

**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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SUPPLEMENTAL STATEMENT OF FACTS

Coca-Cola Discloses All of the Ingredients in Diet Coke® to All of Its Customers.

Respondent contends throughout his Brief that Coca-Cola failed to disclose to consumers that fountain diet Coke® contains saccharin. (*See, e.g.*, Brief of Respondent (“Resp. Br.”) at pp. 7-8.) Contrary to Respondent’s contention, every diet Coke® product sold by Coca-Cola carries an ingredient label that identifies all of the ingredients contained in that product in full compliance with all applicable labeling laws.

Coca-Cola sells diet Coke® in two formats. It sells “post-mix” or “finished” diet Coke® which is packaged in bottles and cans (“bottled diet Coke®”) and ready for consumption when it leaves the bottling plant. The ingredients in bottled diet Coke® are identified on the ingredient label placed on each unit of bottled diet Coke®. Bottled diet Coke® is sweetened exclusively with aspartame, and it is labeled accordingly.

Coca-Cola also sells “pre-mix” concentrated diet Coke® syrup to retail establishments, such as movie theaters, restaurants and convenience stores that have fountain outlets. *See Oshana v. Coca-Cola*, 225 F.R.D. 575, 582 (N.D. Ill. 2005) (finding that “Coca-Cola does not advertise and sell fountain diet Coke – it sells syrup”).

Coca-Cola sells the fountain diet Coke® syrup to its fountain outlet customers in bulk containers. The ingredients in the syrup are identified on the ingredient label on each bulk container of fountain diet Coke® syrup. Fountain diet Coke® syrup is sweetened

with a blend of aspartame and saccharin, and it is labeled accordingly. (A0112.)¹ Like PepsiCo, Inc. and other suppliers of diet fountain soft drink syrups, Coca-Cola uses a blend of aspartame and saccharin in fountain diet Coke® syrup, because aspartame loses its sweetness faster in the concentrated syrup than it does in a finished beverage, such as bottled diet Coke®. The blend of aspartame and saccharin, which does not degrade like aspartame in the syrup, enables fountain diet Coke® to retain its sweetness longer and maintain taste consistency with bottled diet Coke®. (A0109-11, A0122.)

Coca-Cola does not sell fountain diet Coke® to consumers in Missouri or elsewhere. The fountain outlets that purchase fountain diet Coke® syrup from Coca-Cola combine the syrup with carbonated water at the fountain dispensers for retail sale. The fountain outlets then sell the newly “finished” beverage to *their* customers (*e.g.*, the theater, restaurant and convenience store customers) in *their* own cups or glasses. Like any restaurant, these retailers of unpackaged foods and beverages are not required to disclose the ingredients in their products because there is no package to which a label can be affixed.²

¹ The materials identified herein as “A0_____” are compiled in the Appendix filed with Relator’s opening brief. The materials identified herein as “SA0_____” are compiled in the accompanying Supplemental Appendix.

² The extent to which food and beverage manufacturers are required to place ingredient labels on their products is governed by the Federal Food Drug & Cosmetics Act, 21 U.S.C. § 343, at § 403, and its implementing regulations, 21 C.F.R. § 101.1 *et seq.* Pursuant to those

(continued...)

Despite having no legal obligation to do so, many of Coca-Cola's fountain outlet customers voluntarily provide consumers with nutritional information for the food products they sell, including the ingredients in fountain soft drinks such as fountain diet Coke®. (A0113-16.) Furthermore, Coca-Cola voluntarily discloses all of the ingredients in fountain diet Coke® on its website, because it does not sell fountain diet Coke® to consumers. (A0109-111; A0122.)

The Expert Plaintiff Pennington Relies On Admits that Only a Small Percentage of the Putative Class Members Were Even Arguably Injured.

Respondent contends that an ascertainable loss should be presumed for the entire class of fountain diet Coke® consumers in Missouri. However, Dr. Alvin Star (the marketing expert on which Plaintiff Pennington relied in moving for class certification) admitted that only a small percentage of fountain diet Coke® consumers would have their purchasing decisions “affected” if they knew that fountain diet Coke® contains

provisions, ingredient labels are only required for foods sold in “package form,” which means food enclosed in a wrapper or container. As noted above, it is undisputed that Coca-Cola discloses all of the ingredients in fountain diet Coke® in accordance with all applicable labeling laws.

saccharin. (*See* Star Expert Report attached as Exhibit D to Plaintiff's Memorandum in Support of Motion for Class Certification (SA0001-07).)³

