

No. SC91658

IN THE  
MISSOURI SUPREME COURT

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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.

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RELATORS' REPLY BRIEF

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Oral Argument Requested

Steve Garner, MoBar # 35899  
Chandler Gregg, MoBar # 56612  
Strong-Garner-Bauer, P.C.  
415 E. Chestnut Expressway  
Springfield, MO 65802  
Phone 417-887-4300  
Fax 417-887-4385

David Baylard, MoBar # 25595  
Baylard, Billington, Dempsey & Jensen, P.C.  
30 South McKinley  
Union, MO 63084-1812  
Phone 636-583-5103  
Fax 636-583-1877

*ATTORNEYS FOR RELATORS*

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## **ARGUMENT**

### **I. REPLY TO STANDARD OF REVIEW ON ALL POINTS**

When analyzing Relators' Reply, the standard at issue required Respondent to "err on the side of class certification," without inquiring into the merits of the lawsuit. *Hale v. Wal Mart Stores, Inc.*, 231 S.W.3d, 215, 221 (Mo. App. 2007); *State ex rel. Coca-Cola v. Nixon*, 249 S.W.3d 855 (Mo. 2008).

### **II. BASS PRO'S ATTEMPTS TO ESCAPE THE CONSEQUENCES OF MAKING INCONSISTENT JUDICIAL REPRESENTATIONS FAILS DUE TO ITS (A) FACTUAL INACCURACIES AND (B) INCOMPLETE REFERENCES TO NON-PRECEDENTIAL OUT-OF-STATE CASES, AND THUS BASS PRO SHOULD BE ESTOPPED FROM ARGUING ANY LAW OTHER THAN MISSOURI'S.**

#### **A. INTRODUCTION**

Bass Pro requires every customer to agree that Missouri law as applied in Greene County controls, yet it relies almost entirely on out-of-state cases to argue against estoppel arising from its representations in Missouri courts. Regardless, the issue is simple: if the McKeage's claims *arise from* the contract, as Bass Pro represented when it sought transfer of venue, then class certification of all its customers – including its out-of-state customers – is required. Bass Pro's position that because its interests have changed, the Court cannot judicially estop it, would eliminate the doctrine entirely. The purpose of judicial estoppel is to prevent a party from making inconsistent judicial representations, *because* its interests

have changed.

Bass Pro inaccurately claims it argued that only Count VI of the McKeage's Petition *arises from* the purchase agreement. Bass Pro unambiguously represented that Greene County venue was required because all counts in the McKeage's Petition, including the unauthorized practice of law count, *arise from* the agreement. Bass Pro cannot sidestep estoppel by misstating the record.

Finally, the only argument Bass Pro made when requesting that the St. Charles Circuit Court transfer venue to Greene County, was that every count in the Petition *arises from* the agreement requiring transfer to Greene County. The St. Charles court granted the relief requested, on the only basis Bass Pro requested. Bass Pro cannot avoid estoppel by claiming the St. Charles court *may not* have bitten the only lure it cast. Moreover, even if it were not obvious that the court relied on Bass Pro's representations, judicial estoppel applies, to prevent Bass Pro's contradictory judicial representations; reliance by the court is not required under Missouri law. Bass Pro's briefing does nothing to remove its conduct from the textbook teaching of why judicial estoppel exists.

## **B. ARGUMENT**

### **1. There Has Been No Change in the Legal Nor Factual Context, and Bass Pro's "Changed Circumstance" Defense is No Defense at All.**

It is noteworthy that the company who requires all its customers regardless of purchase state submit to Greene County venue and Missouri law now relies almost

exclusively on citations to other states, while addressing its judicial representations in Missouri courts. First, at issue in both the venue and class certification hearings were whether plaintiffs' claims 'arise from' the purchase agreements. The issue was exactly the same; the facts were the same; and the allegations were the same. The only change was the amount of Bass Pro's financial interest, and as a result, its judicial representations.

Second, Bass Pro's "changed circumstance" defense is no defense at all. Quite simply, applying the "rule" that Bass Pro posits would eliminate judicial estoppel in Missouri. For example, In *In re Contest of Fletcher*, Fletcher could not have been estopped because the "facts changed" from his wanting "domicile" in California to his wanting "residency" in Missouri. 337 S.W.3d 137, 138-40 (Mo. App. 2011). Moreover, these were different "legal contexts," because Mr. Fletcher took inconsistent positions in different types of proceedings – once in dealing with politics, and the other time in dealing with his suit against the state. *Id.* at 142. While "domicile" itself can have different meanings in different contexts, the court estopped Fletcher from playing fast and loose.

Likewise, if the court had applied "Bass Pro Law" in *State ex rel. KelCor, Inc., v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399 (Mo. App. 1998), KelCor could not have been estopped from taking inconsistent positions. However, the *KelCor* court considered the "legal change" that KelCor's first representation was in a declaratory judgment proceeding and the second in a mandamus action, considered the "factual change" of a subsidiary sale, and held estoppel was proper. *Id.* at 403-04. Directly on point with Bass Pro's admission

that it changed positions solely to defeat class certification, Exhibit 19,<sup>1</sup> at 76:5-77;5, the *KelCor* court explained, “KelCor’s change in position as corporate strategy is an impermissible attempt to play fast and loose with the court.” *Id.* at 404.

