

**IN THE
SUPREME COURT OF MISSOURI**

NO. SC 88531

STATE EX REL. THE COCA-COLA COMPANY,
Relator,
V.
THE HONORABLE W. STEPHEN NIXON,
JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, AT INDEPENDENCE,
Respondent.

PROCEEDING IN PROHIBITION FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI, CAUSE NO. 04-CV-208580

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this writ proceeding pursuant to both Mo. Const. art. V, § 4.1, which vests this Court with general superintending control over all courts and tribunals, including the authority to issue and determine original remedial writs, *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856 (Mo. banc 2001), and Mo. Rev. Stat. § 530.010, *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986). Pursuant to this authority, on June 26, 2007, this Court issued a preliminary writ of prohibition directing Respondent Honorable W. Stephen Nixon, Circuit Judge of Jackson County, Missouri, at Independence, in the class action captioned *Pennington v. The Coca-Cola Company*, No. 04-CV-208580 (“*Pennington*”), to show cause why a writ should not issue prohibiting him from doing anything other than vacating his order of February 9, 2006, granting plaintiff’s motion to certify a class of all Missouri consumers of diet Coke® served from fountain dispensers (A0001-03),¹ and directing Respondent to deny said motion. (A0328). Relator The Coca-Cola Company (“Relator” or “Coca-Cola”) now requests this Court to make absolute the preliminary writ of prohibition.

¹ The materials identified herein as “A0___” are compiled in the accompanying Appendix.

STATEMENT OF FACTS

Background Facts

Diet Coke® served from fountain dispensers (“fountain diet Coke®”) is available for purchase by consumers at fountain outlets such as restaurants, theaters and convenience stores. Coca-Cola manufactures concentrated diet Coke® syrup and sells the syrup in bulk containers to fountain outlets. The fountain outlets mix the syrup with carbonated water at the fountain dispenser to form the “finished” fountain diet Coke® drinks which are sold to consumers in cups and glasses. In contrast, diet Coke® sold in bottles and cans (“bottled diet Coke®”) is a “finished” packaged beverage which is ready to drink when it leaves the production plant.

Prior to 1984, all diet Coke® drinks sold in the United States were sweetened with a blend of saccharin and aspartame. (A0035-48, at ¶ 11). On November 30, 1984, *The Washington Post* newspaper carried a press release in which Coca-Cola announced that bottled diet Coke® thereafter would be sweetened with 100% NutraSweet®-brand aspartame, but that the sweetener in fountain diet Coke® would remain unchanged, because aspartame loses sweetness over time in the fountain format.² In other words,

² As Coca-Cola explained on its website, “[b]ecause aspartame by itself is heat and pH sensitive (meaning it loses sweetness over time), the concentrated fountain syrup causes aspartame to lose its sweetness faster than it would in a finished beverage. Fountain diet drinks, therefore, are sweetened with a blend of aspartame and saccharin to assure maximum product quality.” (A0109-11).

fountain diet Coke® would continue to contain a blend of saccharin and aspartame. (A0049).

From November 1984 through 1993, Coca-Cola's advertising for diet Coke® displayed the NutraSweet® "pinwheel" logo, but also expressly stated that diet Coke® with 100% NutraSweet® was *not* available at fountain outlets. (A0041, ¶¶ 18-19; A0050-108. Coca-Cola switched from NutraSweet®-brand aspartame to generic aspartame no later than 1993, and, as a result, stopped referring to NutraSweet® in its diet Coke® advertising. (A0041-42, ¶¶ 20-21).

In accordance with all applicable federal labeling laws, Coca-Cola has always disclosed that fountain diet Coke® contains saccharin. Federal law requires Coca-Cola, like other packaged food and beverage manufacturers, to place an ingredient label on its products. Accordingly, Coca-Cola has always listed saccharin on the ingredient labels affixed to the bulk containers of diet Coke® syrup that Coca-Cola sells to fountain outlets. (A0112).

Federal labeling laws do not require *unpacked* foods and beverages to carry ingredient labels. Because fountain diet Coke® is not served to fountain outlet customers in a pre-packaged format, federal law does not require Coca-Cola to disclose the ingredients in fountain diet Coke® at the point of consumer purchase. For example, a glass of fountain diet Coke® served in a restaurant is not required to carry a list of ingredients. Nevertheless, many fountain outlets voluntarily provide ingredient and nutritional information about their products, including the fact that fountain diet Coke® contains aspartame and saccharin, by posting charts of ingredients in public areas of their

stores or by making brochures containing such information available to their customers. (A0113-16).

Information regarding the use of saccharin in fountain diet Coke® has also been available from sources other than Coca-Cola and the fountain outlets. For example, television news stations across the United States have aired reports that fountain diet Coke® and other fountain diet soft drinks, including Diet Pepsi®, contain saccharin. Indeed, on May 17, 1999, a Fox News broadcast in the Kansas City area (KSHB-TV) reported that while most canned diet soft drinks are sweetened only with NutraSweet®, most fountain diet soft drinks contain saccharin. (A0117-27). Coca-Cola explained that it uses saccharin in fountain diet Coke® syrup because, unlike aspartame which loses sweetness over time in the fountain format, “saccharin can be stored for long periods of time without spoiling.” (A0122)

Procedural History

In March of 2004, Diana Pennington filed the present class action against Coca-Cola in the Circuit Court of Jackson County, Missouri, alleging that Coca-Cola made affirmative misrepresentations and omitted material information regarding the fact that fountain diet Coke® contains a blend of aspartame and saccharin unlike bottled diet

Coke® which is sweetened only with aspartame. (A0037, ¶ 1).³ She is asserting claims for violations of the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010, *et seq.* (“MPA”), and for unjust enrichment, on behalf of a class of “[a]ll individuals who purchased for consumption and not resale fountain diet Coke in the State of Missouri.” (A0038-39, ¶ 7). She claims that “many consumers” would not have purchased fountain diet Coke® if they had known it contains saccharin. (A0047, ¶ 45(a), (c)). She does not, however, claim that she or any other class member suffered any personal injury from consuming saccharin (A0393 at 8-10) or contend that saccharin is more unsafe or harmful to consumers than aspartame or any other artificial sweetener. She is seeking disgorgement of all of Coca-Cola’s proceeds from the sale of fountain diet Coke® in

