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.

RESPONDENT'S BRIEF

Eric L. Dirks, MO Bar No. 54921
John F. Doyle, MO Bar No. 66626
WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105
dirks@williamsdirks.com
jdoyle@williamsdirks.com
Tel: (816) 876-2600
Fax: (816) 221-8763

Attorneys for Plaintiff and the Putative Class on Behalf of Respondent

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RESPONDENT'S STATEMENT OF FACTS

A. Factual Overview.

The named Defendants in the Underlying Litigation are Nolan Fogle and Fogle Enterprises, Inc., a company through which Mr. Fogle conducts business (collectively, "Relators").

This case involves Relators' systematic charging of an unauthorized and illegal tax. *See* Relators' Exh. 3 at 008 (Plt.'s Pet. ¶¶ 9-12).[1] Over the class period, Relators — who own and operate a number of restaurants in Branson, Missouri — collected at least $374,570.84 by discretely charging its customers the unauthorized tax. *See* Relators' Exh. 6 at 090. Relators then added the illegal revenues to their general operating funds and spent the money as they pleased, which included: flights, hotel expenses, and tickets to Disneyworld for members of Nolan Fogle's travelling softball team, and personal payments to professional softball players to participate on Nolan Fogle's travelling softball team. *See* Relators' Exh. 6 at 083-86 (Fogle Dep.) Indeed, the expenditures for Mr. Fogle's softball team constitute more than $200,000 of the illegal revenues collected during the class period. *See id.* at 081-82 (Fogle Dep.) *and* 103-109 (excerpts from Relators' CDF expense ledger).

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[1] All citations to "Relators' Exhibits" refer to the exhibits filed in support of Relators' Petition for Writ of Prohibition. All citations to Respondent's Appendix are designated accordingly (*e.g.* "Respondent's App. at A001").

The tax was never authorized pursuant to state or local law. *See* Relators' Exh. 3 at 008 (Plt.'s Pet. ¶ 10). And yet relators unlawfully charged it at each of its Missouri restaurants for approximately eight years. *See* Relators' Exh. 6 at 059-60, 069 (Fogle Dep.). Relators characterized the unlawful charge as the "Community Development Fund fee" (abbreviated to "CDF") in claiming that the revenue collected was being used for "community development" of the Branson, Missouri area. *See id.* at 065, 070-71(Fogle Dep.).

In reality, however, the vast majority of the money collected by Relators via the CDF is either unaccounted for or was not spent for charitable purposes. *See* Relators' Exh. 6 at 083-86 (Fogle Dep.). Indeed, nearly a third of the amount collected was never accounted for, and Relators spent most of the remaining illegal revenues to fund Mr. Fogle's personal softball team or on gift certificates to Relators' restaurants. *See id.* at 085 (Fogle admitting $117,206 of CDF revenue is unaccounted for); *and* at 101 (Relators' statement that somewhere between $20,000 and $50,000 was "donated" by way of gift certificates to their own restaurants). Relators did not pay taxes on the CDF revenues for the entire class period. *See* Relators' Exh. 6 at 077 (Fogle Dep.). And, importantly, Relators were not registered as a charitable organization capable of raising charitable funds in the first place. *See* Mo. Rev. Stat. §§ 407.456 & .462; Relators' Exh. 6 at 076 (Fogle Dep.). In contrast, Relators cannot point to any statute or regulation permitting them to charge the tax.

B. The Mechanics of the CDF Fee.

The "CDF" was automatically included on every customer's bill and was charged whether a customer affirmatively volunteered to pay it or not. *See* Relators' Exh. 6 at 076-77 (Fogle Dep.). The fee was uniformly charged at all of Relators' restaurants. *See id.* at 059-60 (Fogle Dep.). During the majority of time in question, the "bill" given to Relators' customers was merely a handwritten ledger of the meals purchased; and, although the CDF was being charged to the customer, it was not identified on the ledger. *See id.* at 066-68 (Fogle Dep.) *and* at 095 (copy of hand-written bill). The customer would then pay the server or at the cash register. *Id.* Customers could only discover they had actually paid the CDF if they happened to request a take-home copy of their receipt. *See id.* at 095 (copy of hand-written bill *with* take-home receipt). But even then, the receipt did not identify the CDF, only that an additional percentage had been charged at the bottom. *Id.*

When Relators ultimately listed "CDF" on a customer's receipt, it was placed inconspicuously at the bottom to mimic a mandatory tax. *See* Relators' Exh. 6 at 097 (Fogle Dep.). The CDF would only be removed from a customer's bill on the rare occasion that a customer questioned or otherwise knew about the fake tax and affirmatively requested that it be removed. *See id.* at 073 (Fogle Dep.); *and* at 089 (Resp. to Interrog. No. 5).

