. This is the only reasonable expectation. Respondent erred in failing to enforce it.

Bass Pro’s argument that varying laws should apply “is more likely the product of post-dispute litigation strategy, not pre-dispute contractual intent.” *Nedlloyd*, at 1154. This is clearly illuminated by Bass Pro now claiming that its prior judicial admission in this case (that all of plaintiffs’ claims arise from the agreement), is false.

Applying the only reasonable expectation, Missouri law governs the claims of all customers charged illegal document fees. Thus, Bass Pro customers, regardless of their state of contracting, are entitled to class protection. *Dale*, at 164; *Clark*, at 489; *Ysbrand*, at 628.

Respondent abused his discretion by excluding out-of-state purchasers from the class definition.

D. THE CONTRACT LANGUAGE SELECTED BY DEFENDANT IS BROAD AND THEREFORE ENCOMPASSES ALL CONTRACTUAL AND NON-CONTRACTUAL CLAIMS RELATED TO THE AGREEMENT

Bass Pro's purchase agreement which charges document fees to all customers (nationwide) requires and promises that it is "governed by" Missouri law. This language is broad and should be interpreted broadly. Several courts have interpreted this language to encompass all contractual and non-contractual claims related to the agreement. Respondent erred in failing to interpret the language broadly, to govern all of plaintiffs' claims.

"(A) valid choice-of-law clause, which provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized." *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1155 (Cal. 1992). "Choice-of-law clauses that use the language 'governed by and construed by,' as is the case here, are considered to be broad, capturing (all claims) that relate to the contract." *Pro & Davis Land. v. Hertz Equip. Rental Corp.*, 2008 WL 5218267, *5 (D. N.J. 2008). Where a choice-of-law provision indicates the contract is "governed by the laws of the State of Missouri," Missouri law should apply not only to "the contract but the transactions thereunder." *A.G. Edwards & Sons, Inc., v. Smith*, 736 F. Supp.

1030, 1036 (D. Az. 1989).

In *Pro & Davis Land. v. Hertz Equip. Rental Corp.*, 2008 WL 5218267, *5 (D. N.J. 2008), the court certified a nationwide class based on a contracted-for New Jersey choice-of-law clause nearly identical to the clause that governs here. The *Hertz* defendants claimed the choice-of-law provision did not govern plaintiff's tort claims, but the court properly rejected this challenge, explaining:

“Choice-of-law clauses that use the language ‘governed by and construed by,’ as is the case here, are considered to be broad, capturing both contract and tort claims, particularly tort claims that relate to the contract.”

Id. at *5, emphasis. This same “governed by” language is used in Bass Pro’s purchase agreements with all its customers, which is “considered to be broad capturing both contract and (other) claims, particularly...claims that relate to the contract.” *Id.* All of Relators’ claims stem from Bass Pro inappropriately charging document fees pursuant to the contract. Just as New Jersey consumer protection laws applied to a nationwide class in *Hertz*, Missouri laws should apply to all of Bass Pro’s customers here.

In *Northwest Airlines v. Astrea Aviation*, 111 F.3d 1386 (8th Cir. 1997), the Eighth Circuit considered whether contractual choice-of-law provisions governed the parties’ tort claims. Defendant argued that its tort claims should be governed by Texas law, despite the parties’ contractual Minnesota choice-of-law provision. *Id.* at 1392. The relevant agreements provided, “this agreement shall be deemed entered into within and shall be

governed by and interpreted in accordance with the laws of the state of Minnesota.” *Id.* emphasis. Defendant argued the choice of law did not control plaintiff’s tort claims. *Id.* The court rejected defendant’s argument, explaining that the Minnesota choice-of-law provision also governed the tort claims, because said claims “*stem from*” the parties’ agreement. *Id.* The court stated,

“Although mainly styled as torts...(t)hese claims fall within the ambit of the express agreement that the contracts would be *governed by Minnesota law...*(Defendant) thus consented to the application of Minnesota law to such claims.”

Id. emphasis. Bass Pro’s form purchase agreement, used with all customers, regardless of their state, similarly provides:

“GOVERNING LAW. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE **GOVERNED BY** THE LAW OF MISSOURI. The venue for any action or proceeding arising from this Agreement...shall be in Greene County, Missouri.”

Exhibit 1, emphasis added; see also, Exhibits 2-12. Thus, like the *Northwest Airlines* defendants, Bass Pro has “consented to the application of Missouri law to such claims.” *Northwest Airlines*, at 1392.

