IN THE SUPREME COURT OF MISSOURI

No. SC95949

STATE OF MISSOURI ex rel.
FOGLE ENTERPRISES, INC., and NOLAN FOGLE,

Relators,

v.

THE HONORABLE LAURA JOHNSON,
Circuit Court of Christian County, Missouri,

Respondent.

RELATORS' REPLY BRIEF

- Oral Argument Requested -

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Respondent attempts to distract this Court from the serious defects in the certification of the class. Respondent argues that McMillin has sufficiently pleaded, and thus it should be assumed, that Fogle Enterprises is a bad actor who violated the MMPA by receiving CDF contributions from its customers, which justifies forcing Fogle Enterprises to turn over to the class all money it received. This is true, Respondent asserts, regardless of whether (1) the class members could *ever* be identified, (2) the class members could establish a private right of action under the MMPA, and (3) Fogle Enterprises could be afforded a full and fair opportunity to challenge the class member's claims, and raise its defenses, prior to being required to pay damages. Under Respondent's view, a plaintiff could file a class action lawsuit making spurious allegations of class-wide treatment and damage, wait for the defendant to answer, and then immediately move for class certification, which the trial court would be duty-bound to grant. This is not and cannot be the law.

Instead, this Court's established precedent requires a plaintiff to prove, not merely plead, that a class of similarly situated persons exists, is capable of definition, and that it is possible to determine who is and is not a member of that class. The law further requires a plaintiff to prove the express requirements for class certification are met (as relevant here: numerosity, commonality, typicality,

adequacy of representation, predominance, and superiority). Finally, each of these requirements must be met without "cutting corners" that would deprive defendants of their due process rights.

Respondent asks this Court to uphold class certification on a bare-bones record that wholly fails to demonstrate the class definition properly delineates those with potentially valid claims from those without. Respondent also urges the Court to adopt a "worry later" class certification standard: ignore that the record is entirely devoid of evidence establishing the elements for class certification have been met, because the class can be amended or decertified at some later stage.

In reality, a class should not have been certified. The plan for maintenance of this litigation that Respondent approved masks McMillin's failure to meet his burden and violates Fogle Enterprises' due process rights; accordingly, now is the proper time for decertification.

I. REPLY IN SUPPORT OF RELATORS' FIRST POINT RELIED ON

A. McMillin Bore the Burden to Prove that Certification was Proper

Respondent asserts, relying upon *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368 (Mo. App. E.D. 2005), *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. W.D. 2006), and *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo. App. W.D. 2007), that "[i]t is premature to consider Relators' merits-based arguments at the certification stage, because a trial court has no

authority to conduct a preliminary inquiry into the merits of a lawsuit when it is determining whether that lawsuit may be maintained as a class action," that a trial court "is to take the plaintiff's allegations as to the underlying merits of the case as true at the certification stage," and that "the trial court is to consider whether, *assuming* the Plaintiff's asserts are true, *could* they be proved through common evidence." *See* Respondent's Brief at 14-15 (emphasis in original).

In essence, Respondent's position is that **proof** of compliance with the requirements for class certification is not required and, instead, a trial court must rule on certification like it would a motion to dismiss – assuming the plaintiff's allegations are true. To the extent this proposition was ever true, it is no longer the law in Missouri, nor is it the law under Fed. R. Civ. P. 23.

Subsequent to the cases cited by Respondent, this Court expressly held the burden to establish that class certification is proper "rests entirely with the plaintiff." *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 878-79 (Mo. banc 2008). This burden is not one of pleading, but a "burden of **proof**." *See id.* (emphasis added). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are **in fact** sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original).

The Court of Appeals' opinions cited by Respondent state, following *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that "[a] trial court has no authority to conduct a preliminary inquiry into the merits of a lawsuit when it is determining whether that lawsuit may be maintained as a class action," *see Craft*, 190 S.W.3d at 377, and that "in class certification determination, the court assumes the named plaintiffs' allegations are true," *see Hale*, 231 S.W. at 224. That case law, however, conflicts with this Court's later holding in *Green* and, as explained by the United States Supreme Court, presents a "mistaken[ ]" interpretation of its *Eisen* opinion. *See Dukes*, 564 U.S. at 351.