Dr. Star surveyed a group of diet Coke® consumers regarding their knowledge of the sweeteners used in bottled diet Coke® and fountain diet Coke® and the extent to which each consumer's purchasing decisions would have been affected if he or she had known that fountain diet Coke® contains saccharin. First, Dr. Star's survey demonstrated that there was significant awareness of the presence of saccharin in fountain diet Coke®. Specifically, 32.4% of his survey respondents who consumed both fountain and bottled diet Coke® reported either that they are sure or think that fountain

³ Respondent's asserts that it is improper for Coca-Cola to refer to Dr. Star as Plaintiff Pennington's expert, because no experts have been formally disclosed in this case. Respondent's assertion is utterly disingenuous. While it is true that Pennington has not formally designated Dr. Star as her expert in this case, she relied upon Dr. Star's report in her Motion for Class Certification. (*See* Pennington's Memorandum In Support of Motion for Class Certification, attaching Dr. Star's report as Ex. D thereto.) Although Pennington attached Dr. Star's report, she did not include any of the appendices to his report. Thus, in the interest of completeness, Coca-Cola attached the consumer survey results compiled and analyzed by Dr. Star (Consumer Survey, Appendix A) to its Opposition to Pennington's Motion for Class Certification. (SA0008-12.)

diet Coke® contains saccharin. (SA0010 [at A3].)⁴ Second, Dr. Star found that only 19.4% of survey participants who consumed both fountain diet Coke® and bottled diet Coke® said their purchasing decisions would be affected if they learned that fountain diet Coke® contains saccharin. (SA0011-12 [at A4-A5].) Thus, according to Dr. Star’s findings, the fact that fountain diet Coke® contains saccharin is *immaterial* to at least 80.6% of diet Coke® consumers. (*Id.*)⁵

⁴ Respondent cites Coca-Cola focus group studies from the 1990s which indicate that many consumers do not know that fountain diet Coke® contains saccharin. (Resp. Br. at 8, 20-21.) Coca-Cola does not dispute that many consumers are unaware of the ingredients in its products, including saccharin, aspartame and caffeine, but strongly denies that such consumer beliefs resulted from any conduct of Coca-Cola. Indeed, Dr. Star found that 39.1% of his survey respondents stated that they are sure or think that bottled diet Coke® contains saccharin – even though the labels on bottled diet Coke® identify aspartame as the only sweetener. (SA0010 [A3, Table 2].) In fact, the consumers in the studies cited by Respondent were reacting to hypothetical “attack ads” by Coca-Cola’s primary competitor PepsiCo, Inc. (Resp. Br. at 21, citing A091-096 of Resp. Appendix.)

⁵ Dr. Star admitted in his report that the percentage of all fountain diet Coke® consumers (including those who drink fountain diet Coke®, but not bottled diet Coke®) who might actually have altered their purchasing decisions if they had known fountain diet Coke® contains saccharin would be less than 19.4%. (SA0011-12 [at A4-A5].)

Dr. Star conceded at his deposition that those persons who state that their purchasing decisions would not have been affected have no claim for damages:

Q: [...] If some consumers state that it would not alter their purchasing decision if they learned that Diet Coke contains saccharin, would those people be entitled to any damages under your analysis.

A: No, and I have not calculated it that way.

(SA0014 [at 223:2-8].) Thus, according to Plaintiff Pennington's own expert, the vast majority of the class (more than 80%) would not have standing, because they did not sustain any ascertainable loss, even if Pennington could prove that Coca-Cola engaged in conduct in violation of the MPA.

Saccharin Is Safe.

In an attempt to parallel the facts of the *Craft* case, Respondent repeatedly argues that saccharin is an unsafe product about which some consumers have health concerns. (Resp. Br. at 8, 22, 45.) For example, Respondent argues that a "high percentage" of consumers believe saccharin is unsafe, citing a recent consumer survey by BevCat. (*Id.* at 8, 22.) Respondent neglects to mention that the BevCat survey also demonstrated that approximately the same percentage of consumers believe that aspartame is unsafe. (BevCat Survey (excerpted pages), SA0016-21.) In fact, both saccharin and aspartame are FDA-approved and among the most extensively tested ingredients in the food supply. *See, e.g.*, U.S. Food & Drug Administration, *Artificial Sweeteners: No Calories . . . Sweet!*, FDA CONSUMER (July-Aug. 2006), at

http://www.fda.gov/fdac/features/2006/406_sweeteners.html (SA0022-24.) Thus, the survey cited by Respondent merely shows that some consumers have concerns about any artificial sweeteners (even in the absence of any scientific basis for such concerns).