In *Jeffries v. Jeffries*, 840 S.W.2d 291, 294 (Mo. App. 1992), under “Bass Pro’s law,” Jeffries could not have been estopped from claiming he was not the child’s father, since there was a new “factual context.” However, the Missouri court judicially estopped him, despite these “changed” facts. In *Vorhof v. Vorhof*, 532 S.W.2d 830 (Mo. App. 1975), the court could not have estopped wife because there was a change in “legal context,” i.e. a new statute to enforce her contract rights. *Id.* at 832. Yet the court estopped wife from claiming the award was “decretal,” since she previously claimed it was contractual.

In short, the facts from Missouri cases on judicial estoppel prove the opposite of what Bass Pro argues. A change in circumstance does not eliminate the estoppel doctrine; it is often the reason for it. The version of “estoppel” Bass Pro requests does not exist. If it did, not one Missouri court decision applying the doctrine would remain.

Even the most renowned judicial estoppel case in American jurisprudence would be non-existent. In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Supreme Court summarily rejected the same arguments Bass Pro now makes. New Hampshire argued that its prior representations were made only for convenience; that it discovered new facts by searching historical records; and that there was a change in public policy after the state’s

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<sup>1</sup> All exhibits referenced herein are included in the *Appendix to Relators’ Brief*.

original representation. *Id.* at 1811-12. The United States Supreme Court rejected every argument, holding that “the purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.* at 1810. Bass Pro asks the Court to nullify this purpose.

Simply stated, because its financial interests changed, Bass Pro asserts that representations it made to the St. Charles court to force venue in Greene County, are false. Missouri courts do not allow this. Nothing in Bass Pro’s piecemeal citations to other states’ cases changes the analysis. Respondent abused his discretion and caused Bass Pro’s out-of-state customers irreparable harm by failing to estop Bass Pro.

Bass Pro relies heavily on an unpublished Wisconsin opinion. In *O-Ton-Kah Park*, 230 Wis.2d 747 (Wis. App. 1999), defendant tried to judicially estop O-Ton-Kah from claiming it had a right to build a pier, by arguing that O-Ton-Kah had previously made a contrary representation. *Id.* at \*2. The appellate court disagreed, explaining that O-Ton-Kah did not argue in favor of pier rights in the prior proceeding, and in fact, “did not convince the *Stoesser* court of any position regarding pier rights” whatsoever. *Id.*

In this case, Bass Pro clearly (a) did argue all of plaintiffs’ claims arise from the contract, and (b) convinced the St. Charles trial court that “all six of plaintiff’s claims arise from the purchase agreement.” Respondent should have estopped Bass Pro from claiming that “not one of plaintiffs’ claims arise from the purchase agreement,” solely to defeat its out-of-state customers’ claims. While O-Ton-Kah did not take inconsistent positions, Bass Pro

clearly did. Missouri courts have consistently applied the doctrine to similar facts. *KelCor, Inc.* (Mo. App. 1998); *Jeffries* (Mo. App. 1992); *Vorhof* (Mo. App. 1975); *Fletcher* (Mo. App. 2011); *Shockley v. Dir. of Div.*, 980 S.W.2d 173 (Mo. App. 1998). Bass Pro’s reliance on an unpublished Wisconsin opinion does not undo uniform Missouri law. Rather, Bass Pro should be held to its judicial admissions that: “all six (6) counts of plaintiffs’ Petition ‘arise from’ the purchase agreement,” which “clearly dictates that claims arising from the agreement will be governed by Missouri law.”<sup>2</sup>

## 2. Bass Pro Continues to Play Fast and Loose with its Arguments in this Court.

Bass Pro continues to talk out both sides of its mouth. Bass Pro claims that its “position has been consistent,” *Respondent’s Brief*, at 85, even where the record unequivocally contradicts its claim. The facts show Bass Pro’s representations to be quite inconsistent:

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

Please see Exhibit 14, at A72; Exhibit 15, at A79, emphasis added. See also Exhibit 18, at 29-30; and see Exhibit 19, at A250. Bass Pro clearly said that all of plaintiffs’ claims, including its customers’ claims for the unauthorized practice of law, ‘arise from’ the contract,

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<sup>2</sup> Exhibit 14, at A72; Exhibit 15, at A79.

in order to force its customers into Greene County. Now, in an about-face due to its changed interests, Bass Pro argues plaintiffs' unauthorized practice claims for document fees (charged on the face of the contracts), do not 'arise from' the contracts. These representations are blatantly inconsistent.

Bass Pro now also erroneously relies on an argument it never made to the trial court, claiming it "***only argued that the forum selection clause found in the purchase agreement should apply . . . to Count VI's claim for rescission/revocation.***" *Respondent's Brief*, at 42, emphasis; see also, *Id.* at 33-34. Bass Pro argued nothing of the sort. Bass Pro very clearly argued:

***"All six counts of plaintiffs' petition 'arise from' the Purchase Agreement.***

***Accordingly, the Purchase Agreement's forum selection clause must be given effect."***

Exhibit 14, at A72, emphasis. Bass Pro clearly recognized at the time of venue transfer, that all of the McKeage's claims needed to *arise from* the contract, in order to force its customers into Greene County; and that is what it represented to the Court. In fact, Bass Pro's own briefing cites to the *Service Vending* case for the proposition that a forum selection clause only applies if all claims stem from the contract. *Respondent's Brief*, at 52-53, citing *Service Vending v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764, 767-69 (Mo. App. S.D. 2002), and providing, "Existence of a forum selection clause in a contract . . . does not require (other) claims between the parties be litigated in that jurisdiction absent concise language to that

effect.”

The St. Charles court transferred all of the case, not part of it. Bass Pro cannot rewrite the facts, and its current claim that it said things it never said does not change those facts, nor its prior judicial representations. Rather, its current representations are the same type of patently inconsistent comments that judicial estoppel prohibits.