"Although the class certification decision is independent of the ultimate merits of the lawsuit, the applicable substantive law is relevant to a meaningful determination of the certification issues." *Green*, 254 S.W.3d at 880 (citing *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. banc 2007) (relying, in turn, on *Castano v. Am. Tobacco Co.*, 874 F.3d 734, 744 (5th Cir. 1996)). *Eisen* does **not** "suggest[ ] that a court is limited to the pleadings when deciding class certification," as recognized by the decision upon which this Court's statement in *Green* was based. *See Castano*, 84 F.3d at 744. A court "certainly may look past the pleadings to determine whether the requirements [for class certification] have been met." *See id.* Indeed, "[g]oing beyond the pleadings is necessary, as a court must understand the

claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Id.*

Determining the propriety of certification "will entail some overlap with the merits of the plaintiff's underlying claim," because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *See Dukes*, 564 U.S. at 351 (internal editorial marks omitted). "[T]here is nothing unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation." *Id.* at 351-352.

Accordingly, Relators urge the Court to reaffirm *Green's* holding that, at class certification, the burden is not one of mere pleading, but a burden of proof, and to follow the United States Supreme Court's holding in *Dukes* that the plaintiff bears the burden to "affirmatively demonstrate" the requirements for class certification.

B. The Class Definition Certified by Respondent Contains a Substantial Number of Members with no MMPA Claim

Relators have argued the class definition certified by Respondent includes a substantial number of persons with no potentially valid claim under the MMPA because it includes members whose transaction with Fogle Enterprises was not "primarily for personal, family, or household purposes." *See* Mo. Rev. Stat. §

407.025.1.[1] In response, Respondent asserts that (1) businesses may assert a private right of action under the MMPA, because the requirement that a purchase be "primarily for personal, family or household purposes" relates to the subject matter of the purchase and not the identity of the purchaser, and (2) even if the "MMPA business exclusion" applies, this would not preclude certification. Respondent is wrong on both points.

i. Respondent's Argument that the MMPA Provides a Private Right of Action to a Business Purchaser Ignores the Language and Legislative Intent of the Statute

Respondent argues the MMPA's grant of a private right of action is based upon the "subject matter" of the transaction, not on the purpose of the transaction itself. This argument is grounded upon a fundamental misinterpretation of the MMPA.

Respondent's position, like the New Jersey statute on which it is based, expressly places emphasis on the ordinary use of the product purchased, not on the purpose of the transaction at issue, as required by the MMPA. In *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544 (N.J. 2013), the case cited by Respondent, the

[1] The burden of establishing the primary purpose of each transaction is borne by the plaintiff asserting a private right of action under the MMPA. *See, e.g.*, *Williams v. HSBC Bank USA, N.A.*, 467 S.W.3d 836, 843 (Mo. App. S.D. 2015).

court had to determine under the relevant statutory scheme whether the product (a coupon) was "money, property or service which is primarily for personal, family or household purposes." *See id.* at 549. Thus, the emphasis under the statute was not the primary **purpose of the transaction**, but the primary **use of the product**. *See id.*; *see also Korrow v. Aaron's Inc.*, No. 10-6317, 2013 U.S. Dist. LEXIS 157272, at *27 (D.N.J. July 31, 2013) (noting that under New Jersey law individualized inquiry is not required because the question is whether the product is "of the sort commonly purchased for personal use," and not the purpose of the transaction or the motivation of the purchaser).

Quite differently, under the MMPA, the "typical use" of the product has no bearing. Rather, the inquiry is placed squarely upon the **purpose of the purchase** and the motivation of the purchaser. *See Binkley v. Am. Equity Mortg., Inc.*, 447 S.W.3d 194, 198 (Mo. banc 2014) (noting that the MMPA requires a plaintiff to prove "they made a purchase… for personal, family, or household purposes").

As it relates to this case, a business obviously cannot ingest food or beverage, and has no family or household. Thus, a business's purchase of food or beverage cannot be for its personal, family or household purposes. In fact, on this point, McMillin fails to inform the Court that his position has been flatly rejected by a Missouri court applying the MMPA. *See In re Express Scripts, Inc.*,

Pharmacy Benefits Mgmt. Litig., MDL No. 1672, 2006 U.S. Dist. LEXIS 56168 (E.D. Mo. Sept. 13, 2006).