Without citing any authority, Respondent states that “until recently [saccharin] was a listed carcinogen and some scientists still consider [it] such.” (Resp. Br. at 45.) First, saccharin was listed only as a “suspected” carcinogen in the government’s “Report on Carcinogens, and has since been removed. Second, saccharin was not removed from the list of suspected carcinogens “only recently.” Saccharin was de-listed more than seven years ago after studies failed to demonstrate any causal relationship between saccharin consumption and cancer in human beings. (SA0023.) Finally, not only is Respondent’s assertion that “some scientists” still consider saccharin to be a carcinogen contrary to the overwhelming weight of scientific evidence, it finds no support in the record.⁶

⁶ Respondent also asserts that saccharin is a well-known allergen that can trigger headaches and other reactions. (Resp. Br. at 45.) Plaintiff cites no authority for such a proposition before this Court, and no such evidence was before the trial court.

ARGUMENT

As Coca-Cola demonstrated in its opening brief, Respondent abused his discretion in certifying a class of “all fountain diet Coke® consumers” in Missouri. The class is overbroad because it includes countless members who suffered no ascertainable loss, and it is unascertainable because there is no objective means of identifying those class members who suffered any ascertainable loss. Further, there is no indication (let alone evidence) in the record that Respondent rigorously analyzed the requirements of Missouri Rule 52.08 prior to certifying the class, as Respondent now concedes is required by Missouri law.

In response, Respondent argues for an extraordinary expansion of the MPA in the class action context. According to Respondent, every putative class action alleging a violation of the MPA should be certified on the ground that whether the defendant committed an act in violation of the MPA is a common issue that will always predominate over individualized issues such as ascertainable loss and causation which, Respondent asserts, can be presumed for purposes of class certification. (Resp. Br. at 6, 21, citing *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828 (Mo. App. E.D. 2000), and *Craft v. Philip Morris Cos.*, 190 S.W.3d 368 (Mo. App. E.D. 2003).)

As shown below, Respondent confuses an enforcement action by the Attorney General for injunctive relief and penalties under the MPA (*see, e.g., Beer Nuts*), where such presumptions may be justified, with a private cause of action for damages under the MPA, where such presumptions are not justified. Further, Respondent’s reliance on *Craft* is misplaced, because the *Craft* court expressly refused to consider any

presumptions, and the decision certainly does not support such a broad expansion of private damages actions under the MPA.

Respondent also argues that Coca-Cola took an equally extreme position by arguing that a class can never be certified if even one member of the putative class does not suffer an injury. This is not Coca-Cola's position. Rather, trial courts must decide whether individual issues or common issues predominate based on the particular facts of the case before the court. If, as here, the vast majority of the putative class members admittedly suffered no ascertainable loss, then individualized issues of ascertainable loss will predominate over the common issue of whether the defendant committed an act in violation of the MPA.

Respondent also argues that he conducted a rigorous analysis of the class certification requirements. However, there is no evidence in the record of any such analysis – other than the boilerplate order submitted by Plaintiff Pennington's counsel and signed, without modification, by Respondent.

In short, as every state and federal court besides Respondent has properly concluded, the “all fountain diet Coke® consumer” class certified by Respondent is not ascertainable. The class is overbroad because it includes consumers who lack standing because they suffered no cognizable injury, and there is no objective way to identify the small subgroup of consumers who purportedly would not have purchased fountain diet Coke® if they knew it contains saccharin. Thus, this Court should make absolute its preliminary writ of prohibition.

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.

Respondent abused his discretion in certifying a class of “all fountain diet Coke® consumers” in Missouri because the class is unascertainable. As Plaintiff Pennington’s own expert’s data demonstrates, the presence of saccharin is immaterial to at least 80% of fountain diet Coke® consumers, because they would continue to purchase fountain diet Coke® even if they knew it contains saccharin. Thus, the vast majority of class members have no standing because they did not suffer any ascertainable loss. *See Jackson v. Charlie’s Chevrolet, Inc.*, 664 S.W.2d 675, 676 (Mo. App. E.D. 1984). Further, the relatively small group of consumers who would *not* have purchased a fountain diet Coke® if they had known it contains saccharin – the only arguably proper members of the class – cannot be identified by reference to any objective criteria. Whether or not any individual class member suffered an ascertainable loss caused by Coca-Cola’s alleged failure to disclose its use of saccharin in fountain diet Coke® is contingent upon each class member’s individual subjective preferences regarding artificial sweeteners.