Bass Pro also now says it cannot be held to its venue admissions in choice of law analysis, see *Respondent's Brief*, at 30, while also claiming that the analysis is “the same” for choice-of-law clauses (and) forum selection clauses. *Respondent's Brief*, at 53, where Bass Pro states, “Although (these cases) involved forum selection clauses, the analysis is the same for choice of law clauses.” Again, Bass Pro argues fast and loose to this Court. Quite simply, Bass Pro wrote the provisions, enforced them against the McKeages, has enforced them against customers nationwide, and now tries to circumvent the provisions it drafted, promised and required. Under clear Missouri law, it cannot do this.

Very simply, in Bass Pro’s own words,

“All 6 counts of plaintiff’s Petition ‘arise from’ the purchase agreement,”  
which “language clearly dictates that claims arising from the agreement will  
be governed by Missouri law.”

Exhibit 14, at A72; Exhibit 15, at A79. Relators request nothing more than what Bass Pro has admitted. Respondent abused his discretion by permitting Bass Pro to benefit from diametrically opposite representations to Missouri courts, particularly where Respondent was

required to “err on the side of upholding certification.” *Hale*, at 221. Bass Pro’s customers suffer the irreparable harm of having no practical remedy because of the size of their claims and for many, their statutes of limitations have run. Bass Pro’s reliance on out-of-state cases to address its conduct in Missouri courts, and its continued decision to play fast and loose with Missouri courts, do nothing to defeat application of judicial estoppel. Judicial estoppel applies under Missouri law.

**3. Reliance by the St. Charles Court is not Required to Estop Bass Pro, Although the Court’s Reliance on Bass Pro’s Only Argument is Self-Proving.**

Bass Pro’s claim that there is no evidence that the St. Charles court accepted Bass Pro’s representation is at best odd. *Respondent’s Brief*, at 27. Bass Pro sought transfer of all counts on only one ground, that being that all counts of the Petition arose from the purchase contract. The court then transferred all counts as Bass Pro requested. To claim that the court did not accept the only representation before it when granting the relief requested is nonsensical. Furthermore, Bass Pro loses, because reliance by the trial court is not an element of estoppel in Missouri.

For example, in *Galaxy Steel*, 928 S.W.2d 420, 423 (Mo. App. 1996), the court estopped a party from changing its argument, after its original representation was clearly rejected by the court. Likewise, the *Jeffries* court unambiguously held, “Judicial estoppel does not require reliance or prejudice before the party may invoke it (because) it protects the

integrity of the judicial process.” *Jeffries*, at 293, emphasis. Similarly, the *Fletcher* court explained, “Missouri courts (apply) the doctrine where the prior statements were not made under oath and even when the prior statements were not made in court at all.” 337 S.W.3d 137, 144-45 (Mo. App. 2011), citing *Nooney*, 966 S.W.2d 399, 403.

Rather, as Missouri courts have repeatedly held, the doctrine ensures that “one party will not be allowed to take ‘clearly inconsistent legal positions on any given day according to that party’s whims.’ ” *Fletcher*, at 144. Here, taking “clearly inconsistent legal positions” – guided *only* by Bass Pro’s bottom line – is exactly what Bass Pro has done. As such, even if the trial court had not given Bass Pro the relief it requested, estoppel would be proper, to prevent it from playing fast and loose in Missouri courts. *Galaxy Steel*, at 423; *Fletcher*, at 144-45; *Nooney*, at 403.

Nonetheless, the basis for the St. Charles court’s findings is clear. The one argument Bass Pro made before the St. Charles Circuit court (in favor of venue transfer) was that “all six counts of plaintiffs’ Petition ‘arise from’ the Purchase Agreement.” Exhibit 14, A68-A72. The St. Charles court’s grant of the relief requested explicitly and implicitly shows the court accepted Bass Pro’s representation. A number of Missouri cases have addressed implicit findings in court decisions. In *Thomas v. Lloyd*, 17 S.W.3d 177, 187 (Mo. App. S.D. 2000), the Southern District considered a defendant’s claim that the trial court should have partitioned a piece of property *in kind*, rather than through a forced sale. Defendant claimed that the trial court erred, because the trial court failed to make the requisite findings that the

parties would suffer “great prejudice” by partition. *Id.* The Court of Appeals rejected defendant’s claim, explaining that the court decision forcing a sale was “an obvious reference and response by the court to plaintiff’s pleading’s request to sell the land because partition in kind would greatly prejudice both parties.” *Id.* The *Thomas* court held, “When read in context, the judgment contains a sufficient, albeit implicit, finding of ‘great prejudice.’ ” *Id.* See also, *Reding v. Reding*, 836 S.W.2d 37, 42 (Mo. App. S.D. 1992); *Purdun v. Purdun*, 163 S.W.3d 598 (Mo. App. W.D. 2005); *Bellon Wrecking v. Orf*, 983 S.W.2d 541, 546 (Mo. App. E.D. 1999); *State v. Royal*, 610 S.W.2d 946 (Mo. 1981), all reading “implicit findings” into trial court decisions.

Similarly, the St. Charles court made an obvious, “albeit implicit, finding” that all of plaintiffs’ claims ‘arise from’ the purchase agreement, because that was the only thing Bass Pro argued. This Court’s “consideration” of whether the trial courts relied on Bass Pro’s prior representation weighs heavily in favor of estoppel,<sup>3</sup> inasmuch as the court’s findings were implicit. Bass Pro very clearly argued that all counts must be transferred, because all counts “arise from the Agreement.” Exhibit 14, at A71-A72. The St. Charles court agreed, and transferred the case to Greene County. Exhibit 16, *Order*. The courts reliance on Bass Pro’s representation is obvious, even though not required for estoppel.