In *Express Scripts*, the plaintiff was a police officers' retirement plan (the "Plan") that brought suit for violations of the MMPA related to alleged wrongdoing in the handling of pharmacy benefit management services for the Plan (and, ultimately the Plan's members). *See id.* at *7. The defendants argued the plaintiff did not have standing to maintain its MMPA claim because the Plan purchased the services for its business purposes. *See id.* at *41. The plaintiff, however, maintained it had standing because the Plan's pharmacy program was used for police officers and "therefore benefits conferred are for personal purposes." *See id.* The court, in finding that the plain language of the MMPA deprived the plaintiff of standing, explained:

> A private cause of action is given only to one who purchases and suffers damage. And the word purchase is defined as meaning to obtain by paying money or its equivalent. One who never pays anything of value for a purchase cannot be said to have suffered damage by reason of any unlawful practice. Therefore the [Plan] is considered the "person" who purchased Defendants' services, not the police officers. Although the Court can find no cases analyzing the phrase "personal, family or household purposes," given the facts of this case, an extensive

> discussion is unnecessary. The [Plan] purchased Defendants' services and suffered the damages. **The services were not purchased for the Plan's personal, family, or household purposes**. Instead, they were purchased for a business purpose: to serve the Plan's clients. Under a plain reading of the statute, the [Plan] cannot bring suit under MMPA.

See id. at *41-42 (emphasis added).

Express Scripts is directly on-point and its sound logic applies here with equal force. Where a business contributed to the CDF, the business suffered the alleged damage under the MMPA – not the person actually consuming the food. While the transaction that business had with Fogle Enterprises may have ultimately resulted in a person eating food or drinking a beverage, such purchases were not for **the business's** personal, family, or household purposes. Instead, it was a purchase primarily for a business purpose: to serve or entertain the businesses' employees or customers. *Express Scripts* confirms that McMillin's argument is not supported by "a plain reading of the statute." *See id.*; *see also Binkley*, 447 S.W.3d at 198. McMillin misconstrues the MMPA in favor of inapplicable New Jersey law. Missouri law is clear, however, that the many transactions customers had with Fogle Enterprises for a business purpose cannot give rise to a private right of action under the MMPA.

Further, directly contrary to Respondent's argument, it has been explained that under the MMPA, "a business entity is essentially unable to sue another business for an unfair or deceptive trade practice." *See Fabas Consulting Int'l v. Jet Midwest, Inc.*, 74 F. Supp. 3d 1026, 1031 (W.D. Mo. 2015). Similarly, an individual that purchases merchandise for a business purpose does not have standing to maintain a private right of action under the MMPA. *See Black v. MoneyGram Payment Sys.*, No. 4:15-cv-01767-AGF, 2016 U.S. Dist. LEXIS 90003, at *13 (E.D. Mo. July 12, 2016) (holding that a plaintiff that "purchased money transfer services 'to secure a business asset' and 'establish a business relationship'" lacks standing to maintain an action for violation of the MMPA); *McNeil v. Best Buy Co.*, No. 4:13CV1742 JCH, 2014 U.S. Dist. LEXIS 45237, at *10 (E.D. Mo. Apr. 2, 2014) (dismissing an individual's MMPA claim arising from his purchase of services relating to the transfer, preservation and recovery of his computer data because it was "mainly commercial in nature, and thus did not involve merchandise purchased primarily for personal, family or household purposes"); *Saey v. CompUSA, Inc.*, 174 F.R.D. 448, 450 (E.D. Mo. 1997) (holding that an individual that purchased a computer for business lacked standing to bring a claim under the MMPA).

In short, the narrow focus of the MMPA's private right of action "represents an intentional policy decision by the Missouri legislature:

> Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices [and was] enacted [as] paternalistic legislation designed to protect those that could not otherwise protect themselves."

See Fabas Consulting, 74 F. Supp. 3d at 1031 (quoting *High Life Sales Co. Brown-Forman Corp*., 823 S.W.2d 493, 498 (Mo. banc 1992)).

ii. The Inclusion of Persons and Entities without Standing to Maintain a Private Cause of Action Under the MMPA in the Class Definition Precludes Certification

In arguing that the inclusion of persons and entities without standing to maintain an MMPA claim does not preclude certification, Respondent conflates the requirements of a proper class definition and predominance, and in so doing puts the cart before the horse.

For the class to be properly defined, it must not be overbroad. Only **after** a class is properly defined can the parties and the Court adequately address whether common issues predominate over individual issues. Respondent's argument is based purely on the proposition that predominance can, in some instances, be established, even if individualized fact-finding would later be required; however, this says nothing about the propriety of the class definition.