³ As discussed below, *Pennington* is one of several identical class actions filed by her counsel against Coca-Cola in state courts seeking certification of statewide classes under state procedural rules governing class actions. Counsel filed these actions following a federal court’s denial of certification of a national class in *Zapka v. The Coca-Cola Company*, No. 99CV8238, 2000 U.S. Dist. LEXIS 16552 (N.D. Ill. Oct. 26, 2000) (A0128-31). Counsel simultaneously filed companion cases against PepsiCo, Inc. in the same states on behalf of statewide classes of consumers of fountain Diet Pepsi®, including the Missouri case entitled, *Kaiser-Engel v. PepsiCo, Inc.*, No. 22042-09301-01, 2007 WL 1972027 (Cir. Ct. for the City of St. Louis, June 25, 2007) (A0329-37).

Missouri, as well as the proceeds from the sale of “bottled diet Coke and other Coca-Cola products.” (A0047, ¶ 45(b)-(d)).⁴

On February 9, 2006, Respondent certified a class of all consumers of fountain diet Coke® in Missouri since 1999. (A0001-03). Respondent adopted *verbatim* the proposed certification order submitted by plaintiff’s counsel. (Compare A0001-03 and A0004-07). The order does not contain any findings of fact. The order contains some boilerplate conclusions of law which track the requirements for certification of a class under Missouri Supreme Court Rule 52.08(b)(3), but it fails to address many of the arguments made by Coca-Cola in opposition to class certification, including the argument that the class is not ascertainable. (A0001-03).

On February 21, 2006, pursuant to Rule 52.08, Coca-Cola filed a Petition for Leave to Appeal from the Respondent’s certification order in the Court of Appeals (A0147-82), which was denied without opinion on June 29, 2006. (A0183). Similarly, Coca-Cola’s Motion for Rehearing or Rehearing *En Banc* or, Alternatively, For Transfer to the Missouri Supreme Court (A0184-96) was denied without opinion on August 14, 2006. (A0197).

⁴ Plaintiff seeks recoupment of Coca-Cola’s revenues from the sale of bottled diet Coke® and other Coca-Cola products under the theory that, “if consumers learned of Coca-Cola’s misconduct as alleged herein, many consumers would have lessened or stopped their purchases of bottled diet Coke and other Coca-Cola products.” (A0047, ¶ 45(b)).

On August 29, 2006, Coca-Cola filed an Application for Transfer in this Court. (A0198-228). On October 30, 2006, this Court issued an order directing the parties to brief two issues: (1) whether the Supreme Court has jurisdiction to consider an application for transfer when the court of appeals refused to permit an appeal of an order granting or denying class action certification; and (2) whether the Supreme Court can treat an application for transfer as a petition for writ if any application for transfer is not permitted. (A0229). The parties briefed the issues, and, on December 19, 2006, this Court denied Coca-Cola's Application for Transfer without opinion. (A0230).

On April 6, 2007, pursuant to Rule 84.22, Coca-Cola filed a Petition for Writ of Prohibition in the Court of Appeals, which was denied on April 11, 2007. (A0305).

On May 15, 2007, Relator Coca-Cola filed its Petition for Writ of Prohibition in this Court. On June 26, 2007, this Court issued its preliminary writ of prohibition directing the Respondent to show cause why a writ should not issue prohibiting him from doing anything other than vacating his order certifying the class and directing Respondent to deny the motion for class certification. (A0328).

On July 25, 2007, Respondent filed his Answer to Relator's Petition for Writ of Prohibition ("Answer").

POINTS RELIED ON

1. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff’s Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Respondent Abused His Discretion in Certifying a Class that Is Not Sufficiently Ascertainable, in that the Certified Class Includes All Purchasers of Fountain diet Coke®, Regardless of Whether Class Members Suffered Any Injury.

- *Oshana v. The Coca-Cola Company*, 225 F.R.D. 575 (N.D. Ill. 2005), *aff’d*, 472 F.3d 506 (7th Cir. 2006), *cert. den.*, 127 S. Ct. 2952 (2007).
- *Kaiser-Engel v. PepsiCo, Inc.*, No. 22042-09307-01, 2007 WL 1972027 (Cir. Ct. for the City of St. Louis, June 25, 2007) (A0329-37).
- *Dumas v. Albers Medical, Inc.*, No. 03-0640, 2005 U.S. Dist. LEXIS 33482 (W.D. Mo. Sept. 7, 2005) (A0284-90).
- *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. W.D. 2006).

2. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff’s Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Respondent Abused His Discretion in Certifying the Class, in that He Failed to Conduct a Rigorous Analysis of the Requirements of Rule 52.08.

- *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986).
- *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006).

- *Massman Constr. Co. v. Missouri Highway & Transp. Comm’n*, 914 S.W.2d 801 (Mo. banc 1996).
- Rule 52.08.

3. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff’s Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Such An Order Will Prevent Unnecessary Burden, Expense and Inconvenience from the Respondent’s Abuse of Discretion in Certifying the Class, in that Further Proceedings on a Classwide Basis Exponentially Raise Both the Costs of Litigation and the Risk of Overcompensating Class Members or Fostering a “Blackmail Settlement.”

- *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729 (Mo. banc 2004).
- *State ex rel. Amer. Fam. Mut. Ins. Co. v. Hon. Thomas C. Clark*, 106 S.W.3d 483 (Mo. banc 2003).

ARGUMENT

The narrow issues before this Court are whether Respondent abused his discretion in certifying a broad class of all purchasers of fountain diet Coke® in Missouri where the vast majority of class members suffered no cognizable injury, and whether Respondent conducted a rigorous analysis of the requirements for class certification. It is Relator's position that Respondent abused his discretion by certifying a class of all purchasers of fountain diet Coke® in Missouri. First, Respondent abused his discretion because the class is not ascertainable. Missouri law is settled that a class is overbroad if it includes persons who suffered no injury, and a class of all purchasers of fountain diet Coke® contains countless members with no cognizable injury. Second, Respondent abused his discretion because he abdicated his responsibility to scrutinize rigorously the requirements for class certification. Indeed, Respondent's perfunctory certification order stands in marked contrast to the well-reasoned opinions of other courts, including another Missouri state trial court, which concluded that such a class is not ascertainable. The writ should be made absolute to prevent any further unnecessary burden, expense and inconvenience arising from Respondent's abuse of discretion in certifying the class.

I. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff’s Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Respondent Abused His Discretion in Certifying a Class that Is Not Sufficiently Ascertainable, in that the Certified Class Includes All Purchasers of Fountain diet Coke®, Regardless of Whether Class Members Suffered Any Injury.

A. Standard of Review.

If the trial court abuses its discretion in certifying a class, “prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004), *citing State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001); *State ex rel. Amer. Fam. Mut. Ins. Co. v. Hon. Thomas C. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003) (same). The trial court has abused its discretion if it “bases its decision on an erroneous conclusion of law” or if there is no rational basis in the evidentiary record demonstrating that the requisite elements for a class action have been met. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 164 (Mo. App. W.D. 2006).

B. The Class Is Not Sufficiently Ascertainable.

Respondent abused his discretion in certifying a class of all fountain diet Coke® consumers in Missouri because such a class is not sufficiently ascertainable. An implicit prerequisite to class certification under Missouri law is the existence of a sufficiently definite class. *Dale*, 204 S.W.3d at 177. The description of the class must be

“sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Id.* at 178; *In re Tetracycline Cases*, 107 F.R.D. 719, 728 (W.D. Mo. 1985).⁵ A precisely defined class “identifies the plaintiffs who will be bound by the judgment if they lose, and insures that those actually harmed by the defendant’s wrongful conduct will receive the relief ultimately awarded.” *Dale*, 204 S.W.3d at 178; *see also Ad Hoc Comm. to Save Homer G. Phillips Hosp. v. City of St. Louis*, 143 F.R.D. 216, 219 (E.D. Mo. 1992) (“If a class is so vague that it is not susceptible to ready identification, problems may arise regarding the provision of notification to class members, the binding effect of any judgment rendered in the case and the general concerns of propriety of an overly large class.”); *Suter v. Crawford*, No. 06-4032, 2007 WL 188451, *1, n.2 (W.D. Mo. Jan. 23, 2007) (A0338-39) (“Identifying the class insures that those actually harmed by the defendant’s conduct will be the recipients of the relief eventually provided.”).

Accordingly, the class must be sufficiently identifiable without being overly broad. *Dale*, 204 S.W.3d at 178. It is overly broad if it includes persons who suffered no injury. *Hale v. Wal-Mart Stores, Inc.*, No. WD66162, 2007 WL 1672261, at *11 (Mo. App. W.D. Mo. June 12, 2007) (A0353) (“The class, however, must include only those who are injured.”).

⁵ Missouri state courts consider case law interpreting Fed. R. Civ. P. 23, because the Missouri rules governing class actions are parallel to Rule 23. *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004).

Further, membership in the class must be ascertainable by reference to objective criteria. *Dale*, 204 S.W.3d at 178. This means that a class should not be defined by criteria that are subjective. *Id.* Thus, a class is not sufficiently ascertainable where membership is contingent on the state of mind of the class members. *Dale*, 204 S.W.3d at 177-78; *Zapka v. The Coca-Cola Company*, No. 99CV8238, 2000 U.S. Dist. LEXIS 16552, at *7-*8 (N.D. Ill. Oct. 26, 2000) (A0130).

In *Dumas v. Albers Medical, Inc.*, No. 03-0640, 2005 U.S. Dist. LEXIS 33482 (W.D. Mo. Sept. 7, 2005) (A0284-90), the court denied class certification due to the lack of an identifiable class. The plaintiff, on behalf of a putative class of individuals who purchased Lipitor from the defendant, asserted claims against the defendant under the MPA and for unjust enrichment based on the defendant's distribution of counterfeit Lipitor. *Id.* at *5-*6 (A0285-86). Certification was denied because it was impossible to identify class members without individualized inquiries into the facts and circumstances surrounding each class member's purchase of Lipitor. Because there were no records that identified who purchased the counterfeit drug, it was necessary to separately examine each class member to determine which consumers purchased counterfeit Lipitor (and therefore suffered an injury) and which consumers purchased genuine Lipitor (and therefore suffered no injury). *Id.* at *15-*20 (A0288-89).

Similarly, in *Suter*, 2007 WL 188451 (A0338-39), the court denied the plaintiffs' motion for class certification because the class was not sufficiently ascertainable. The plaintiffs sued to enjoin the defendants from constructing a new correctional facility designed to house more than two females per room. The court stated that a class

comprised of inmates of the new prison was overly broad because it could include inmates who find safety and companionship in numbers and thus have no objection to more than two inmates per cell. *Id.* at *1, n.5 (A0339).

Recently, in *Hale*, 2007 WL 1672261 (A0340-55), the court reversed the certification of a subclass which included persons who suffered no injury. The plaintiffs alleged that Wal-Mart's employment practices caused employees to work off the clock without compensation. One of the subclasses certified by the trial court was defined as "all current and former hourly employees . . . who continued to work and/or were not allowed to leave the defendant's premises immediately after having 'clocked out' of defendant's computerized payroll system because of any action, policy or practice of the defendants." *Id.* at *11 (A0353). The appellate court noted that the "and/or" language meant that someone who was not allowed to leave a Wal-Mart store after having 'clocked out' was a class member even if he or she did not work during that time. *Id.* The court stated: "**The class, however, must include only those who are injured.**" *Id.* (emphasis added.) Because the alleged injury was uncompensated *labor*, the class definition was "impermissibly overbroad" in that it included persons who did not *work* off the clock. *Id.*⁶ See also *Saey v. CompUSA, Inc.*, 174 F.R.D. 448, 450-51 (E.D. Mo. 1997) (denying certification of MPA claim of class of purchasers of computers that had previously been purchased and returned and then re-sold at original price, because class definition that

⁶ The Court of Appeals cured the deficiency in the class definition by deleting the "/or" language. *Id.*

includes purchasers who received a full refund or received a computer that had not previously been opened or used would be overbroad and court “would be required to conduct mini-trials for each putative class member to determine whether he or she falls within the class definition.”)