In response, Respondent argues that ascertainable loss and causation can be presumed in a private action under the MPA. (Resp. Br. at 6.)⁷ Respondent, however, conflates the requirements of an Attorney General enforcement action under the MPA for injunctive relief or penalties with the more stringent requirements of a private cause of action for damages under the MPA.

The plain language of the MPA provides that in order to maintain a private cause of action for damages under the MPA, the plaintiff must have suffered an ascertainable loss as a result of the alleged misconduct:

⁷ Respondent argues that causation can be presumed if the jury concludes that an alleged misrepresentation is material. (Resp. Br. at 6, 11.) There are at least two major problems with that theory in the context of class actions. First, at the class certification stage, there is no jury to rule on materiality. Second, even if a finding of materiality resulted in a presumption of causation as a matter of law, such a finding would not resolve the issue of whether class members suffered an ascertainable loss. For example, in *Jackson*, 664 S.W.2d at 677, the defendant car dealer's material misrepresentations caused the plaintiff to sign a contract to buy a car, but plaintiff suffered no ascertainable loss when the defendant later sold the car to someone else because she never paid any money toward the purchase of the car. Thus, even where materiality and causation are established, a court must still determine whether the common issue of whether a violation of the MPA occurred predominates over any individualized issues of whether class members suffered ascertainable losses.

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* in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover *actual damages*.

R.S.Mo. § 407.025(1) (emphasis added). Cases interpreting the MPA confirm that a plaintiff cannot maintain a private MPA claim for damages unless he or she can establish that he or she suffered an injury that was caused by the defendant's violation of the MPA. *See, e.g., Briehl v. General Motors Corp.*, No. 97-3506, 999 WL 222661 (8th Cir. Apr. 14, 1999) (in private action under MPA, plaintiff's injury must have been "proximately caused by defendant's actions"); *Freeman Health Systems v. Wass*, 124 S.W.3d 504, 506 (Mo. App. S.D. 2004) (ascertainable loss and causation are elements of private right of action under MPA); *Willard v. Bic Corp.*, 788 F. Supp. 1059, 1070 (W.D. Mo. 1991) (same); *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007) (same).

In contrast, the Attorney General of Missouri is authorized to bring an enforcement action under the MPA for injunctive relief and penalties without proof that the violation caused an ascertainable loss to a consumer. *See Jackson*, 664 S.W.2d at 677 (distinguishing Attorney General MPA actions from private MPA actions on the ground

that, unlike an Attorney General who is authorized to enjoin those who attempt to sell merchandise using unlawful practices, “a private cause of action is given only to one who purchases *and* suffers damage.”) (Emphasis added.) Indeed, the case cited by Respondent for the proposition that injury and causation can be presumed if the court finds that there has been a violation of the MPA (*Beer Nuts*, 29 S.W.3d at 837-38) is an Attorney General enforcement action for injunctive relief and civil penalties, not a private action for damages. In fact, even the Attorney General must establish ascertainable loss and causation when seeking restitution for consumers. *Hess*, 220 S.W.3d at 770, *citing* Sec. 407.100.4 of the MPA. Thus, *Beer Nuts* does not provide any support for Respondent’s assertion that ascertainable loss and causation can be presumed in a private action for damages under the MPA.

In fact, courts have demonstrated that they will not presume ascertainable loss or causation for purposes of class certification in private MPA actions for damages. *See Dumas v. Albers Medical, Inc.*, No. 03-0640, 2005 U.S. Dist. LEXIS 33482, at *15-*20 (W.D. Mo. Sept. 7, 2005) (A0284-90) (court denied class certification despite clear violation of MPA from sale of counterfeit Lipitor because it was impossible to identify class members without individualized inquiries of each class member to determine which consumers purchased counterfeit Lipitor (and therefore suffered an ascertainable loss) and which consumers purchased genuine Lipitor (and therefore suffered no ascertainable loss); *Saey v. CompUSA, Inc.*, 174 F.R.D. 448, 450-51 (E.D. Mo. 1997) (court denied certification of class of purchasers of computers that had been sold and returned by original buyers and then re-sold as new for the original purchase price, because class that

included purchasers who had returned their re-sold computers to defendant and received a full refund and purchasers who had received an unopened computer suffered no ascertainable loss).