As *Jeffries* explains, “Judicial estoppel does not require reliance or prejudice before

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<sup>3</sup> Contrary to Bass Pro’s briefing, reliance by the court is not an *element* of the doctrine but rather a *consideration*. *Jeffries*, at 293; *KelCor*, at 403; *Fletcher*, at 144-145.

the party may invoke it (because) it protects the integrity of the judicial process.” *Jeffries*, at 293. The purpose of the doctrine is to prevent parties from taking inconsistent positions and from playing fast and loose with the court. Technicalities pulled from snippets of other states’ cases do not unwind that purpose, nor its application to Bass Pro’s conduct. Respondent erred in failing to estop Bass Pro.

**4. There is Nothing Inconsistent about the McKeage’s Representations Throughout These Proceedings.**

Bass Pro’s claim that the McKeages have presented inconsistent claims is simply wrong. Bass Pro argues that because (a) the McKeages previously argued the purchase agreement is a contract of adhesion and/or (b) Relators claim Respondent erred in his class definition, the McKeages *would be* “estopped” from enforcing the Missouri choice of law clause in this class action. *Respondent’s Brief*, at 47.

The McKeages have claimed since day one that this is an adhesion contract, and this remains the case today. See *Relators’ Brief*, at 37-47. Simply put, the law requires strict construction of adhesion contracts, when enforced against the drafter. Thus, interpretation of the purchase agreement is resolved against drafting party Bass Pro, and in favor of every customer. *Greenberg v. Saha*, 84 S.W.3d 474 (Mo. App. 2002); *Trimba v. Pracna*, 167S.W.3d 706 (Mo. 2005). Similarly, as against contract drafter Bass Pro, customers’ reasonable expectations must be enforced. *Estrin Construct. Co., Inc., v. Aetna*, 612 S.W.2d 413 (Mo. App. 1981); *Zelman v. Equity*, 935 S.W.2d 673, 675 (Mo. App. 1996). In

addition to estoppel, these clear rules of law also require Bass Pro's choice of Missouri law be enforced, regardless of customer purchase state. *Relators' Brief*, at 37-47. Principles of both (a) adhesion contracting, and (b) judicial estoppel independently require Missouri law apply.

The ambiguities that Bass Pro writes into its purchase contracts do not eliminate its customers' rights to enforce the contract. Customers can still enforce the contract and its terms – and enforce those terms (a) pursuant to *their reasonable expectations* and (b) with all ambiguities interpreted in their favor. There is nothing inconsistent in the McKeage's position. Bass Pro's estoppel analogy on Relators' perfectly consistent issues, is factually and legally groundless.

Likewise, Bass Pro's argument that Relators *would be* barred from pursuing a class action because Relators contest the *scope* of Respondent's order, is again illogical. Relators have claimed all along that Respondent appropriately certified a class action, albeit under too narrow a class definition. See Exhibit 24, at A276, A280; Exhibit 25, at A624-A625. The fact that plaintiffs have sought to expand the class after learning that Bass Pro uses the same contract, with the same choice of law and venue provisions nationwide, is 100% consistent with the McKeage's original claim. There is no conduct of the McKeages to estop.

In an attempt to deflect attention from its inconsistent judicial representations, Bass Pro posits that Relators' entirely consistent positions were inconsistent. Its claims are baseless.

**5. Bass Pro's Heavy Reliance on *Owens* is Unpersuasive, as Missouri Cases Requiring Bass Pro be Estopped are Numerous and Clear.**

The *Owens v. Contigroup Companies, Inc.*, 2011 WL 1118665 (Mo. App. 2011) court held estoppel was not required, while noting that the lawyer's statements were in front of the same judge, the plaintiff never received an outcome nor resolution as a result of his first representation, and it was unclear whether plaintiff had misled the court. *Id.* at \*7. In fact, the court explained that if the court was misled, sanctions may be appropriate. *Id.* at \*7. However, here Bass Pro (a) took opposite positions, (b) took the positions in front of two separate judges, (c) obtained a favorable outcome as a result of its initial position, i.e. transfer to Greene County, Missouri, and (d) currently has a favorable outcome for taking the opposite position, i.e. depriving out-of-state victims from receiving promised protections under Missouri law.

The *Owens* case does nothing to undo the heavy weight of Missouri authority applying the doctrine to prohibit conduct like Bass Pro's. In fact, the *Owens* court cited to a number of cases with facts similar to the issues here, where Missouri courts judicially estopped a party from taking inconsistent positions regarding the same matter. *Id.* at \*7, citing *Vorhof v. Vorhof*, 532 S.W.2d 830, 831 (Mo. App. 1975); *State v. Dillon*, 41 S.W.3d 479, 485-86 (Mo. App. 2000); *Jeffries v. Jeffries*, 840 S.W.2d 291 (Mo. App. 1992).

A brief review of these cases undermines Bass Pro's argument. In *State v. Dillon*, the conduct at issue and estopped was conduct in the same trial. In estopping the party from

taking opposite positions, the court explained,

“A party may not conduct himself throughout the trial so as to leave the adversary with the understanding that a fact is uncontroverted and then take the position it has not been proved . . . Appellant is therefore estopped from arguing the lack of evidence.”