Several courts in Missouri and elsewhere have specifically addressed the requirement of an ascertainable class in the precise context of the facts of this case. *Pennington* is just one of several identical lawsuits filed by Pennington’s counsel against Coca-Cola and PepsiCo, Inc. in state courts seeking certification of statewide classes under state procedural rules governing class actions following denial of certification of a national class in *Zapka v. The Coca-Cola Company*, No. 99CV8238, 2000 U.S. Dist. LEXIS 16552 (N.D. Ill. Oct. 26, 2000) (A0128-31). Except for Respondent, all of these courts, including another Missouri state trial court, denied certification of the statewide class of purchasers of fountain diet Coke® or fountain Diet Pepsi®.

In *Oshana v. The Coca-Cola Company*, 225 F.R.D. 575, 580-81 (N.D. Ill. 2005), the case filed on behalf of Illinois consumers of fountain diet Coke®, which was removed to federal court, the court denied certification of the class because the plaintiff did not satisfy the threshold requirement of a definite and identifiable class. The court stated: “The identities of class members do not need to be specified for certification, but the proposed class must be sufficiently definite in order to demonstrate that a class actually exists.” *Id.* at 580. In other words, “[t]he class description must be sufficiently definite to permit ascertainment of class members[.]” *Id.* Because the proposed class definition

included millions of people who suffered no injury and thus were without standing, the Court held that the class was fatally defective:

Class membership requires nothing but the mere purchase of a fountain diet Coke in Illinois during a five year period....In other words, the proposed class definition is overly inclusive and encompasses millions of potential members without any identifiable basis for standing.

Id. Class members without standing include individuals “who purchased fountain diet Coke with full knowledge that fountain diet Coke contains saccharin” and individuals who do not have a preference for aspartame over saccharin. *Id.* at 580-81.

The court further held that any subclass that was limited to consumers who allegedly suffered an injury (*i.e.*, those who would not have purchased fountain diet Coke® if they had known it contained a sweetener blend of saccharin and aspartame rather than 100% aspartame) would not be ascertainable because membership in the class necessary would be based on *subjective* consumer taste preferences. Membership would imply a state of mind element that requires an individual examination of each class member. *Id.* at 581.

The United States Court of Appeals for the Seventh Circuit in *Oshana* affirmed, holding that the proposed class was not “sufficiently identifiable or definite.” *Oshana*, 472 F.3d at 515. The court stated:

Membership in Oshana’s proposed class required only the purchase of a fountain Diet Coke from March 12, 1999 forward. Such a class could include millions who were not deceived and thus have no grievance under

the [Illinois Consumer Fraud Act]. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception.

Id. at 514 (emphasis in original).

In *Kaiser-Engel v. PepsiCo, Inc.*, No. 22042-09301-01, 2007 WL 1972027 (Cir. Ct. for the City of St. Louis, June 25, 2007) (A0329-37),⁷ the court followed the reasoning of the District Court and Seventh Circuit Court of Appeals in *Oshana* in denying certification of a class of Missouri consumers of fountain Diet Pepsi® in the companion case filed by Pennington's counsel against PepsiCo, Inc. As in the present case, the plaintiff asserted claims for violation of the MPA and for unjust enrichment based on PepsiCo's alleged failure to disclose that fountain Diet Pepsi® contains a blend of saccharin and aspartame unlike Diet Pepsi® sold in bottles and cans which contains aspartame only. *Id.* at *1 (A0329). In his 14-page opinion, Judge John J. Riley discussed the standards for class certification under Rule 52.08 and the elements of claims for

⁷ Relator recognizes that the decision of a Circuit Court is not authoritative precedent for this Court, but Judge Riley's well-reasoned decision in *Kaiser-Engel* stands in marked contrast to the perfunctory order of Respondent on the same legal claims and essentially same facts.

violations of the MPA⁸ and for unjust enrichment, considered the pertinent record evidence, and analyzed the reasoning of the District Court and the Court of Appeals in the *Oshana* litigation. As in the *Oshana* litigation, which the court described as “a case in which the alleged facts and legal claims were virtually identical,” the court concluded that the class definition was not sufficiently ascertainable. *Id.* at *3 (A0331). The court explained:

Primarily, as this Court sees it, the core problem is that if the class here, as it is now proposed, is defined in a way that may be (at least on the surface)

⁸ Section 407.025.1 of the MPA provides in relevant part: “Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an *ascertainable loss of money or property*, real or personal, *as a result of* the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action . . .to recover actual damages.” *Freeman Health System v. Wass*, 124 S.W.3d 504, 506 (Mo. App. S.D. 2004) (emphasis added). Section 407.020 declares the following acts to be unlawful: “[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce. . .” *Id.* at n.2. The ascertainable loss must have been proximately caused by the defendant’s alleged misconduct. *Willard v. Bic Corp.*, 788 F. Supp. 1059, 1070 (W.D. Mo. 1991).

sufficiently identifiable for not being too subjective, then it necessarily is flawed for being too overbroad under the *Oshana* analysis; but by the same token, if the class is [re]defined in a way that is not so defectively overbroad, then the class would necessarily depend on potential class members' subjective state of mind – and hence not be sufficiently identifiable to support class certification. Either way, it appears to the Court, class certification in this case would not be proper.

Plaintiff has defined a class that consists simply of all individuals who consumed fountain Diet Pepsi in Missouri over the five year period, which undoubtedly includes countless individuals who consumed the beverage knowing full well that it contained saccharin. Under Missouri law, these individuals were not deceived and suffered no damages, much less damages that were proximately caused by any violation of the Merchandising Practices Act. As such, the proposed class is either ill-defined and/or overbroad; and it certainly is not identifiable based on objective criteria that relate only to those individuals who might conceivably have legitimate claims against PepsiCo for the type of deceptive marketing conduct that has been alleged.