Respondent also cites *Craft v. Philip Morris Co., Inc.*, 190 S.W.3d 368 (Mo. App. E.D. 2003), as supporting his argument that ascertainable loss and causation can be presumed for purposes of class certification in a private MPA action. Notably, Respondent did not once cite *Craft* in his certification order. Nevertheless, Respondent's current reliance on *Craft* is misplaced. Contrary to Respondent's assertion, the *Craft* court specifically struck from the class certification order all references to any presumptions of reliance and deception, stating:

Since plaintiff did not allege reliance and deception, it was not necessary for the court to draw legal conclusions relating to proof of reliance and deception. The trial court's legal conclusions relating to presumptions of reliance and deception are surplusage in its order certifying the class.

Id. at 385. Thus, *Craft*, like the Attorney General action cited by Respondent, provides no support for any presumption of causation or injury.

Further, *Craft* is readily distinguishable from the present case for several important reasons. First, the *Craft* court concluded that all class members were injured by purchasing a product that was objectively inferior to the product they thought they were purchasing, because the defendants' "Light" cigarettes had less economic value than cigarettes which actually deliver less tar and nicotine than regular cigarettes. *Id.* at 386.

“Light” cigarettes are defined by the amount of tar and nicotine they deliver, and a “Light” cigarette that delivers the same amount of tar and nicotine as a regular cigarette is simply not what it purports to be and is thus inferior to a cigarette that actually delivers less tar and nicotine than a regular cigarette. By contrast, Coca-Cola markets diet Coke® (whether in bottled or fountain form) as a zero-calorie soft drink with the flavor profile that diet Coke® consumers associate with diet Coke® products. Whether sweetened with a blend of saccharin and aspartame (fountain diet Coke®) or exclusively with aspartame (bottled diet Coke®), a diet Coke® remains a zero-calorie soft drink with a particular “diet Coke®” flavor profile. Further, a fountain diet Coke® containing a blend of saccharin and aspartame sweeteners is not an *objectively* inferior product to a fountain diet Coke® containing an aspartame-only sweetener. Rather, a fountain diet Coke® containing a blend of saccharin and aspartame sweeteners is only arguably inferior if a particular consumer has a subjective taste or lifestyle preference for an aspartame-only sweetener. In fact, as noted in Relator’s opening brief, studies have long demonstrated that the saccharin-aspartame blend is a *superior* sweetener formulation for diet fountain soft drinks because the blend does not lose its sweetness in the concentrated fountain syrup as quickly as an aspartame-only sweetener. (A0109-11, A0122.)

Second, the *Craft* court expressly held that individual issues of causation did not predominate because the “plaintiff did not allege reliance or deception in her petition, and she did not base the theory of this lawsuit on reliance or deception.” *Craft*, 190 S.W.3d at 383. In contrast, in this case, Plaintiff Pennington specifically alleged deception and reliance in her Petition.

- Plaintiff consumed both bottled and fountain diet Coke and was *deceived* by Coca-Cola’s marketing practices into believing that fountain diet Coke was sweetened exclusively with aspartame. (Petition at ¶ 4 (emphasis added).)
- *As a result of Coca-Cola’s misrepresentations*, Plaintiff and Class members purchased and consumed saccharin without their consent. (Petition at ¶ 41.e (emphasis added).)
- *[B]ased on Coca-Cola’s representations*, Plaintiff believed that all diet Coke, including fountain diet Coke, was sweetened with only aspartame. (Petition at ¶ 34 (emphasis added).)
- *Because of Coca-Cola’s misrepresentations* that fountain diet Coke is that same product as bottled diet Coke which does not contain saccharin, Plaintiff purchased and ingested fountain diet Coke on a regular basis until learning that it contained saccharin. (Petition at ¶ 35 (emphasis added).)
- *As a result of Coca-Cola’s marketing scheme* as alleged herein, many consumers were *tricked* into purchasing fountain diet Coke, which they would not have purchased if they had known it contained saccharin. (Petition at ¶ 45.a (emphasis added).)

Unlike the plaintiff in *Craft* who “in her carefully worded petition . . . did not specifically allege that she purchased Lights as a result of any misrepresentation,” 190 S.W.3d at 384, Plaintiff Pennington repeatedly and specifically alleges that she purchased fountain diet

Coke® as a result of Coca-Cola’s alleged misrepresentations.⁸ Indeed, she characterized the nature of her action as involving a “deceptive marketing scheme” of “misrepresentations” which actually “deceived” and “tricked” her and other consumers into making purchases of fountain diet Coke® they would not have otherwise made. *See, supra*, pp. 17-18 (excerpts from Pennington Petition). Thus, unlike the *Craft* plaintiff, Plaintiff Pennington alleges deception, causation, and injury as the basis of her MPA claim, which raises numerous individualized questions with respect to each member of the putative class.