A proper definition "clearly underlies each of the mandatory elements for certification." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. banc 2008). "Moreover, a properly defined class is necessary to realize both the protections and benefits for which the class action device was created." *Id.* "**Before** considering the criteria established by section 407.025.3 and Rule 52.08, therefore, it is **first** necessary to determine whether the class exists and is capable of legal definition." *Id.* (internal editorial marks omitted). "If a class is not properly defined, the circuit court must deny certification." *Id.* "A class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *Id.*

"A class must… be defined in such a way that anyone within it would have standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). "Or, to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Id.*

Respondent does not challenge the uncontroverted evidence demonstrating a significant portion of Fogle Enterprises' customers were tour bus groups and various other businesses. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 20-23 (165). Accordingly, a significant portion of the proposed class members lack the ability to bring, on their own, the MMPA claim that McMillin purports to bring on their behalf.

The fact that the class definition includes a substantial number of members who lack the ability to assert a private right of action under the MMPA is fatal to class certification. Accordingly, Respondent's Order constitutes a clear abuse of discretion, and the Court should make permanent its Preliminary Writ of Prohibition.

C. The Class Definition Certified by Respondent Contains a Substantial Number of Members that Voluntarily Contributed to the CDF

The undisputed evidence presented to Respondent also demonstrated that a substantial number of members in the class voluntarily contributed to the CDF with full knowledge of the facts related to their contribution and the CDF. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶¶ 9-10, and 13. The only evidence presented by McMillin was that he, and he alone, did not voluntarily contribute to the CDF. *See* Exhibit 6, *McMillin's Motion for Class Certification* at ¶ 19 (036).

Respondent does not direct the Court to any evidence demonstrating the class does not include a substantial number of members that voluntarily contributed to the CDF. Instead, Respondent argues that the voluntary payment doctrine is inapplicable to McMillin's common law claims as a matter of law "because the [CDF payment] was illegal and void," and, thus, the inclusion of

voluntary-payers in the class definition should be permissible. *See* Respondent's Brief at 19. Respondent's position is simply not correct.

No Missouri court has ever held that the voluntary payment doctrine does not apply to claims for unjust enrichment and money had and received, even where the payment was "illegal and void."[2] Instead, Missouri courts have held the voluntary payment doctrine may not be available as a defense to certain **statutory causes of action**. *See Wiley v. Daly*, 472 S.W.3d 157 (Mo. App. E.D. 2015) (voluntary payment doctrine "cannot be used to abrogate statutory remedies"); *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009) (voluntary payment doctrine is "not available to defeat claims authorized by the [MMPA]"); *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007) (voluntary payment doctrine not available to defeat a claim under Mo. Rev. Stat. §

[2] As noted by Respondent, the doctrine may be unavailable where the payment was made due to "fraud or duress." *See Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. W.D. 2013). However, *Damon* was decided following the grant of a motion to dismiss, not class certification. The Court of Appeals explained that the voluntary payment defense involves numerous "factual issues" that would need to be determined to conclude that "the facts prove an independent equity so as to prohibit the doctrine's application." *See id.* at 193.

484.020). Thus, Respondent's position is fundamentally flawed in that unjust enrichment and money had and received are not statutory claims, and do not seek statutory remedies.

Further, a plaintiff's allegation that a payment was "illegal" does not render the voluntary payment doctrine inapplicable. "Money voluntarily paid to another under a claim of right to the payment, and with knowledge of the facts by the person making the payment, is not recoverable on the ground that the claim was **illegal** or that there was no liability to pay in the first instance." *See Edwards v. City of Ellisville*, 426 S.W.3d 644, 666 (Mo. App. E.D. 2013). "This is true even when the payor wrongly believes that the demand for payment was legal." *Id.*

D. The Class Certified by Respondent is Erroneous because it is not Administratively Feasible to Determine the Class Members

Respondent concedes that "Missouri courts require an administratively feasible method to test and determine if any individual who eventually comes forth is indeed a class member." *See* Respondent's Brief at 32. "And this method must be provided by way of a clear and precise class definition against which each potential class member can be verified." *Id.* These concessions are absolutely fatal to class certification, because McMillin presented Respondent with no administratively feasible method to test and determine whether any individual is a member of the class, either now or when they "eventually come[ ] forth."