Id. at *4, *6.) (A0332, A0334). Contrary to Respondent's order in the present case, the court also specifically found that the elements of the Illinois Consumer Fraud Act and MPA "are not meaningfully distinguishable." *Id.* at *4, n.3 (A0332). The court stated

that “[n]either statute requires individual reliance” and that both statutes require proximate causation for a consumer to recover private damages. *Id.*⁹

Similarly, in *Cox v. The Coca-Cola Company*, No. 04-CV-3830 (Johnson County, Kan.) (A0142-46), the Kansas state court denied certification of a class of Kansas consumers of fountain diet Coke®, because the plaintiff failed to satisfy the requirement of an identifiable class:

I, like other judges who have looked at this similar litigation, find that numerosity and identification of the class is a real problem for the plaintiff. The plaintiff attempts to define the class as all individuals who purchased for consumption and not resale fountain diet Coke in the state of Kansas after May 18th, 2001. I tend to agree with defendant’s assertion that this makes the class very difficult to identify and too broad. The class is defined in a way that disregards the fact that some consumers are simply not concerned about consuming saccharin. It includes people for whom the omission by Coca-Cola is frankly immaterial, because frankly, they knew it contained saccharin or didn’t care which sweetener was utilized.

* * *

⁹ On August 1, 2007, the Court of Appeals, Eastern District, denied the plaintiff’s petition for leave to appeal from the order denying class certification in *Kaiser-Engel*. (A0329-37).

I also have concerns with respect to the issue of causation, and note the concerns of the judges in these past cases, about being difficult to find an identifiable class if the membership in the class is essentially contingent on the state of mind of the prospective members[.]

(A0144).¹⁰

Finally, in closely analogous cases alleging that the manufacturer of the artificial sweetener Splenda® misled consumers into believing that Splenda® contains real sugar, courts have denied certification of proposed classes of Splenda® consumers because such classes are not objectively ascertainable. *See Green v. McNeil Nutritionals, LLC*, No. 2004-0379-CA, 2005 WL 3388158, *7-*10 (Fla. Cir. Ct. Nov. 16, 2005) (A0280-83) (denying certification of class of consumers of the artificial sweetener Splenda® because, *inter alia*, identifying class members would require investigation into each class member's subjective state of mind); *Turner v. McNeil Nutritionals, LLC*, No. BC 326 265, mem. op. at 15 (Super. Ct. Cal. Jan. 26, 2006) (A0370) (denying certification because plaintiff failed to demonstrate how to distinguish persons who were deceived by

¹⁰ In February 2006, following the denial of class certification, the *Cox* case was voluntarily dismissed. The Florida and California cases filed by Pennington's counsel against Coca-Cola were voluntarily dismissed prior to any ruling on class certification, while the Massachusetts case was settled on an individual basis prior to any ruling on class certification.

defendant's advertising and thus could recover from those who were not deceived and thus could not recover).

In the present case, the certified class consists of "all individuals who purchased for consumption and not resale fountain diet Coke in the state of Missouri after March 24, 1999 through the date of [the certification] order." This class is grossly overbroad. Like the class in *Suter* which was overbroad because it contained inmates who had no objection to having more than two inmates per cell, the class in the present case is overbroad because it includes persons who have no objection to the use of a blend of saccharin and aspartame to sweeten fountain diet Coke®. Like consumers of Tab®, a soft drink sweetened with saccharin, many members of the class actually prefer the taste of saccharin to aspartame. Anyone who prefers saccharin to aspartame is not a proper member of the class because that individual cannot have been damaged by the alleged non-disclosure of the use of some saccharin in fountain diet Coke®.¹¹

Further, as in *Dumas*, where the class was overbroad because it was not limited to those who purchased counterfeit Lipitor (and thus suffered an injury), the class in the present case is overbroad because it is not limited to those consumers who would have avoided purchasing fountain diet Coke® if they had known it contained some saccharin (and thus allegedly suffered an injury). As the court stated in *Hale*, "The class, however,

¹¹ Indeed, Plaintiff Pennington herself admitted that she knowingly consumed saccharin under the brand name Sweet & Low® for ten years because she preferred the taste of saccharin to other artificial sweeteners. (A0236-37).

must include only those who are injured.” *Hale*, 2007 WL 1672261, at *11 (A0353). Indeed, the class includes all of the consumers who already know that fountain diet Coke® contains saccharin, as well as those who would still purchase fountain diet Coke® after learning it contains saccharin. Plaintiff Pennington’s own expert conceded that his survey demonstrated that over 80% of the consumers who drink both fountain and bottled diet Coke® and who were not already aware that fountain diet Coke® contains saccharin would continue to consume fountain diet Coke® after learning that it contains saccharin. (A0398: Only 19.4% said their purchasing decision would be “affected” if diet Coke® contained saccharin.)¹² Accordingly, on nearly identical facts and claims, the *Oshana* (Illinois), *Cox* (Kansas) and *Kaiser-Engel* (Missouri) courts all rejected statewide classes of purchasers of fountain diet soft drinks as overbroad.

Further, as each of these cases held, any subclass that might be limited to consumers who would not have purchased fountain diet Coke® if they had known it contained some saccharin (and thus allegedly suffered an injury) would not be ascertainable because membership would be contingent on each class member’s state of mind rather than objective criteria. Each putative class member would need to be

¹² If this Court quashes the writ or affirms the class certification ruling, Respondent will promptly order notice to the class, but Respondent’s certification ruling does not provide any guidance as to how Respondent or the parties could identify the less than 25% of the class members who *might* claim an injury and would be entitled to notice of the lawsuit.

examined individually to determine: (1) whether the person believes that fountain diet Coke® is sweetened exclusively with aspartame, (2) whether that person's belief is based on any representation or omission by Coca-Cola, and (3) whether that person even cares that fountain diet Coke® contains saccharin. *See Zapka*, 2000 U.S. Dist. LEXIS, at *7-*8 (A0130). These same types of subjective criteria were rejected by the Court of Appeals in *Dale*, 204 S.W.3d at 177-78.¹³ To date, Respondent has never explained how it would be administratively feasible to objectively identify those fountain diet Coke® consumers in Missouri who suffered an ascertainable loss, *i.e.*, those who would not have purchased fountain diet Coke® if they had known it contained a blend of saccharin and aspartame rather than 100% aspartame.