Third, *Craft* involved a uniform alleged misrepresentation that cigarettes are “light.” The court stated, “Plaintiffs alleged that identical misrepresentations about tar and nicotine yields were made to all class members.” *Id.* at 383. In contrast, as discussed above and in Relator’s opening brief, the present case involves various representations about the sweeteners in diet Coke® drinks, including *accurate* disclosures that fountain diet Coke® contains saccharin. For example, the ingredient labels on fountain diet Coke® syrup containers list saccharin as an ingredient (A0112); Coca-Cola’s website identifies saccharin as an ingredient in fountain diet Coke® (A0109-111); and nutritional charts and brochures provided to consumers by many fast food restaurants disclose the fact that fountain diet Coke® contains saccharin (A0113-116). Furthermore, Coca-Cola has disclosed in its television and print advertising for diet Coke® that the 100%

⁸ Respondent’s assertion that this is really just an omissions case is belied by the allegations in Pennington’s Petition. (Resp. Brief at 21.)

aspartame sweetener used in bottled diet Coke® is not available for fountain diet Coke®. (A0041 at ¶¶ 18-19; A0050-108.)

In the recent decision, *In re Neurontin Marketing and Sales Practices Litig.*, MDL Docket No. 1629, Civ. Action No. 04-10981, 2007 Dist. LEXIS 63898 (D. Mass. Aug. 29, 2007) (SA0025-50), the court denied certification of a class of all purchasers of the prescription drug Neurontin for off-label use and distinguished the “light” cigarette cases. The court explained that class treatment was justified in the “light” cigarette cases because the market price for “lights” was higher than it would have been had the cigarettes been honestly advertised and, therefore, all purchasers of the product paid more because of the deception. *Id.* at *60-*61. Thus, the certified classes did not include any non-injured persons. In fact, the court noted that “[t]he plaintiffs have not identified any case in which a court has certified a class of consumers that necessarily includes a substantial number of unidentifiable non-injured persons.” *Id.* at *62. This is precisely the class that Respondent certified in the present case and the reason Respondent abused his discretion is certifying such a class.

Respondent further argues that individualized issues of damages can be resolved using fluid recovery. (Resp. Br. at 17 & 46.) Respondent is confusing individualized issues of damages, which have never been raised by Coca-Cola, with individualized issues of ascertainable loss and causation. Notwithstanding, the judicial trend consistently has been to reject the use of fluid recovery as a substitute for proof of injury or causation. *See, e.g., Dumas*, 2005 U.S. Dist. LEXIS 33482, at *23 (rejecting fluid recovery as a substitute for identifying class and/or proof of individual injury); *In re*

Phenylpropanolamine Prods. Liab. Litig., 214 F.R.D. 614, 620 (D. Wash. 2003) (“Ninth Circuit rejected the use of fluid recovery as a means of dispensing with proof of individual injury under Rule 23.”).

Respondent relies entirely on a statement in the concurring opinion in *Buchholz Mortuaries, Inc. v. Dir. of Rev.*, 113 S.W.3d 192, 196 fn.1 (Mo. banc 2004), in support of his fluid recovery argument,. *Buchholz* was not even a class action, so the statement about fluid recovery is *dicta*. As the *Buchholz* concurrence noted, fluid recovery may be appropriate in certain circumstances, such as facilitating the distribution of settlement funds. *Id.* It cannot, however, be used to dispense with the need for each class member to have standing to bring a claim as recognized by the *Dumas* decision.

Respondent argues that Coca-Cola takes the position that class certification is improper if the proposed class includes even one uninjured person. (Resp. Br. at 32-33.)⁹

⁹ In its opening brief, Coca-Cola cited *Hale v. Wal-Mart Stores, Inc.*, No. WD66262, 2007 WL 1672261, at *11 (Mo. App. W.D. June 12, 2007) as ruling that “[t]he class must include only those who are injured.” Respondent contends that the quote is “taken out of context and ignores the real finding in *Hale*.” (Resp. Br. at 14.) The “real finding,” according to Respondent, is that “a class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant.” (*Id.*, quoting *Hale*, 2007 WL 1672261, at *14.) First, Coca-Cola did not take the quote out of context. Indeed, in conformance with its ruling that “the class must include only those who are injured,” the *Hale* court struck the

(continued...)