Respondent does not contend there is any objective way to identify Fogle Enterprises' cash-paying customers. Respondent does not contend there is any objective way to identify the majority of Fogle Enterprises' customers that paid with a credit card, as the signatures are often illegible. Respondent also does not contend there is any objective way to determine which of the customers that can somehow be identified actually contributed to the CDF, as the simple math indicates that a large number of Fogle Enterprises' customers did not, in fact, contribute.

Instead of arguing that "it is administratively feasible to identify the members of the class," *see Coca-Cola Co.*, 249 S.W.3d at 862, Respondent urges the Court to depart from its prior precedent and adopt what she terms "the well-reasoned decisions in *Mullins*, *Briseno*, and *Sandusky*." [3] Those cases, however, do not suggest that a class action can proceed where there is no feasible way to identify the class members, and they do not dispense with the necessity of identifying the class members prior to the entry of judgment against a defendant.

[3] *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016).

Instead, those cases – which represent one side of a multi-circuit split – suggest that administrative feasibility may better be addressed by a "rigorous analysis" of compliance with the requirements for class certification, including predominance and superiority. *See, e.g.*, *Mullins*, 795 F.3d at 663 ("[C]oncern about administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3), which requires that the class device be 'superior to other available methods for fairly and efficiently adjudicating the controversy.'"); *Briseno*, 844 F.3d at 1133 (merely declining to adopt a "separately articulated" administrative feasibility requirement); *Sandusky*, 821 F.3d at 996 (noting that "a rigorous analysis of the Rule 23 requirements… [already] includes that a class 'must be adequately defined and clearly ascertainable.'"); *but see In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015) (holding that a court may only proceed with class certification if distinguishing injured from non-injured class members is "administratively feasible and protective of defendants' Seventh Amendment and due process rights"); *Brecher v. Republic of Argentina*, 802 F.3d 303 (2d Cir. 2015); *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014); *Karhu v. Vital Pharms. Inc.*, 621 F. App'x 945 (11th Cir. 2015).

Further, after *Sandusky*, the Eighth Circuit recently noted a separate analysis of ascertainability is appropriate where there is a dispute as to whether and how

class members can be identified. "Though ascertainability is an implicit requirement that our court enforces through a rigorous analysis of the Rule 23 requirements, a dispute regarding the method for identifying class members calls for an independent discussion of whether a class is ascertainable." *See McKeage v. TMBC, LLC*, 847 F.3d 992, ---, at *9 (8th Cir. 2017) (internal editorial marks omitted).

There is no question that "the requirements of ascertainability and manageability are intertwined," but at bottom, "[w]hether addressed under the heading of 'ascertainability' or 'manageability,' the fact remains that in order for a class to be certified, the proposed class must be both ascertainable in theory and readily identifiable (thus, administratively manageable) in fact." *See Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482, at *21 (W.D. Mo. Sept. 7, 2005).

Here, McMillin failed to present any evidence that it would be administratively feasible to identify the class either now, or at any point in the future. Whether viewed as a threshold issue of ascertainability, or part of a "rigorous analysis" of the express requirements for class certification, the fact remains that the class cannot be identified.

Importantly, despite looking for it in discovery, McMillin presented no evidence that the class could be identified from any available records, or other

objective evidence, unlike the plaintiff in *Sandusky*. McMillin presented no evidence that all Fogle Enterprises customers were subjected to a uniform misrepresentation, unlike the plaintiffs in *Mullins*, *Briseno*, and *Craft*. McMillin presented no evidence that class members will be able to remember whether they contributed to the CDF (even he cannot remember whether he contributed except for one occasion). He presented no evidence that class members will be able to provide any evidence that they contributed to the CDF (even he only retained one receipt from his multiple visits to Fogle Enterprises restaurants).

Accordingly, McMillin failed to meet his burden of demonstrating that it is administratively feasible to identify members of the class, either now or at some point prior to the entry of judgment, and failed to establish that the class is ascertainable. *See Coca-Cola, Co.*, 249 S.W.3d at 862. Respondent's Order was in error, and the Court's Preliminary Writ of Prohibition should be made permanent.