C. Plaintiff's Allegations and Procedural History.

On February 28, 2014, Plaintiff brought this action on behalf of himself and others similarly situated to recover monies improperly charged as a CDF. *See* Relators' Exh. 3

at 007-16 (Plt.'s Pet.). Plaintiff alleges the CDF constitutes an illegal tax which Relators were legally precluded from charging. *Id.* Plaintiff further alleges that the CDF constitutes an unconscionable "negative option" scheme. *Id.* Plaintiff asserts violation of the MMPA § 407.010 *et seq*. as well as common law unjust enrichment and money had and money received. *Id.*

On February 29, 2016, Plaintiff moved for certification of a class consisting of "[Relators'] customers within five years of the filing of this action who paid a CDF." Relators' Exh. 6 at 031-119 (Plt.'s Mtn. for Class Cert.). After considering over 100 pages of briefing and a two-hour hearing on the relevant issues, Respondent certified Plaintiff's proposed class. *See* Respondent's App. at A093-A187 (Hearing Transcript). In doing so, the trial court ordered, in relevant part:

> The Court finds that Plaintiff's class definition is not overbroad and is sufficiently definite to identify members of the class. Plaintiff's Motion is aided by the fact that the total amount of CDF collected during the relevant period was $374,570.84, so Defendants' liability is limited regardless of the ultimate number of claimants. Plaintiff's Motion for Class Certification should not be defeated because Defendants have not maintained adequate records to assist in identifying class members.

See Relators' Exh. 11 at 289 (Respondent's Order).

RESPONSE TO RELATORS' POINTS RELIED ON

I. Respondent properly exercised her discretion in certifying Plaintiff's proposed class because she correctly applied Rule 52.08, in that (1) the class definition is based upon objective criteria and, thus, is sufficiently definite to identify class members, (2) Plaintiff alleges all class members were injured and Relators' merits-based arguments to the contrary are premature, and (3) the proposed class satisfies Missouri's recognized standard of "ascertainability" and likewise comports with the majority federal standard of "ascertainability."

State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855 (Mo. banc 2008)

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. App. 2006)

Craft v. Philip Morris Companies, Inc., 190 S.W.3d 368 (Mo. App. 2005)

Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015)

II. Respondent properly exercised her discretion in certifying Plaintiff's proposed class because she correctly applied Rule 52.08, in that (1) Relators charged all class members the same fee and the total amount collected by way of the fee is known, (2) Relators' due process arguments are erroneous and premature, and (3) a class action does not violate Relators' constitutional rights.

Craft v. Philip Morris Cos., 190 S.W.3d 368 (Mo. App. 2005)

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016)

Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017)

III. Respondent properly exercised her discretion in certifying Plaintiff's proposed class because she correctly applied Rule 52.08, in that (1) the record supports the elements of typicality, commonality, predominance, and superiority were satisfied and (2) Respondent followed well-settled Missouri case law in determining those elements had been satisfied by Plaintiff.

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. App. 2006)

Plubell v. Merck & Co., 289 S.W.3d 707 (Mo. App. 2009)

Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215 (Mo. App. 2007)

Elsea v. U.S. Eng'g Co., 463 S.W.3d 409 (Mo. App. 2015)

ARGUMENT

I. INTRODUCTION AND SUMMARY

Relators ask the Court to materially change existing Missouri case law in order to give Relators a free pass to retain the illegally collected proceeds from its fake tax — the CDF fee. Despite the relatively low amount in controversy, this decision could have serious ramifications on the future of class actions in Missouri. Indeed, if the Court sides with Relators, it will result in a significant restriction to the class action device in cases for which the class mechanism is the most beneficial — low value claims. A reversal of the trial court's certification order could result in the crippling of the class action device in the three following ways:

1) Class actions will not be certified in cases where the identity of class members is unknown — as is nearly always the case in low value consumer class actions. Such a result will encourage business in Missouri that do not play by the rules to keep poor records to elude liability;
2) Defendants who wish to avoid certification of a class need only plead "individualized issues," regardless of whether the issues have merit, and regardless of whether the trial court will be able to ultimately address the alleged issues in a manageable way; and
3) Trial court discretion in managing class actions at the trial court level will be significantly impaired.

On the other hand, if the certification order is affirmed, there will exist the chance that the merits will be reached under the careful supervision of the trial court in a case

involving what is an unlawful, unfair and unjust fee charged to each and every class member.