To the contrary, Coca-Cola posits only that trial courts must rigorously analyze whether the common issue of whether the defendant committed an act in violation of the MPA predominates over individualized issues such as ascertainable loss and/or causation under the particular facts and circumstances of the case presented. In this case, the extent to which each consumer might perceive some injury from consuming a fountain diet Coke® containing saccharin is a highly individualized issue that predominates over the common issue of whether Coca-Cola committed an act in violation of the MPA. This is especially true where it is undisputed that more than 80% of consumers of fountain diet Coke® report that the presence of saccharin would be immaterial to their purchasing decisions, and Plaintiff Pennington has not suggested any means of identifying the small subset of consumers for whom it might be material.

On the other hand, Respondent's argument certainly would require every MPA class action to be certified. According to Respondent, if a plaintiff alleges a violation of the MPA, the issue of whether an MPA violation occurred is a common issue which, as a

portion of the class definition that included uninjured class members. (*See* Relator's Brief at 22.) Second, Respondent, not Coca-Cola, has taken language from *Hale* out of context. The court acknowledged that some of the class members might not want to pursue their rights and, instead, opt out, citing *Elliott v. ITT Corp.*, 150 F.R.D. 569, 575 (N.D. Ill.1992). The language quoted by Respondent is a quote from *Elliott* relating to opt-outs.

matter of law, predominates over any individualized issues of ascertainable loss or causation, which should be presumed. Respondent's argument has no support in Missouri law and represents an unwarranted expansion of the "fraud on the market" theory recognized only in federal securities law cases. Courts have consistently rejected the use of the "fraud on the market" theory in consumer fraud cases where, in contrast to the securities market, there is an imperfect or inefficient market. *See, e.g., Int'l Union of Op. Eng. Local No. 68 Welfare Fund v. Merck & Co, Inc.*, 2007 N.J. LEXIS 1055 (N.J. Sup. Ct., Sept. 6, 2007) (reversing certification of nationwide class of third-party payors for Vioxx, and rejecting "fraud on the market" as a substitute for proving that each class member suffered an "ascertainable loss" as required by the New Jersey Consumer Fraud Act).

For all of these reasons, Respondent abused his discretion in certifying a class that all other courts (including the Missouri state trial court in the recent decision *Kaiser-Engel v. PepsiCo, Inc.*, No. 22042, 2007 WL 1972027 (Cir. Ct. for the City of St. Louis, June 25, 2007)) properly refused to certify as 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 narrowly defined subclass of consumers who would not have purchased a fountain diet Coke® if they had known it contains 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.

Respondent does not dispute that he was obligated to rigorously analyze whether the requirements of Rule 52.08 were met prior to certifying the class. Thus, the issue before this Court now is whether there is sufficient evidence in the record that Respondent did, in fact, perform the required rigorous analysis. Respondent does not cite to anything in the record other than the class certification order itself as evidencing the required rigorous analysis. As explained in Coca-Cola’s opening brief, far from suggesting that Respondent rigorously analyzed the Rule 52.08 requirements, the class certification order evidences a complete lack of such analysis: (1) the order is comprised of bare conclusions of law with no supporting findings of fact; (2) the order does not address the main argument raised by Coca-Cola that the class is not sufficiently ascertainable; and (3) Respondent simply adopted verbatim the proposed order submitted by Pennington’s counsel, mistakes and all. (*See* Relator’s Brief at 36-38.) Simply put, where the trial court is deviating from an unbroken line of state and federal court decisions rejecting certification of virtually identical classes, a cursory order prepared by class counsel is not sufficient evidence that the requisite rigorous analysis has been performed.

Respondent criticizes Coca-Cola for not including findings of fact in its own proposed order and for not formally requesting that Respondent make findings of facts. (Resp. Br. at 39-41.)¹⁰ Respondent's criticism is a red herring. Whether Coca-Cola's proposed order was sufficient or whether it requested findings of fact has no bearing on whether Respondent conducted the required rigorous analysis of the requirements of Rule 52.08 prior to certifying the class. A blanket statement by Respondent in his certification order that he "fully considered" and "carefully reviewed" the evidence (Resp. Br. at 28) cannot substitute for the rigorous analysis of the class certification requirements both parties agree is required by law.

¹⁰ Respondent accuses Coca-Cola of failing to request findings of fact, *citing Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. W.D. 2006). Nothing in Rule 52.08 requires parties to request findings of fact and conclusions of law in class certification decisions. Further, counsel for Coca-Cola has been unable to find a single case preceding *Dale* (issued on June 30, 2006) which even suggested that parties should request finding of fact and conclusions of law for class certification rulings. In fact, the authority cited by the *Dale* court for this proposition (Rule 73.01) addresses the procedure that should be used in bench trials. It makes no reference whatsoever to class certification orders. In the present case, the parties submitted their proposed orders to Respondent on or about January 6, 2006, and Respondent issued his certification order on February 9, 2006. Thus, all of the relevant activity in the underlying *Pennington* case occurred well before the *Dale* decision was published.