II. REPLY IN SUPPORT OF RELATORS' SECOND POINT RELIED ON

A. Determining Class-Wide Damages Prior to Giving Relators the Opportunity to Challenge Each Class Member's Claims or Present Defenses Violates Relators' Right to Due Process

Respondent does not suggest there is any method, or there is any intention, to identify class members prior to the entry of judgment. The only mechanism for determining a person's membership in the class presented by McMillin is a post-judgment claims procedure, whereby an individual claiming to be a member of the class would submit claims to a pool of money that Fogle Enterprises has already been required to pay through entry of judgment. As Fogle Enterprises has consistently maintained, this would deprive Fogle Enterprises of its due process right to raise defenses or challenge an individual's membership in the class prior to the entry of a judgment against it.

Respondent's argument concerning the propriety of establishing class-wide damages appears to be rooted in a fundamental misconception about the nature of McMillin's claims. Specifically, Respondent indicates that because the total amount of money collected for the CDF is known, this case is proper for an "aggregate damages" award. The error in this reasoning is that it ignores McMillin's theories of liability. Each cause of action asserted by McMillin requires proof of damages to the individual plaintiff. *See* Mo. Rev. Stat. §

407.025.1 (authorizing action "to recover actual damages"); *Pub. Sch. Ret. Sys. of Mo. v. Taveau*, 481 S.W.3d 10, 24 (Mo. App. W.D. 2015) (to recover for unjust enrichment a plaintiff must prove that "**he** conferred a benefit on the defendant") (emphasis added); *Investors Title Co. v. Hammonds*, S.W.3d 288, 293-294 (Mo. banc 2007) (cause of action for money had and received lies "where the defendant has received or obtained possession of the money **of the plaintiff**, which in equity and good conscience, he ought to pay over to the plaintiff") (emphasis added). Moreover, "[t]he general rule is that a party may not recover from all sources an amount in excess of the damages sustained…." *Bucksaw Resort, L.L.C. v. Mehrtens*, 414 S.W.3d 39, 45 (Mo. App. W.D. 2013).

"[A] plaintiff's damages case **must** be consistent with its liability case…." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). It is manifest that if Fogle Enterprises is not liable to a specific class member, the class is not entitled to the money that member's claim represents. Accordingly, an "aggregate damages" judgment cannot be proper. Indeed, as pointed out in the case touted by Respondent as being "well-reasoned," a defendant's right to due process is protected only where "the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase," not merely to challenge such member's claim after damages have already been determined. *See*

Mullins, 795 F.3d at 671 ("[T]he defendant has a right not to pay in excess of its liability and to present individual defenses….").

Respondent's reliance on the recent case of *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), for the proposition that "aggregate damages class actions are permissible even if the award includes uninjured class members," overreaches. *See* Respondent's Brief at 39. First, the question of "whether a class may be certified if it contains members who were not injured and have no legal right to any damages," was abandoned and the court expressly noted that it "need not, and does not, address it." *See Tyson Foods*, 136 S. Ct. at 1049. Second, the court limited its analysis to whether the petitioner's concern about the **distribution** of the jury's damage award to uninjured class members was ripe, not whether a defendant's due process rights are violated by awarding class damages prior to a defendant's right to present defenses to the claims of individual class members. *See id.* at 1049-1050. In fact, the court noted that it was the defendant, not the plaintiff, that "insisted upon a single proceeding in which damages would be calculated in the aggregate…." *See id.* at 1044.

Here, Fogle Enterprises staunchly opposes McMillin's plan to try the issues of liability and damages prior to identifying the class through some post-judgment claims procedure. Further, Fogle Enterprises maintains it has a right to challenge

individual class member's claims (and present its defenses) prior to the entry of judgment.

At this juncture, unlike the situations presented in *Bouaphakeo*, *Kansas Ass'n of Private Investigators v. Mulvihill*, 159 S.W.3d 857 (Mo. App. W.D. 2005), and *Barfield v. Sho-Me Power Elec. Co-op.*, 309 F.R.D. 491 (W.D. Mo. 2015), Fogle Enterprises is not complaining about the mere distribution of an award already made. Instead, a damages award cannot be made in the first instance without giving Fogle Enterprises the opportunity to challenge individual class members' claims (and thereby reduce any liability it may be found to have to the class). It is for this reason Respondent's argument that Fogle Enterprises has no due process interest in the "allocation" or "apportionment" of a damage award also misses the mark. Respondent cannot seriously dispute that Fogle Enterprises has a due process interest in reducing the amount of its liability.