In *Hitachi Credit*, 166 F.3d 614 (4th Cir. 1999), the court considered a choice-of-law provision much like the one before this court and held that plaintiffs’ tort claims were

governed by the clause. In *Hitachi*, the relevant clause provided for “the application of Virginia law in the interpretation of this agreement and the rights and obligations of the parties hereunder.” *Id.* at 624. The court held this language was “sufficiently broad to encompass contract-related tort claims.” *Id.* at 628. The court further held:

“(R)ecognizing the close relationship of the tort claims to the contract, this court will apply Virginia law to Hitachi’s fraud claims.”

Id. The language at issue in this case should be similarly upheld, to provide that Missouri law applies to all of plaintiffs’ claims, which *stem from* the purchase agreements at issue and which are wholly dependent on the agreements at issue.

A number of courts around the country have interpreted choice-of-law provisions, like the clause at issue, and held the provisions to be broad, encompassing any claim related to the agreement. In *A.G. Edwards*, 736 F.Supp. 1030, 1036, the court held that a contract provision stating that the contract was “governed by the laws of the State of Missouri,” controlled all claims related not only to “the contract but the transaction thereunder.” In *Corestates Bank, N.A., v. Bank*, 1996 WL 482909, at 14 (E.D. Pa. 1996), where the agreement stated it was “governed by” Virginia law, the court held that “the words ‘governed by’ envision claims other than those sounding in contract law,” including fraud claims. In *Tracy Broadcasting Corp., v. Spectrum Scan, LLC*, 2008 WL 394989, at 5 (D. Neb. 2008), the court held that following the *Restatement (Second) Conflict of Laws*, non-contractual legal theories which “stem from” the contract “fall within the ambit of the express agreement

that the contracts would be governed by [the state's] law.” In *Holden Farms, Inc., v. Hog Slat, Inc.*, 347 F.3d 1055, 1061 (8th Cir. 2003), the Eighth Circuit explained that “in analyzing the tortious behavior, we are essentially analyzing the contract” and thus, even plaintiff’s tort claims were governed by the contractual choice-of-law clause. In *Sullivan v. Sov. Bancorp*, 33 Fed. Appx. 640 (3rd Cir. 2002), the court held that tort claims were governed by the contractual choice-of-law provision found in the contract.

As a number of courts have held, the phrase “governed by” as used in Bass Pro purchase agreements is broad, encompassing all claims related to or stemming from the contract. All of Relators’ claims are based on improper “document fees” charged pursuant to (and on the face of) the contract. Exhibits 1-12. Missouri law thus governs all such claims. With Missouri law governing all out-of-state customer claims, these customers are entitled to: (a) the protection of Missouri law; and (b) the protection of the class. *State ex rel. Amer. Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 486-87 (Mo. 2003); *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d 151, 175 (Mo. App. 2006). Respondent abused his discretion in exempting out-of-state purchasers from the class definition.

CONCLUSION

Respondent correctly found the requirements for certification under Rule 52.08 were satisfied. This court has made similar determinations on virtually identical claims. *See e.g., Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 (Mo. 2007); *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697 (Mo. 2008).

However, Respondent abused his discretion by certifying a class definition limited to those who entered into contracts in Missouri, rather than those who entered into contracts containing a Missouri choice-of-law clause. Respondent's January 24, 2011 Order Granting class certification inappropriately denied certification to purchasers who Bass Pro contractually promised the benefits of Missouri law, through a contractual Missouri choice-of-law provision. All customers, regardless of state, seek to remedy the same grievance, and all customers charged document fees, regardless of where they signed their purchase agreements, are entitled to class protection. Namely, Respondent abused his discretion and is causing irreparable harm to Bass Pro's out-of-state purchasers who were charged document fees, in that:

First, Bass Pro is legally prohibited from making opposite legal claims and representations in the same litigation. Bass Pro affirmatively sought and succeeded in transferring venue based upon its representation that all of Relators' claims arise from the purchase agreement. Bass Pro should have been estopped from then arguing the opposite, so as to deprive its out-of-state customers of their right to apply Missouri law under the choice-of-law clause. Missouri courts protect the integrity of our state's judicial system by preventing parties from taking a position clearly inconsistent with one previously taken. Respondent erred in not defining the class in accordance with: (a) Bass Pro's initial admission that all of plaintiffs' claims arise from the contract; and (b) the express language of the provision itself.