Relators advance two primary arguments in their Brief, which are repackaged in each of their three Points Relied On. Relators' first argument — which was the focus of their trial court briefing and their Petition for a writ — is that the class definition does not meet the requisite "ascertainability" standard. While Relators understandably back away from this argument (possibly given the recent slew of authority holding such an argument to be without merit), they nonetheless make the argument that, because Relators failed to keep records of those harmed by their illegal fee, class certification should have been denied. Respondent, however, was well within her discretion in correctly finding that Plaintiff's proposed class definition (*i.e.*, Relators' customers who paid the CDF fee) "is not overbroad and is sufficiently definite to identify members of the class."

Second, Relators make various arguments relating to two alleged defenses. Relators' argue that their defenses could render a portion of the class uninjured such that a class-wide award could include uninjured class members. The argument fails at the outset because Relators' alleged individual issues are highly speculative and likely to fail on a class-wide basis as a matter of law. Moreover, the argument reaches the merits of the case in contradiction to well-established Missouri law. Indeed, Relators ask the Court to discard Plaintiff's theory of the case — that all class members were injured — in favor of Relators' theory of the case. The argument improperly asks the Court to prematurely fast forward to Relators' case and ignores the trial court's ongoing role in managing the class action as it progresses. As discussed below, there are multiple ways the alleged individual

issues may be ruled upon and multiple ways to account for them even if they survive summary judgment. Relators' request that this Court throw out the trial court's order on the mere *possibility* their defenses could, at some point, become unmanageable to the trial court. This is contrary to law and common sense.

Relators' arguments are largely devoid of Missouri case support. As such, perhaps necessarily, Relators rely heavily upon trial court rulings from random federal trial courts across the nation. Relators' cases are factually distinguishable and often represent the minority view. Relators do not provide *any* case support for their assertion that the trial court departed from well-established Missouri authority on class certification. If anything, Relators only raise concerns about the manageability of this particular class action. But such questions under established law should be left to the discretion of the trial court who can manage the litigation process. Indeed, existing case law dictates that, if the case were to become unmanageable at some point, the trial court has the authority to amend the class definition or even decertify the case. This is precisely why Missouri appellate authority instructs trial courts to err in favor of certification, and why appellate courts should give considerable discretion to trial courts in managing their class action.

Simply put, it cannot be said — as it must for Relators to prevail — that Respondent's certification decision departs from Missouri case authority, or, is in any way irrational, arbitrary or so unreasonable as to shock one's sense of justice and indicate a lack of careful consideration.

II. LEGAL STANDARD

A. Standards Relating To a Request For an Extraordinary Writ.

The Missouri Supreme Court "may issue and determine original remedial writs." Mo. Const. art. V, § 4. A writ of prohibition, however, does not issue as a matter of right. *See State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 760 (Mo. App. 2007). Rather, a writ of prohibition is discretionary and will lie only to prevent "an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id.*

Importantly, in a prohibition proceeding "the burden is on the petitioning party to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption of right action in favor of the trial court's ruling." *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 391 (Mo. App. 2000). And this Court has cautioned that a writ of prohibition is "an extraordinary remedy [which] is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). Indeed, the discretionary authority of a court to issue a writ of prohibition is only exercised "when the facts and circumstances of a particular case demonstrate ***unequivocally*** that an extreme necessity for preventative action exists." *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo. App. 2003) (emphasis added).

B. The Review of Class Certification is Highly Deferential.

Missouri appellate courts likewise review a trial court's order granting class certification for abuse of discretion. *See Wright v. Country Club of St. Albans*, 269

S.W.3d 461, 464 (Mo. App. 2008). In Missouri, courts will find an abuse of discretion only if the trial court's ruling is "**so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration.**" *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 580 (Mo. App. 2010) (emphasis added).

This Court has observed that class actions are "designed to promote judicial economy by permitting the litigation of common questions of law and fact of numerous individuals in a single proceeding." *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). "Whether a particular action should proceed as a class action under Rule 52.08 is a matter that lies within the sound discretion of the trial court." *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 221 (Mo. App. 2007) (citing *Union Planters Bank, N.A.*, 142 S.W.3d at 735).

"Although the class certification decision lies in the circuit court's discretion, the courts should err in close cases in favor of certification because the class can be modified as the case progresses." *Meyer v. Flour Corp.*, 220 S.W.3d 712, 715 (Mo. banc 2007); *see also Hale*, 231 S.W.3d at 221 (stating the court should "err on the side of upholding certification in cases where it is a close question because Rule 52.08(c)(1) provides for de-certification of a class before a decision on the merits.") (quoting *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 164 (Mo. App. 2006)).