*Id.* at 485-86, emphasis. In *Vorhof*, the court estopped wife from claiming *the same* child support she previously claimed was decretal, was contractual. *Vorhof*, at 831. Similarly in *Jeffries*, the court estopped husband from obtaining relief from the court’s divorce decree, based on prior representations about the *same decree*. *Jeffries*, at 294. There is nothing in *Owens* that undermines the mandate to estop Bass Pro’s conduct.

Bass Pro wrote the contract. It chose the wording. It chose the state law that would apply. It chose to impose the language it wrote on its customers, and to force them into Greene County, Missouri. Under Missouri state law, which it chose for this contract with fill-in-the-blanks for document fee charges, Bass Pro’s conduct is not allowed. When it realized Missouri law does not allow its conduct, it (a) tried to invalidate the provision it wrote and (b) took clearly inconsistent positions, by its own admission solely to escape class certification. Exhibit 19, at A250 (hearing at 76:5-77:5). Bass Pro should have been estopped from objecting to the choice of law provision it wrote, particularly after it previously argued, and benefitted from arguing, that: “But for the terms of the Purchase Agreement, Counts I-V would not exist. All six (6) counts of plaintiffs’ Petition ‘arise from’

the Purchase Agreement.” Exhibit 14, at A71-A72. Respondent abused his discretion in failing to estop Bass Pro and is causing irreparable harm to Bass Pro’s out-of-state customers by depriving them of contractual legal remedies promised by Bass Pro.

**III. APPLYING MISSOURI LAW TO ALL OF BASS PRO CUSTOMERS’ CLAIMS DOES NOT VIOLATE A FUNDAMENTAL POLICY OF ANY OTHER STATE, AND BASS PRO’S ARGUMENTS IGNORE BASIC RULES OF CONTRACTUAL INTERPRETATION WHICH REQUIRE BASS PRO’S CHOICE OF LAW BE ENFORCED**

**A. INTRODUCTION**

The cases do not support Bass Pro, so it posits facts and holdings found nowhere in the cases it cites. Bass Pro’s analysis ignores basic rules of contractual interpretation. It can provide no reason why the parties’ reasonable expectations should be disregarded. Its analysis is likewise almost entirely devoid of cases interpreting “choice of law” issues, but rather relies on authority enforcing the parties’ reasonable expectations against the contract drafter, albeit on non-choice of law matters. Furthermore, this court’s decision in *Eisel* is perfectly consistent with certification of all customers’ claims, and in repeatedly referencing *Eisel*, Bass Pro “cites” issues and facts that were not before the *Eisel* court.

Finally, there is no state that has a fundamental policy (1) preventing a Missouri company from subjecting itself to the laws of Missouri, (2) requiring that Bass Pro charge document fees in their state, (3) permitting Bass Pro to object to the contractual promises and

rights it provided to that states' citizens, nor (4) requiring that its citizens be fleeced by an out-of-state company's add-on charges. Basic contract principles and *Restatement (Second) Conflicts of Law* §187 require Missouri law apply to all claims, regardless of the customers' purchase state.

## **B. ARGUMENT**

### **1. Missouri Case Authority Requires That Missouri Law Apply.**

Bass Pro erroneously claims Relators "do not cite a single Missouri case" in support of applying Missouri law to all of Bass Pro customers' claims. *Respondent's Brief*, at 52. This proves Relators' supposition that Bass Pro did not read Relators' brief. See *Relators' Brief*, generally; see also, e.g. *Bauer v. Farmers*, 270 S.W.3d 491 (Mo. App. 2008); *Zememann v. Equity Mutual*, 935 S.W.2d 673, 675 (Mo. App. 1996); *Sachs Electric v. H.S. Construction*, 86 S.W.3d 445 (Mo. App. 2002).

For example, in *Sachs Electric v. H.S. Construction*, 86 S.W.3d 445 (Mo. App. 2002), the Missouri court applied the doctrine of reasonable expectations to require that Missouri law apply to all claims, including claims arising in Texas. In *Bauer v. Farmers*, 270 S.W.3d 491 (Mo. App. 2008), the Missouri court required Missouri law apply to all claims based on a choice of law provision, because defendant failed to prove Kansas had a materially greater interest in applying a fundamental policy.

Moreover, the principles that require the contractual Missouri choice of law provision apply to customer claims for document fees found on the face of every agreement, are firmly

rooted in Missouri case authority. *Rheem Mfr. Co. v. Progressive*, 28 S.W.3d 333 (Mo. App. 2000), holding “Missouri courts honor contractual choice of law clauses”; *Missouri Rental & Leasing v. Walker*, 14 S.W.3d 638 (Mo. App. 2000), holding disputes about contract terms are resolved against the drafter; *Zememann v. Equity Mutual*, 935 S.W.2d 673, 675 (Mo. App. 1996), holding “reasonable expectations” doctrine applies if contract “contains an ambiguity or is a contract of adhesion.” *Estrin Construct, Inc. v. Aetna*, 612 S.W.2d 413 (Mo. App 1981), explaining that terms in a form contract are interpreted pursuant to the “typical life situation to determine the purpose of the contract.” Bass Pro objects to the provision it chose, wrote, required and enforced. Missouri law does not now let it complain, when its customers enforce its promise.

Bass Pro’s position that Relators do not cite Missouri cases is not only incorrect, but ironic given that in response to precedential Missouri authority opposite Bass Pro’s position, Bass Pro cites cases that interpret *outbound forum selection* clauses against the contract drafter. These cases also all enforce the parties’ reasonable expectations, just as this Court should do by applying Missouri law to all of Bass Pro’s customers’ claims. See *Respondent’s Brief*, at 83, 86, claiming *Service Vending*, *Jitterswing*, *Janson* and *High Life* prohibit a Missouri choice of law from being applied. Contrary to Bass Pro’s briefing, not one of these cases addresses a choice of law issue; rather all involve legally disfavored outbound forum clauses. The cases Bass Pro provides do not support its arguments, nor stand for what it claims.