Respondent concedes that "a plaintiff may not circumvent his elements of proof through conjecture about injury and damages." *See* Respondent's Brief at 41. Similarly, a plaintiff cannot "cut[ ] corners in an effort to avoid proving that all class members were injured, and the amount of any such damages." *See id.* Again, Respondent's concessions fly in the face of her argument that certification was proper – if this case proceeds as certified, McMillin is being permitted to do the very things Respondent concedes are improper.

A trial on liability and aggregate damages due to the class prior to (1) determining whether the members of the class have standing to maintain an action under the MMPA, and (2) permitting Fogle Enterprises to raise its defenses to individual claims, is the very model of "cutting corners" condemned by the United States Supreme Court. *See Dukes*, 564 U.S. at 367 (where monetary damages are sought by class members, a defendant must "have the right to raise any individual affirmative defenses" to individual claims prior to judgment). Such a process would never be permitted in traditional litigation, and it cannot be permitted merely because that is the only conceivable way, in the context of this case, to realize any efficiencies from the class-action device. Instead of proving that certification of the class does not violate Fogle Enterprises' due process rights, Respondent's argument proves that a class never should have been certified. Due process cannot be sacrificed for the sake of rough justice.

B. Application of Rule 52.08 in a Manner that Changes Substantive Rights Violates the Missouri Constitution

This Court is enabled to establish rules of procedure by the Missouri Constitution. However, like the federal Rules Enabling Act's proviso that court rules "shall not abridge, enlarge or modify any substantive right," the Missouri Constitution provides that Court rules "shall not change substantive rights…." *See*

MO. CONST., art. V, § 5. Thus, the application of Rule 52.08 in a manner that changes the substantive rights of the parties violates the Missouri Constitution.

Certainly, due process is a substantive right. *See Blanks v. Fluor Corp.*, 450 S.W.3d 308, 409 (Mo. App. E.D. 2014). Due process requires that the defendant be given a full opportunity to litigate its defenses, **before** judgment is entered against him. *See Ex parte Nelson*, 251 Mo. 63, 106, 157 S.W. 794, 808-809 (1913); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Further, absolving a party of its burden to establish **each** element of its claim (e.g., under the MMPA that a purchase was primarily for personal, family or household purposes) constitutes a change to substantive, not procedural, rights. *See, e.g., Cimino v. Raymark Indus.*, 151 F.3d 297, 312 (5th Cir. 1998) (holding that the Rules Enabling Act mandates that the "use of Rule 23… does not alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon)….").

Respondent offers no argument avoiding the fact that determining liability and creating an aggregate damages judgment prior to class "claimants" coming forward changes the parties' substantive rights. McMillin and the individual class members would not be required to prove, prior to judgment, that they can satisfy their prima facie case by a preponderance of the evidence. Fogle Enterprises would not be allowed to prove, prior to judgment, that McMillin and the class members are not entitled to recover. Accordingly, the only plan proffered for maintenance of

this case as a class action is prohibited by Article V, Section 5, of the Missouri Constitution, and Respondent's certification cannot stand.

III. REPLY IN SUPPORT OF RELATORS' THIRD POINT RELIED ON

A. McMillin Presented No Evidence that his Claims are Typical of the Class

Respondent, in attempting to address the standard for typicality, cites *Dale* for the proposition that "variance in the underlying facts of the representative's claim and the putative class member's claim" will not defeat certification. *See* Respondent's Brief at 46. However, *Dale* actually provides that typicality can be found only if "the underlying facts are not markedly different." *See* 204 S.W.3d at 172. The facts concerning McMillin's visit giving rise to his case, however, were remarkable. McMillin and his wife entered the restaurant through a back door and had their waitress run McMillin's personal credit card while they stayed at the table. This specific set of facts purportedly permitted McMillin to avoid seeing various posted notices about the CDF. Further, contrary to Fogle Enterprises' written guidance and training, McMillin asserts he was not verbally informed about the CDF by restaurant staff. McMillin presented no evidence to Respondent that any other customer had a similar experience.

Respondent further argues, in reliance upon *Dale* and *Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. App. W.D. 2009), that the existence of unique defenses "has nothing to do with the typicality standard," because "defenses that go the

merits of the case… are not properly considered in class certification"). *See* Respondent's Brief at 46-47.