In short, Respondent abused his discretion in certifying a class that all other courts, including another Missouri state trial court, properly refused to certify as patently unascertainable. The certified class is overbroad because it includes all purchasers of fountain diet Coke®, regardless of whether a class member suffered any injury, and any

¹³ In *Dale*, the Court of Appeals affirmed the trial court's certification of a class of Missouri purchasers of Dodge Durangos who returned their vehicles for service for failed electric window regulators and who did not receive Bosch®-brand replacement window regulators. 204 S.W. 3d at 177-78. Relator agrees with the *Dale* court's conclusion that the class in that case was not overly broad because class membership was limited to purchasers of vehicles with the *failed* window regulators, not all purchasers of vehicles with window regulators. *Id.*

narrowly defined subclass of consumers who would not have purchased a fountain diet Coke® if they had known it contained saccharin would be improperly based on the subjective state of mind of each subclass member.

II. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff’s Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Respondent Abused His Discretion in Certifying the Class, in that He Failed to Conduct a Rigorous Analysis of the Requirements of Rule 52.08.

A class should only be certified if, after “rigorous analysis,” the trial court determines that the prerequisites for class certification have been satisfied. *See Hervey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir. 1986) (affirming decertification of class of employees alleging race and gender-based discrimination by employer), *citing General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982); *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006) (vacating class certification order and requiring “rigorous analysis” to ensure class certification requirements are met); *East Maine Baptist Church v. Union Planters Bank*, No. 4:05-CV-962, 2007 WL 532181, *3 (E.D. Mo. Feb. 15, 2007) (A0374-85) (decertifying class as to certain counts following “rigorous analysis” of class requirements); *Sample v. Monsanto Co.*, 218 F.R.D. 644, 647 (E.D. Mo. 2003) (denying class certification and holding that courts must engage in “rigorous analysis” to determine whether the requirements for class certification have been met); *see also Amer. Fam. Mut. Ins. Co.*, 106 S.W.3d at 489 (affirming in part

certification of class where “trial court determined after rigorous analysis” benefits of class adjudication).

This rigorous analysis requires, at a minimum, that courts look beyond the pleadings to assess whether a class may be certified in light of the underlying “claims, defenses, relevant facts, and applicable substantive law.” *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *see also Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (“a court must conduct a limited preliminary inquiry, looking behind the pleadings.”). Thus, a court should not accept as true the substantive allegations of the complaint when deciding whether to certify a class. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *see also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (“If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court’s responsibilities for taking a ‘close look’ at relevant matters, for conducting a ‘rigorous analysis’ of such matters, and for making ‘findings’ that the requirements of Rule 23 have been satisfied.”) (internal citations omitted). Rather, the court should make whatever factual and legal inquiries are necessary to determine whether a case should proceed as a class action. *Szabo*, 249 F.3d at 676; *Blades*, 400 F.3d at 566.

The *Manual for Complex Litigation*, § 21.21 (4th ed. 2004) suggests that the trial court should enter findings of fact and conclusions of law addressing each of the applicable class certification requirements and that “[f]ailure to make such findings may

result in reversal or remand for further proceedings after interlocutory appeal.” Similarly, in *Dale*, 204 S.W.3d at 162-63, the Court of Appeals held that the trial court is not always required to make findings of fact and conclusions of law to support class certification, but that “in the absence of specific findings supporting the trial court’s class action certification, the cause has to be remanded to the court for that purpose, unless the basis for the court’s certification is apparent from the record, enabling the appellate court to conduct meaningful appellate review.” *See also Consol. Edison Co. of N.Y. v. Richardson*, 233 F.3d 1376, 1394 (Fed. Cir. 2000) (remanding issue of certification because district court provided no reasons for its denial), *amended by* No. 99-1436, 2000 U.S. App. LEXIS 35446, at *22-23 (Fed. Cir. Feb. 27, 2001) (A0386-91); *Prado-Steinman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (noting that “a limited or insufficient record may adversely affect the appellate court’s ability to evaluate fully and fairly the class certification decision” and remanding grant of class certification); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) (vacated order certifying class because order was “silent as to any reason why common issues predominate over individual issues”).

This Court has specifically described as “troublesome” the “practice of adopting, without modification, significant portions of a proposed order prepared by respondent’s counsel.” *See Massman Constr. Co. v. Missouri Highway & Transp. Comm’n*, 914 S.W.2d 801, 804 (Mo. banc 1996) (“Trial judges are well advised to approach a party’s proposed order with the sharp eye of a skeptic and the sharp pencil of an editor.”). Such a practice is devoid of any rigorous analysis of the class certification requirements. In

Hervey, for example, the Eighth Circuit held that the parties’ proposed stipulated class certification order could not substitute for the rigorous analysis required of the court because “[t]he purpose of the analysis is to protect unknown or unnamed potential class members, and by definition those people do not and cannot participate in any stipulations concocted by the named parties.” *Hervey*, 787 F.2d at 1227. Similarly, in *Valentino*, the Ninth Circuit sharply criticized the trial court’s adoption of a class certification order prepared by plaintiff’s counsel:

The certification order which we review is brief and conclusory. The record reflects that it was entered with the express hope on the part of the district judge of encouraging settlement, and to trigger a ruling from this court on the more general issue of the viability of class certification in this circuit....The order was entered at an early stage in the proceedings, and the record simply does not reflect any basis for us to conclude that some key requirements of Rule 23 have been satisfied.

97 F.3d at 1234. *See also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004) (“Were the court to defer to the representative parties on this responsibility by merely accepting their assertions, the court would be defaulting on the important responsibility conferred on the courts by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified.”).

In this case, Respondent did not conduct the rigorous analysis required by law to determine whether the proposed class satisfies the requirements of Rule 52.08. First, Respondent’s order does not contain any findings of fact or apply any of the facts in the voluminous record to the legal standards for class certification. Instead, the order is comprised of unsupported legal conclusions that the requirements of Rule 52.08 are satisfied. The order does not offer even a cursory explanation as to how the plaintiff

satisfied her burden of establishing that the class is ascertainable and that common issues predominate. In the absence of any findings of fact or explanations by Respondent of his reasoning, the basis for Respondent's order certainly is not "apparent from the record" to enable any "meaningful appellate review." *Dale*, 204 S.W.3d at 162.