Plaintiff's tort claims in *Service Vending v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764 (Mo. App. 2002), were wholly independent of the terminated contract between the parties. After Wal-Mart terminated its vending contract with Service Vending (SVC), SVC entered into negotiations with a third party, Store Service. *Id.* at 767. SVC then brought tortious interference claims against Wal-Mart for interfering with the negotiations between SVC and Store Service. *Id.* at 767-68. SVC's claims had nothing to do with SVC's prior contract with Wal-Mart, nor issues therein. *Id.* When Wal-Mart tried to enforce a forum selection clause from the terminated contract, the court explained,

“The litigation that embodied SVC's claim did not arise due to the parties' agreement . . . The tort claim Wal-Mart was defending was not litigation that arose 'due to the parties' agreement.' It arose on the basis of allegations that Wal-Mart unreasonably interfered with business negotiations between SVC and Store Service.”

*Id.* at 769, emphasis. In refusing to apply the terminated contractual language to the issue before it, the *Service Vending* court went no further than common sense. Logically, the court held that a terminated contractual forum selection clause does not control completely independent claims between parties, but rather controls only claims that “arise due to the parties' agreement.” *Id.* at 769. Moreover, in refusing to enforce the forum selection clause, the court ruled against the contract drafter.

Whereas the *Service Vending* claims “did not arise due to the parties' agreement,”

Relators' claims clearly do. Whereas reasonable expectations in *Service Vending* were that a forum clause not apply to issues "wholly independent" of a terminated contract, the parties' reasonable expectations here are that (a) Bass Pro drafted Missouri choice of law and venue to ensure uniform application of Missouri laws, and (b) the contract drafter cannot object to the language it wrote, required and promised. Bass Pro has itself defined the parties' reasonable expectations, by admitting "all six counts of plaintiffs' Petition arise from the purchase agreement" and "the law very clearly dictates that claims arising from the agreement will be subject to Missouri law." Exhibit 14, at A72; Exhibit 15, at A79.

Bass Pro's reliance on *Jitterswing* is likewise inapposite. Like the *Service Vending* court, the Eastern District in *Jitterswing* addressed an *outbound* forum selection clause. *Jitterswing v. FranCorp, Inc.*, 311 S.W.3d 828, 831 (Mo. App. 2010). The court explained that enforcement of the outbound forum clause would be "unfair," because it would leave the consumer "without recourse." *Id.* at 831. The *Jitterswing* court interpreted the terms against the contract drafter. In relying on *Jitterswing*, Bass Pro ignores basic rules of contractual interpretation, namely (a) interpretation of forum agreements against the contract drafter, and (b) enforcement of the parties' reasonable expectations. Bass Pro's attempt to support its anti-consumer position with a case that prevents a corporate contract drafter from undermining consumer rights, is illogical.

Bass Pro likewise string-cites *High Life Sales v. Brown*, 823 S.W.2d 493 (Mo. 1992), before then proclaiming that *High Life* "instruct(s) that (the) Missouri choice of law clause

may not be applied.” *Respondent’s Brief*, at 86. Like *Jitterswing* and *Service Vending*, *High Life* has nothing to do with a choice of law clause, much less a choice of law clause to which the drafting party is objecting. Rather, the *High Life* court again dealt with an *outbound* forum selection clause that the court interpreted against the drafter. *Id.* at 495-98.

Finally, Bass Pro cites the federal case of *Janson v. Legalzoom.com, Inc.*, 727 F. Supp.2d 782 (W.D. Mo. 2010), which also concerned interpretation of an *outbound forum selection* clause, and which that court also interpreted *against* the contract drafter. In fact, the court explained there was “uncertainty as to which law applies,” despite “Missouri law issues beyond the sales transaction.” *Id.* at 789. Like *Service Vending*, *Jitterswing* and *High Life*, *Janson* does nothing to unravel required enforcement of a choice of law clause (a) against the contract drafter, (b) when reasonable expectations require enforcement, (c) when plaintiffs’ claims concern document fees charged on the face of the agreement, (d) when the contract drafter enforced the venue provision pursuant to judicial representations that all of plaintiffs’ claims ‘arise from’ the contract, and (e) when the drafter admitted all six (6) counts of plaintiffs’ claims ‘arise from’ the agreement and that all claims arising from the agreement are governed by Missouri law.

The cases that Bass Pro says “instruct that a Missouri choice-of-law clause may not be applied when application of Missouri law conflicts with a fundamental policy of (another) jurisdiction,” say no such thing. *Respondent’s Brief*, at 86. These cases have nothing to do with a (a) choice of law clause nor (b) interpreting the fundamental policy of another state.

Because Bass Pro's position is unsupported by the cases it cites, it represents to this Court that the cases address issues, and make holdings, that the cases simply never touch.<sup>4</sup>

Missouri case authority, and basic legal principles firmly rooted in Missouri law, overwhelmingly require the Missouri choice of law clause be enforced. See e.g., *Bauer*, at 498-99; *Sachs*, at 454, 457; *Zemermann*, at 675; *Walker*, at 641-42. The drafter intended to force all out-of-state customers to file suit in Greene County, no matter how small the claim. Surely Bass Pro felt this to be fair and equitable and not just a means to abuse its customers. If it was fair and equitable against its customers, it is certainly fair and equitable against Bass Pro, the drafter. Respondent abused his discretion in denying certification of all claims regardless of purchase state.