As an initial matter, each of these statements trace their roots to the same "mistaken[ ]" interpretation of *Eisen* that would require a plaintiff's allegations to be accepted as true – that a court has no authority to conduct a preliminary inquiry into the merits of a suit to determine whether it may be maintained as a class action. This position has been expressly rejected by the United States Supreme Court. *See Dukes*, 564 U.S. at 351 n. 6 ("[I]t is the purest dictum and is contradicted by our other cases").

Moreover, consideration that Fogle Enterprises may raise defenses to the claims of a substantial portion of the class members' claims is certainly appropriate at class certification. *See, e.g., Waste Mgmt. Holding, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("[W]e regard the law as settled that affirmative defenses should be considered in making class certification decisions."); *Jaynes v. United States*, No. 04-856C, 2005 U.S. Claims LEXIS 439, at *31 (Fed. Cl. Aug. 19, 2005) ("The law is settled that affirmative defenses are properly considered…."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 233 (2d Cir. 2008); *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982); *In re Express Scripts, Inc., PBM Litig.*, No. 4:05MD01672HEA, 2015 U.S. Dist. LEXIS 1854, at

*26 (E.D. Mo. Jan. 8, 2015) ("The individual issues raised by affirmative defenses can clearly preclude certification.").

Specifically, "[i]n assessing the typicality of the plaintiff's claims, the court must pay special attention to unique defenses that are not shared by the class representatives and members of the class." *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 316 (S.D.N.Y. 2003). "This rule applies to defenses that negate the plaintiff's case-in-chief and to affirmative defenses for which defendant bears the burden of proof." *Id.*

B. McMillin Failed to Demonstrate Commonality, Predominance, and Superiority

"[A] prospective class must articulate at least one common question that will actually advance all of the class members' claims." *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 550 (7th Cir. 2016).

Respondent posits that "[i]t cannot seriously be contested that there are numerous common questions of fact and law," and attempts to identify those questions for the Court's consideration. *See* Respondent's Brief at 50. As Relators' explained, quite seriously, in their opening Brief, none of the purportedly common questions initially identified by McMillin are truly common to all class members. And neither are the purportedly common questions now identified by Respondent.

"[W]hether Missouri law precludes Relators from charging the fee because they did not register as a charity," and "whether Relators' conduct constitutes a 'negative option,'" are only relevant to McMillin's MMPA claim. Accordingly, they do not present questions that advance the claims of **all** class members, because a mere violation of the MMPA is not a question advancing the claims of the substantial number of members that do not have a private right of action under the MMPA.

"[I]s the purchase of food with a business credit card an exception to the MMPA," is not a question common to **all** class members, because not all class members used a business card. Specifically, for example, this question is not common to McMillin, because he used a personal card. Thus, resolution of this question does nothing to advance his personal claim.

Further, "can the voluntary payment doctrine be viable as a matter of law when the conduct at issue is prohibited by §407.450 *et seq.*," is not common to **all** class members, because the voluntary payment doctrine is not applicable to all members. Again, this question may not be common to McMillin, because he claims that he did not have any knowledge of the CDF. Thus, the legal question of whether the defense may properly be applied to those having full knowledge, does not advance his personal claim.

Identifying a question that is common to **som**e, or even **a large number**, of the class members does establish commonality. In order to meet his burden, McMillin was required to identify a question applicable to **all** class members. He failed to do so. Even now, Respondent apparently cannot identify a common question that will materially advance the claims of **all** the class members.

At bottom, McMillin failed to establish "the capacity of a classwide proceeding to generate common **answers** apt to drive the resolution" of the claims of **all** class members. *See Dukes*, 564 U.S. at 350 (emphasis in original). Instead, the uncontroverted record before Respondent demonstrated that individual questions will predominate the case moving forward and will render the case unmanageable (*i.e.*, not superior), due in large part to the inclusion of persons within the class definition that are not similarly situated to McMillin at all.

WHEREFORE, Relators/Defendants Fogle Enterprises, Inc., and Nolan Fogle respectfully request the Court issue an order making permanent its Preliminary Writ of Prohibition, and granting Relators such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 7,748 words, as determined by the word-processing system used to prepare the brief.

/s/ *Jason C. Smith*

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on this 13th day of March, 2017, the foregoing instrument was electronically filed with the Clerk of the Supreme Court, and was delivered to the following in the manner indicated:

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