Second, Respondent ignored the contracted-for choice-of-law provision in determining the putative class. Missouri courts are required to consider the choice-of-law clause first, because if it applies, there is no territorial analysis. Defendant did not show, and Respondent did not find, that another jurisdiction had a “materially greater interest” in the resolution of these claims, nor that Missouri law contravenes a “fundamental policy” of that jurisdiction. Moreover, (a) no state has a materially greater interest than Missouri in regulating a Missouri business that conducts its business nationwide and requires all its customers, regardless of state, settle disputes in a Missouri courtroom, subject to Missouri law; and (b) Missouri law does not contravene a “fundamental policy” of any other state with a materially greater interest in resolving the issues. No state’s *lack* of having (yet) enacted the consumer protections Missouri provides, is a “fundamental policy” of that state. Rather, every other state has an interest in its citizens receiving the promised protection of Missouri law. As such, Missouri law governs Bass Pro’s out-of-state customers’ claims to recoup illegally-charged document fees. Bass Pro’s non-Missouri customers are entitled to the protection of Missouri law and should be members of the class.

Third, defendant, as drafter of the choice-of-law provision, should not have been allowed to argue against application of the provision based on their own alleged failure to provide “concise language.” The choice-of-law provision should have been strictly construed against Bass Pro, the drafter of the adhesion contract. This requires that all customers charged improper document fees receive the benefit of Missouri law, regardless

of where the contract was signed.

Fourth, application of Missouri law enforces the parties reasonable expectations. No reasonable person would believe defendant Bass Pro chose to force every customer regardless of state, into a Missouri courtroom with a Missouri choice-of-law provision, only then to apply fifty (50) different state laws. Rather, the parties' reasonable expectations are that Bass Pro sought uniformity of law, forum and result, for both itself and its customers, on all claims arising from the contract.

Fifth, the choice-of-law provision is written broadly, to govern all claims related to the agreement. All of Relators' claims arise directly from the agreement, and thus, Missouri law applies to all claims. Applying Missouri law to all claims, out-of-state purchasers are entitled to the protection of the class.

Uniformly, courts have certified similar class actions of all customers where a corporate drafter requires that the law of its domicile apply to its customers regardless of state. Respondent's January 24, 2011 Order Granting Certification of Class Action inappropriately denied certification to purchasers who Bass Pro contractually promised the benefits of Missouri law. These rights were denied by an erroneous territorial assessment of contracts "entered into within the State of Missouri." Respondent abused his discretion. As a result, the putative class faces irreparable and enduring harm. Specifically, given the amount of the harm to each individual, class certification provides Bass Pro out-of-state customers their only practical remedy, and many of these out-of-state purchasers' statutes of

limitation may (have) otherwise run.

For the reasons set forth above, and in their Petition for Writ of Prohibition, Relators request this court's preliminary writ be made permanent and that a permanent Writ of Prohibition be issued prohibiting the trial court from restricting the class definition to contracts entered into in Missouri. Relators request remand with instructions that Respondent certify a class containing all persons who were charged document fees pursuant to a contract with a Missouri choice-of-law provision, regardless of the place where the contract was signed.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06,

AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)

) *ss:*

COUNTY OF GREENE)

Pursuant to Rule 84.06(c) and 84.24(I), counsel for Relators certify that this brief complies with the limitations contained therein. Excluding the cover page and this certification, there are 14,381 words in this brief. This complies with Rule 84.06(b). Counsel for Relators relied on the word count of their word processing system in making this certification.

Pursuant to said Rules, counsel for Relators certify that the CD-ROM filed herewith contains an electronic version of the brief in Word Perfect 15, and that said CD-ROM has been scanned for viruses and is virus-free.

Further, counsel for Relators state that Relators' Brief was served via **HAND DELIVERY**, along with the Brief Appendix, in the following stated number of copies, addressed to the following, on the **1st day of August, 2011**:

One **(1)** original and nine **(9)** copies of Relators' Brief, and **(1)** CD containing the same; one **(1)** original and nine **(9)** copies of Brief Appendix; one **(1)** copy of Relators' Brief, one **(1)** copy of Brief Appendix, and one **(1)** copy of CD containing the same to be

returned file-stamped to counsel for Relator (self-addressed stamped envelope included):

Bill Thompson, Interim Clerk
Supreme Court of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65102

One (1) copy of Relators' Brief, one (1) CD-ROM containing the same, one (1) copy of Brief Appendix, and one (1) CD-ROM was served on the following, via **HAND DELIVERY AND U.S. MAIL** on the **1st day of August, 2011**:

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IN THE SUPREME COURT OF MISSOURI

STATE EX REL. ROBERT McKEAGE, JANET McKEAGE, and Those Similarly Situated)	
)	
Relators,)	Supreme Court Docket SC91658
)	
vs.)	
)	
THE HONORABLE MICHAEL J. CORDONNIER,)	
)	
Respondent.)	