**2. Nothing in *Eisel* is Inconsistent with Certifying All Customer Claims, Regardless of Purchase State.**

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<sup>4</sup> Bass Pro's fleeting reference to other Missouri cases is no more persuasive, nor on point. In *Major v. McCallister*, 302 S.W.3d 227 (Mo. App. 2009), the court considered a forum selection clause and held it should be enforced "where the statements giving rise to a claim are integrally linked to the contractual relation between the parties." *Id.* at 231. In *Huch v. Charter*, 290 S.W.3d 721 (Mo. Banc. 2009), the court addressed neither forum nor choice of law clauses but rather made a merit decision unfavorable to Bass Pro's position. In *Farmers Exchange*, 107 S.W.3d 381 (Mo. App. 2003), the court dealt with conflict issues where there was no choice of law.

Bass Pro adds words to this Court's holding in *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 (Mo. Banc. 2007), and draws legal conclusions without legal analysis. Bass Pro claims that granting Relators' Petition for Writ "would require disregard of *Eisel*." *Respondent's Brief*, at 63; see also *Id.*, at 59, 81, 85. This is incorrect and lacks explanation. The *Eisel* court held that under Missouri law, i.e. the law Bass Pro has chosen, companies like Bass Pro cannot charge their customers "document fees" for preparing and processing legal documents. *Eisel*, at 339.

This Court in *Eisel* never expressed the opinion that it is fundamental policy to permit a Missouri company to (a) fleece out-of-state customers; (b) benefit from claiming it intentionally wrote an unenforceable choice of law provision; (c) take diametrically opposite positions because its interests have changed; (d) disclaim contract provisions it drafted and from which it benefits. Nor did this Court express in *Eisel* that (f) another states' lack of Missouri's protections is a fundamental policy trumping a Missouri choice of law provision drafted by a Missouri company; nor (g) another state has a fundamental policy preventing its citizens from receiving the full protections of Missouri law, when a Missouri company requires its citizens agree to Missouri law applied in a Missouri courtroom in order to buy Bass Pro products.

In fact, quite contrary to Bass Pro's briefing, **the word "fundamental" appears nowhere in the *Eisel* opinion.** Despite Respondent's repeated reference to *Eisel* addressing (other) states' "fundamental policies" in choice of law analysis, *Respondent's Brief*, at 77,

81, 83, 85, this Court in *Eisel* performed no such analysis. Once again, the case does not support Bass Pro, so it implies a holding that does not exist.

This Court in *Eisel* held that charging document fees, as Bass Pro has done, is prohibited by Missouri law. *Id.* at 339.<sup>5</sup> Bass Pro has illegally charged these fees, under its own choice of Missouri law. Accordingly, under *Eisel*, and *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697 (Mo. 2008), all of Bass Pro's customers regardless of purchase state, are entitled to a return of money illegally taken by Bass Pro; this, pursuant to the law of Missouri that Bass Pro chose to apply to each sale. Because Bass Pro has chosen this state's law to apply, all its customers regardless of state get the benefit of Missouri law, which prohibits Bass Pro's conduct.

Moreover, whether something is fundamental policy in Missouri, or not, is not the issue. The issue is whether other states with (1) *materially greater interests* have (2) *fundamental policies* that are NOT protected by application of Missouri law to Bass Pro customer claims. *Bauer*, 270 S.W.3d 491 (Mo. App. 2008); *Restatement (Second) of Conflicts* §187 (1998). In order to meet its burden, Bass Pro must prove that each state in which it does business promising customers the protection of Missouri law and requiring Greene County, Missouri venue, has a fundamental policy (a) prohibiting Bass Pro from fully complying with Missouri law, (b) prohibiting its states' citizens from receiving the

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<sup>5</sup> Relators note that the merits are not at issue in class certification. See *Nixon*, 249 S.W.3d 855 (Mo. 2008).

contractually promised benefits of Missouri law, and (c) requiring dealers charge their customers document fees amounting to whatever the market will bear. Bass Pro has not, and cannot, meet its burden.

Furthermore, Bass Pro's claim that Relators are undermining *Eisel* "in reverse" is not accurate. Bass Pro implies that if this court enforces the Missouri choice of law promised to all Bass Pro customers, Illinois law would apply where an Illinois company charges document fees to customers in Cape Girardeau pursuant to an Illinois choice of law clause. The issue is inapposite to the issue here. Fundamentally, the question in the example is, "Can the Illinois company as drafter force illegal fees on its customers in another state?"; whereas here, the question is, "Can the drafter promise out-of-state consumers Missouri legal protection and then abandon the promise it wrote?"

Moreover, Bass Pro's example is devoid of legal analysis, and ignores basic contract law and *Restatement §187* analysis. Several relevant questions bearing on which states' law would apply, are unanswered. For example:

- ▶ What is Illinois' policy on document fees?
- ▶ Is Illinois policy on document fees consistent or inconsistent with Missouri?
- ▶ Is Illinois' policy more or less restrictive than Missouri?
- ▶ What are the parties' reasonable expectations under the relevant facts?
- ▶ Is the drafter objecting to language it wrote and if so, is drafter claiming

the language it drafted lacks conciseness?

- ▶ Is the company who drafted the choice of law clause and benefitted from it (to eliminate enumerable customers' ability to bring claims in other states), then trying to disclaim the provision it wrote?
- ▶ Who is the choice of law clause being interpreted against – the drafter or non-drafter?
- ▶ Did the company who is now trying to disclaim the provision force its customer into Cape Girardeau pursuant to a venue provision on the same issues?