Second, Respondent never addressed several significant issues raised by the parties during briefing on class certification. Every court that has addressed class certification in these cases has held that the class is not sufficiently ascertainable, but the court below never even addressed this requirement, which was the primary argument relied upon by Relator in opposing class certification. (A0400-439). Respondent held that the common issue of whether Coca-Cola violated the MPA predominates over any individual issues, but he never addressed the certifiability of the class on plaintiff's unjust enrichment claim. If Respondent refused to certify the unjust enrichment claim, it is unclear why he did so and why he reached a different result on the plaintiff's MPA claim. Finally, Respondent never addressed plaintiff's request to certify the class under Rules 52.08(b)(1) or 52.08(b)(2). If Respondent refused to certify a Rule 52.08(b)(1) or 52.08(b)(2) class on plaintiff's MPA claim, it is unclear why he did so and why he reached a different result on the Rule 52.08(b)(3) class.

Third, contrary to this Court's admonition in *Massman, supra*, Respondent adopted *verbatim* the proposed order prepared by plaintiff's counsel. (Compare A0001-03 and A0004-07). As a result, Respondent adopted plaintiff's counsel's erroneous "analysis" of the holdings in the *Oshana* (Illinois) and *Cox* (Kansas) cases. The only

reference to the *Oshana* and *Cox* cases in the certification order adopted by Respondent is as follows:

The Illinois Court found that each individual class member would have to show that any deception or omission by Defendant induced a purchase. The Kansas Court agreed. Such proof of reliance is not required by Missouri.

(A0003, ¶ 9). That statement is simply wrong. Reliance is not an element of the Illinois or Kansas consumer protection statutes, and individualized issues of reliance were *not* factors in the Illinois or Kansas decisions. Indeed, the *Oshana* court expressly stated that “[a] plaintiff need *not* prove reliance; however, she must show proximate cause.” *Oshana*, 225 F.R.D. at 585 (emphasis added). Thus, the court ruled that individual issues of causation and ascertainable loss predominated over any common issues. 225 F.R.D. at 584-86. The Kansas court does not even mention reliance in its order denying certification. (A0142-46). Rather, both courts held that individual issues of causation and ascertainable loss (not reliance) predominated over any common issues. 225 F.R.D. at 584-86; A0144. Causation and ascertainable loss are elements of the MPA,¹⁴ just as they are elements of the Illinois and Kansas consumer protection statutes. Moreover, in *Kaiser-Engel*, Judge Riley specifically found that the elements of the Illinois Consumer Fraud Act and MPA “are not meaningfully distinguishable.” 2007 WL 1972027, at *5, n.3 (A0333). The court correctly stated that “[n]either statute requires individual reliance” and that both statutes require proximate causation for a consumer to recover private damages. *Id.*

¹⁴ See footnote 9, *supra*.

In short, Respondent abused his discretion by not conducting a rigorous analysis of the class certification requirements. Courts should never “rubber stamp” a proposed class certification order prepared by class counsel. This is especially true where, as here, other courts previously denied certification of the identical class in lengthy published opinions. Instead, courts must rigorously analyze each of the class certification requirements in the context of the facts of the particular case.

III. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff’s Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Such An Order Will Prevent Unnecessary Burden, Expense and Inconvenience from the Respondent’s Abuse of Discretion in Certifying the Class, in that Further Proceedings on a Classwide Basis Exponentially Raise Both the Costs of Litigation and the Risk of Overcompensating Class Members or Fostering a “Blackmail Settlement.”

The preliminary writ issued by this Court should be made absolute to prevent any further unnecessary burden, expense and inconvenience arising from Respondent’s abuse of discretion in certifying an overly broad class. *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004), *citing State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001); *State ex rel. Amer. Fam. Mut. Ins. Co. v. Hon. Thomas C. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003) (same). While an abuse of discretion alone may not generally support the issuance of a writ, an abuse of discretion

in certifying an overly broad class may create such an unnecessary burden, expense and inconvenience to justify immediate review of the class certification decision by writ.¹⁵

First, if the certification order stands and the class is ultimately awarded class-wide relief by settlement or judgment, then all of the class members who prefer saccharin to aspartame or have no preference for aspartame over saccharin will be significantly overcompensated. *See, e.g., In re Bridgestone/Firestone*, 288 F.3d 1012, 1017 (7th Cir. 2002) (purchasers of potentially defective tires that had not yet failed would be overcompensated if broad class of all purchasers of defendants' recalled tires were allowed to recover economic losses). The burden, expense and inconvenience of overcompensating uninjured class members is absurdly high here where plaintiff's own expert conceded that more than 80% of the consumers of fountain diet Coke® who did not already know that fountain diet Coke® contains saccharin would continue to purchase fountain diet Coke® even if they discovered that it contains saccharin. (A0399).

Second, the certification of an overly broad class exponentially raises the stakes in the litigation and thereby facilitates "blackmail settlements." *See, e.g., Castano*, 84 F.3d at 746 ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing

¹⁵ For similar reasons, the Missouri General Assembly has provided for interlocutory review by the Court of Appeals of class certification decisions. Mo. Rev. Stat. § 512.020(3); Mo. Sup. Ct. R. 52.08(f).

an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (same). In *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001), the court explained that “the class certification turns a \$200,000 dispute (the amount that [the individual plaintiff] claims as damages) into a \$200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport’s managers and may induce a substantial settlement even if the customers’ position is weak.” Thus, even though Relator may be convinced that it has done nothing wrong, and even if it believes the probability of ultimately prevailing is high, it is unlikely to go to trial where a settlement with the class is far more economical. This is especially true here where the certified class includes every consumer of a diet Coke® served from a fountain dispenser in Missouri since 1999, and the class seeks disgorgement of all of Coca-Cola’s proceeds from the sale of fountain diet Coke®, as well as the proceeds from the sale of “bottled diet Coke and other Coca-Cola products.” (A0047). Immediate review by this Court of Respondent’s class certification ruling will prevent the risk of a blackmail settlement. *In re Bridgestone/Firestone*, 288 F.3d at 1016 (“Permitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f)”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1297 (granting mandamus to review order certifying the class because “appeal [after judgment] will come too late to provide effective relief for these defendants” due to the “sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them.”)