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3. ***Order Acknowledgment and Agreement of Sale*** (Exhibits 81, 87 from Plaintiffs’ First Amended Motion for Court Order Certifying Nationwide Class Action and Appointing Class Counsel, which sets

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..... A11-A14
4. *Order Acknowledgment and Agreement of Sale* (Exhibit 82 from Plaintiffs’ First Amended Motion for Court Order Certifying Nationwide Class Action and Appointing Class Counsel, which sets forth the sales contracts used by defendants in its **Indiana** facilities) A15-A16
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13.	<i>First Class Action Petition</i> (By plaintiffs Robert and Janet McKeage; dated January 21, 2009)	A51-A62

14.	<i>Motion to Transfer Venue and Suggestions in Support</i> (By defendants Bass Pro Outdoor World, LLC; dated March 11, 2009)	A63-74
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18.	<i>Suggestions in Opposition to Plaintiffs' First Amended Motion For Court Order Certifying Nationwide Class Action</i> (By Defendants Bass Pro Outdoor World, LLC; dated August 6, 2010)	A179-A230
19.	<i>Transcript of Summary Judgment / Class Certification Hearing</i> (By the Circuit Court of Greene County, the Honorable Michael J. Cordonnier, presiding; dated October 12, 2010)	A232-A250
20.	<i>Order Granting Certification of Class Action</i> (By the Circuit Court of Greene County, the Honorable Michael J. Cordonnier, presiding; dated January 24, 2011)	A251-A254
22.	<i>Deposition of Wayne Stokes</i> (Please see <i>Suggestions in Support of Petition for Writ</i> for reference.)	A255-A274

23.	<i>Order Denying Plaintiff’s Petition for Permission to Appeal Order Granting Class Certification.</i> (By Missouri Court of Appeals, dated February 22, 2011)	A275
24.	<i>Petition for Writ of Prohibition and Mandamus, Suggestions in Support</i> (By relators Robert and Janet McKeage, dated March 31, 2011)	A276-A623
25.	<i>Motion to Amend Class Definition Pursuant to Missouri Supreme Court’s Preliminary Writ</i> (By plaintiffs Robert and Janet McKeage, dated June 8, 2011)	A624-A627
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27.	<i>Second Amended Class Action Petition</i> (By plaintiffs Robert and Janet McKeage; dated May 28, 2009)	A629-A643
28.	<i>Third Amended Class Action Petition</i> (By plaintiffs Robert and Janet McKeage; dated January 27, 2010)	A644-A660
29.	<i>Motion for Order Certifying Class</i> (By plaintiffs Robert and Janet McKeage; dated June 30, 2009)	A661-A707
30.	<i>Suggestions in Opposition to Defendant’s Motion to Limit Discovery to Missouri Transactions</i> (By plaintiffs Robert and Janet McKeage; dated December 8, 2009)	A708-A728
31.	<i>Counter-Motion for Summary Judgment and Suggestions in Support</i> (By plaintiffs Robert and Janet McKeage; dated August 12, 2010)	A729-A756

32.	<i>Order Granting Preliminary Writ</i> (By Supreme Court of Missouri; dated May 31, 2011)	A757
33.	<i>Bass Pro Organizational Chart</i>	A758
34.	<i>Bass Pro/Tracker Business Card</i>	A759
35.	<i>Deposition of Tim Eisenhower</i>	A760-A775
36.	<i>Affidavit of Wayne Stokes</i>	A776-A778

Respectfully submitted

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06,
AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss
COUNTY OF GREENE)

Pursuant to Rule 84.069(c) and Local Rule 16, counsel for Relators certify that this brief complies with the limitations contained therein. Excluding the cover page and this certification, there are 14,381 words in this brief. Counsel for Relators relied on the word count of their word processing system in making this certification.

Pursuant to said Rules, counsel for Relators certify that the CD-ROM filed herewith contains an electronic version of the brief in Word Perfect 15, and that said CD-ROM has been scanned for viruses and is virus-free.

Further, counsel for Relators state that Relators' Brief was served via **HAND DELIVERY**, along with the Brief Appendix, in the following stated number of copies, addressed to the following, on the **1st day of August, 2011**:

One (1) original and nine (9) copies of Relators' Brief, (1) CD containing the same, and (1) original and nine (9) copies of Brief Appendix; one (1) copy of Relators' Brief, one (1) copy of Brief Appendix, and one (1) copy of CD containing the same to be returned file-stamped to counsel for Relators:

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One (1) copy of Relators' Brief, one (1) CD-ROM containing the same, one (1) copy of Brief Appendix, and one (1) CD-ROM was served on the following, via **U.S. MAIL** on the **1st day of August, 2011**:

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