This “reverse” is not the reverse. Nothing in this Court’s decision would answer the example Bass Pro provides. The court *may* or *may not* apply Illinois law, and *may* or *may not* apply Missouri law, depending on the facts. But the court would apply choice of law analysis to the facts, not leap-frog choice of law analysis by making an unsupported “sea change” argument. Bass Pro’s example is unpersuasive. Certification of all Bass Pro customer claims, regardless of purchase state, is perfectly consistent with, and supported by, this Court’s decision in *Eisel*.

**3. No Other State Requires Boat Dealers Charge Document Fees, Particularly No State Compels Out-of-State Dealers Charge Their Citizens Fees Amounting to “What the Market Would Bear.”**

Bass Pro’s claims that many states do not prevent it from charging document fees is

irrelevant. *Respondent's Brief*, at 61-63. Bass Pro chose to promise, and require, application of Missouri law to all its customers' claims. None of the cases Bass Pro cites require dealers to charge document fees, nor do any of the cases prohibit a Missouri company conducting business in their states from subjecting itself to Missouri's laws. It would in fact be very odd for a state to force an out-of-state company to fleece its citizens with spurious add-on fees. Furthermore, while Bass Pro claims certain states have mandatory licensing fees, that is not what Bass Pro charges as "document fees," as Bass Pro unabashedly admits to charging its customers "what the market would bear." Exhibit 22, at A264, A268.

Whether other states (a) allow dealers to charge document fees if they include specific language, or not, or (b) deem the charging of document fees the practice of law, or not, are irrelevant issues. As the *Hall* court explained, "The fact that (Missouri) law might not otherwise apply is irrelevant because the parties expressly agreed that (Missouri) law would apply." 876 N.E.2d 1036, 1042 (Ill. App. 2007). The parties have chosen Missouri law to govern all of these claims, and Missouri law should apply. Bass Pro cannot meet its burden to prove any other state requires Bass Pro charge document fees, precludes a company headquartered in Missouri from subjecting itself to Missouri law, or requires its customers be fleeced with add-on charges after the sale appears closed.

In fact, the *Brack v. Omni Loan Co.* case that Bass Pro hails from California, illustrates this burden that Bass Pro cannot meet. 164 Cal. App.4th 1312 (Cal. App. 2008). There, the court considered "which state, in the circumstances presented, will suffer greater

impairment of its policies if the other state's law is applied.” *Id.* at 1328. In reaching its decision, the court explained,

“Nevada . . . has no policy which prevents its lenders from subjecting themselves to the regulatory authority of other states. That is to say, nothing in Nevada law prevented Omni from fully complying with California law.”

*Id.* at 1329. Likewise here:

“(Florida, Texas, Illinois, etc.) has no policy which prevents its boat dealers from subjecting themselves to the regulatory authority of other states. That is to say, nothing in (Florida, etc.) law prevented Bass Pro from fully complying with Missouri law.”

For pages, Bass Pro discusses that *some* other states *allow* document fees to be charged; but no state requires boat dealers do so. There is thus no evidence of any other state having a policy that is unprotected by application of Missouri law. No state has an interest in preventing its citizens from receiving greater consumer protection, by contract. Further, there is nothing novel about Missouri courts governing out-of-state conduct of a Missouri (citizen or corporation) that is, or is not, engaging in the practice of law outside the state. See Supreme Court Rule 5.20; see also, *In re Winder*, 530 S.W.2d 222 (Mo. 1975), supplemented 547 S.W.2d 459 (Mo. 1975); *In re Storumt*, 873 S.W.2d 227 (Mo. 1994).

Bass Pro produces no evidence that any other state requires it to charge its customers whatever fee the market will bear, because no state does. Bass Pro chose Missouri law, and

thus, Missouri law applies to all of Bass Pro's customers' claims. Respondent abused his discretion in failing to certify a class of all customers regardless of purchase state who were charged document fees pursuant to a contract requiring Missouri law.

#### **4. Application of Missouri Law Brings Predictability of Result.**

Bass Pro unsupportedly claims that enforcing the Missouri choice of law clause would produce "unpredictability" of results. *Respondent's Brief*, at 82. This is silly. Applying the same state law to all claims insures predictability, which is why Bass Pro claims it put this choice of law provision in the contract. Bass Pro's current unpredictability claim is nothing more than a self-centered stance that it wants predictability only when it favors Bass Pro.

Even when there are no estoppel issues present, courts in class cases uniformly enforce the chosen law, to ensure uniformity and predictability of result. See *Hall v. Sprint*, 876 N.E.2d 1036 (Ill. App 2007); *Schlesinger v. Supreme Court*, 2010 WL 3398844 (Cal. App. 2010); *Nedlloyd v. Superior Court*, 834 P.2d 1148, 1154 (Cal. 1992). There is no doubt Bass Pro has countless times prevented consumer suits in other states from proceeding, by forcing Greene County venue and Missouri choice of law. When a Missouri company (a) writes a Missouri choice of law provision into every customer contract, (b) forces its customers into a Greene County courtroom, (c) represents that all of plaintiffs' claims arise from the contract requiring Greene County venue and Missouri law, and then tries to disclaim the Missouri provisions it wrote and enforced, the result should be predictable – Missouri law applies.



**BAYLARD, BILLINGTON,  
DEMPSEY & JENSEN, P.C.**

David Baylard

30 South McKinley

Union, MO 63084-1812

Phone 636-583-5103

Fax 636-583-1877

dbaylard@bbd-law.com

*Attorneys for Relators*