Third, although the popular justification for class actions is that small individual claims will not be pursued without the collective strength of the class action, the blackmail problem fosters the opposite effect. By liberally certifying broad classes, courts can deter defendants from pursuing valid litigation strategies and defenses because of the sheer magnitude of the expense and exposure. For example, Relator could feel compelled to settle rather than appeal after trial the issue of whether a class of all purchasers of a product is ascertainable under Missouri law. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1298 (“If they settle, the class certification – the ruling that will have forced them to settle—will never be reviewed.”). As a result, Missouri state court judges and the public would be denied case law which would clarify the class certification rules. Relator likewise may be deterred from pursuing valid merits defenses, such as whether a person who consumes a fountain diet Coke® containing a sweetener blend of saccharin and aspartame has suffered any ascertainable loss under the MPA.

In the present case, Respondent abused his discretion in certifying the class. This Court should make the writ absolute to prevent any further unnecessary and expensive litigation and to eliminate the risks of a “blackmail settlement.”

Respondent argues in his Answer that Rule 84.22 prohibits this Court from issuing a writ of prohibition because “Relator can appeal, by right, the class certification issue and all other potential issues for appeal at the end of the action.” (Answer, pp. 2-3). Plaintiff misconstrues Rule 84.22. The issue is not whether an issue can be appealed at the end of a case, but whether “adequate relief can be afforded” by an appeal at the end of the case. Rule 84.22. *See State ex rel. Fisher v. McKenzie*, 754 S.W.2d 557, 562 (Mo.

banc 1988) (ability to appeal at end of case does not provide adequate relief where “relators could not appeal until they proceed through a trial . . . [and] ‘useless and unwarranted litigation.’”). Further, Rule 84.22 “is not absolute and is waived in the event of great urgency for an early determination or in the event the issue is one of public importance.” *Kohlbusch v. Eberwein*, 642 S.W.2d 683, 684, n.1 (Mo. App. E.D. 1982) (finding that “it was of public importance that the judiciary and bar receive guidance in [the area of venue for registration of foreign judgments].”).

Thus, even in cases involving an issue that can be raised on appeal at the end of the case, this Court has issued writs of prohibition where the writ “will prevent unnecessary, inconvenient and expensive litigation.” *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7, 8-9 (Mo. 2003) (preliminary writ of prohibition was made absolute and reversing order denying defendant’s motion for summary judgment); *State ex rel. New Liberty Hospital Dist. v. Pratt*, 687 S.W.2d 184, 187 (Mo. 1985) (preliminary writ of prohibition was made absolute and reversing order denying defendant’s motion to dismiss). Specifically, this Court has issued writs of prohibition to review class certification rulings notwithstanding the defendant’s ability to appeal the class certification ruling at the end of the case. *See, e.g., Amer. Fam. Mut. Ins. Co.*, 106 S.W.3d at 487 (making writ absolute, as modified, where trial court abused its discretion in certifying class with respect to insureds whose contracts were subject to laws of states other than Missouri); *Union Planters Bank*, 142 S.W.3d 729, 735 (Mo. banc 2004) (making writ absolute, as modified, where trial court abused its discretion in

finding that representative parties would fairly and adequately protect the interests of the class.).¹⁶

Respondent also argues that, if this Court grants the writ, every class certification decision will end up before this Court as a writ (Answer, p. 4), but history has already proven Respondent wrong. This Court has already issued writs to review erroneous class certification decisions, *see, e.g., Amer. Fam. Mut. Ins. Co. and Union Planters Bank, supra*, yet few petitions for such writs have been filed since that time despite the large number of class action complaints filed in Missouri state courts each year. Similarly, this Court's issuance of writs to review orders denying motions for summary judgment and motions to dismiss, *see, e.g., Springfield Underground and New Liberty Hospital District, supra*, has not caused every defendant who has lost a motion for summary judgment or a motion to dismiss to file a petition for a writ seeking to overturn those rulings.

Finally, Respondent argues that the issuance of a writ here would render Rule 52.08(f) (and Mo. Rev. Stat. § 512.020) a nullity. (Answer, pp. 9, 17-18.) As a general rule, writs are rarely granted, so Rule 52.08(f) provides an alternative means to seek

¹⁶ In both of these class action opinions, the dissent, like Respondent here, argued that the writ should have been quashed because the class issues could be raised on direct appeal at the end of the case. The majority, however, concluded that the writ should be made absolute notwithstanding the availability of appellate review at the conclusion of the case.

review of class certification rulings.¹⁷ Rule 52.08(f) allows a party to seek permission from an appellate court to appeal an interlocutory class certification decision, while a writ allows a party to seek direct review by this Court of pretrial rulings generally, including class certification decisions.

CONCLUSION

For the reasons set forth above, Relator The Coca-Cola Company respectfully requests this Court to make absolute the preliminary writ of prohibition prohibiting Respondent from doing anything other than vacating his order of February 9, 2006, granting Plaintiff's motion for class certification, and directing Respondent to deny said motion.

Date: August 25, 2007

Respectfully submitted.

THE COCA-COLA COMPANY

By: _____
One of Its Attorneys

¹⁷ Contrary to Respondent's unsupported contention, Rule 52.08(f) does not provide an "exclusive remedy for interlocutory review" of class certification rulings. (Answer, p. 18). Nothing in the language of Rule 52.08(f) indicates that the Rule was meant to supplant this Court's constitutional authority to issue writs.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06(c)

I, Lori R. Schultz, an attorney, hereby certify that the foregoing brief complies with the limitation contained in Mo. Sup. Ct. R. 84.06(b), and that the brief contains 10,102 words.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

APPENDIX

CERTIFICATE OF SERVICE

I, Lori R. Schultz, an attorney, hereby certify that I caused two true and correct copies of the foregoing **Brief of Relator**, which was filed this date with the Clerk of the Missouri Supreme Court, and one disk containing the foregoing brief, to be served on the following by depositing copies of same, postage prepaid, in the U.S. Mail depository at 1100 Main, Suite 1600, Kansas City, Missouri 64105 on this 27th day of August 2007:

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