If the standard of review for class certification decisions were *de novo*, then it might not matter as much if the trial court's certification order is conclusory. However, where a trial court is required to conduct a rigorous analysis of the requirements for class certification *and* the appellate courts review the certification ruling only for an abuse of discretion, there must be a well-reasoned analysis of the class certification requirements somewhere in the record – statements by the judge at oral argument, statements in an opinion or elsewhere in the record – so that a reviewing court can determine whether the trial court abused its discretion by not conducting a sufficiently rigorous analysis. All we have from Respondent is the conclusory class certification order prepared by Pennington's counsel and adopted *verbatim* by Respondent.

In an attempt to shore up his own bare-bones order, Respondent argues that the trial court in a related case, *Cox v. Coca-Cola* (Kan. 2006), “made no findings of any kind, made no statements, failed to provide even minimal information as to what it found did not satisfy Kansas law, and instead issued a one sentence order that the motion [for class certification] was denied.” (Resp. Brief at 40.) This statement is patently false. The Kansas court made its detailed ruling on the record at the conclusion of the hearing on the plaintiff's motion for class certification (A0142-146). In contrast to this case, in which there is no record whatsoever of any analysis by Respondent, the Kansas court's oral ruling demonstrated that the court conducted the required rigorous analysis and provides a basis for appellate review.

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.”

In response to Coca-Cola’s argument that the preliminary writ should be made absolute to spare the parties and the Missouri courts unnecessary burden, expense, and inconvenience, Respondent states that this is only the law in Missouri in “cases involving venue issue and other issues for which there would be inadequate appellate review.” (Resp. Brief at 7.) Notably, the only case cited by Respondent in support of this argument is *Union Planters Bank N.A. v. Kendrick*, 142 S.W.3d 729 (Mo. banc 2004), which itself is not a venue case. Rather, it was a class action in which the issue for review was whether the class certification requirement of adequate class counsel had been met. Respondent fails to explain why it is proper for this Court to use its writ power to review a trial court’s ruling on the adequacy of class counsel requirement of Rule

52.08(a), but improper to use it to review a trial court's ruling on any of the other requirements of Rule 52.08.¹¹

Respondent also argues that this writ should be quashed because Coca-Cola can appeal at the end of the case. (Resp. Br. at 46-47.) As explained in Coca-Cola's opening brief, the issue is not whether or not Coca-Cola can appeal as of right at the end of the case, the issue is whether "adequate relief can be afforded" by an appeal at the end of the case. Rule 84.22. *See 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.'"). For the reasons set forth in Coca-Cola's opening brief, adequate relief cannot be afforded here. Likewise, this Court's use of its writ power – a constitutional power that was in no way abrogated or truncated by the enactment of Rule 52.08(f) – to correct Respondent's error in certifying the class in this particular case will not nullify Rule 52.08(f).

CONCLUSION

As set forth above and in Coca-Cola's opening brief, Respondent abused his discretion in certifying the "all fountain diet Coke® consumer class" in this case. The class is not ascertainable because it is grossly overbroad. The vast majority of the class

¹¹ This Court recently confirmed that a writ of prohibition can issue "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, *or* to prevent exercise of extra-jurisdictional power." *State ex rel. McDonald's Corp. v. Midkiff*, 226 S.W.3d 119, 122 (emphasis added).

members lack standing to sue because they have not suffered any ascertainable loss. The class is also not sufficiently ascertainable because there is no objective way to identify the relatively few class members for whom the presence of saccharin may be material. Respondent's reliance on *Craft* for the proposition that ascertainable loss and causation can be presumed is misplaced where, as here, the product at issue (fountain diet Coke® with saccharin) is not an objectively inferior product for all of the putative class members and, thus, there is no basis for finding ascertainable loss or causation for the class as a whole. Finally, not only is Respondent's certification order erroneous, it was not supported by the rigorous analysis that Respondent admits he was required to perform under Missouri law.

Thus, Relator The Coca-Cola Company respectfully requests that this Court make absolute its preliminary writ of prohibition, thereby prohibiting Respondent from doing anything other than vacating his February 9, 2006 class certification order and directing Respondent to deny said motion.

Date: September 28, 2007

Respectfully submitted.

THE COCA-COLA COMPANY

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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 7,315 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 **Reply 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 28th day of Septemeber 2007:

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