In addressing the propriety of certification, "[w]hether a plaintiff is able to prove a theory is irrelevant…because the sole issue is whether the certification requirements were met." *Plubell v. Merck & Co.*, 289 S.W.3d 707, 715 (Mo. App. 2009). Indeed, 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." *Dale*, 204 S.W.3d at 178.

For these reasons, this Court has held a trial court only abuses its discretion "if the class certification is based on an erroneous application of the law or the evidence provides ***no rational basis for certifying the class.***" *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 599 (Mo. banc 2012) (emphasis added). This is a significant burden, and one which Relators have failed to meet.

III. RESPONSE TO RELATORS' FIRST POINT RELIED ON

Respondent properly exercised her discretion in certifying Plaintiff's proposed class because she correctly applied Rule 52.08, in that (1) the class definition is based upon objective criteria and, thus, is sufficiently definite to identify class members, (2) Plaintiff alleges all class members were injured and Relators' merits-based arguments to the contrary are premature, and (3) the proposed class satisfies Missouri's recognized standard of "ascertainability" and likewise comports with the majority federal standard of "ascertainability."

A. The Class Definition is Well-Defined and Not Overbroad.

Relators' class definition argument is primarily based on their two alleged defenses to Plaintiff's claims: (1) the business exclusion to the MMPA; and (2) the voluntary payment doctrine defense. *See* Relators' Br. at 25-28. According to Relators, if these arguments are successful, then such a finding will render some portion of the proposed class "uninjured." *Id.* Relators' argument is misplaced because Missouri law is well-settled that such merits-based arguments do not defeat certification. Moreover, even accepting that Relators can prematurely submit merits-based arguments at this stage, their argument still fails because both defenses lack merit. Finally, even if Relators' defenses are eventually proven, they do not alter the trial court's finding at this stage that common questions predominate and class treatment of the CDF is superior.

i. Individual Merits-Arguments Do Not Defeat Certification.

It 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." *Dale*, 204 S.W.3d at 178; *see also Hale*, 231 S.W.3d at 224 (finding the trial court is to take the plaintiff's allegations as to the underlying merits of the case as true at the certification stage).

Missouri case law makes clear that alleged defenses do not defeat certification: "predominance of the common issues is not defeated simply because individual questions may remain after the common issues are resolved, such as questions of damages ***or possible defenses to the individual claims***." *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 383 (Mo. App. 2005) (emphasis added). Thus, "[e]ven if other important matters will need to be tried separately, a case may proceed as a class action if one or more of the central issues are common to the class and can be said to predominate." *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 790 (Mo. App. 2006) (citing *Craft*, 190 S.W.3d at 381-82). Stated succinctly, "it matters not that there may be a multitude of individual questions of fact that would have to be resolved for the individual class members [to recover under the MMPA] . . . . The question is whether the record supports the fact that there is at least one significant fact question or issue, dispositive or not, that is common . . . ." *Dale*, 204 S.W.3d at 176. If a defendant could avoid class certification simply by asserting a merits-based argument that it claims is individualized in nature — no matter how unlikely to succeed the argument is — then no class action could ever be certified. This is not the law in Missouri; rather, the trial court is to consider whether, *assuming* the Plaintiff's assertions are true, *could* they be proven through common evidence. *See Hale*, 231 S.W.3d at 224; *see also Craft*, 190 S.W.3d at 377.

ii. The Business Exception Does Not Defeat Certification.

Relators' first alleged individualized issue — the business purchase exception to the MMPA — fails to defeat certification for two independent reasons: (1) the business exception does not apply to Plaintiff's MMPA claim as a matter of law; and (2) even if the business exclusion could apply to the MMPA claim, it does not preclude certification of Plaintiff's proposed class.

1. The MMPA Business Exclusion Does Not Apply.

The MMPA allows "persons" to bring a civil claim for damages incurred as a result of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or other matters. *See* Mo. Rev. Stat. §§ 407.020 & .025. "Person," in turn, is defined as "any natural person or his legal representative, partnership, firm, ***for-profit or not-for-profit corporation***, whether domestic or foreign, company, foundation, trust, business entity or association…." Mo. Rev. Stat. § 407.010 (emphasis added). Thus, even the plain language of the MMPA expressly contemplates that ***businesses*** may bring forth claims under the MMPA. This necessarily means that the requirement that a purchase be "primarily for personal, family or household purposes" (Mo. Rev. Stat. § 407.025) relates to the ***subject matter*** of the purchase and not the identity of the purchaser.

Here, the purchase of food and beverages is inherently personal in nature. Indeed, as one court observed: "Dining out and pursuing entertainment . . . are quintessential personal, family or household pursuits." *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 437 (N.J. 2013) (ultimately finding gift certificates for dining out qualified as "primarily for personal, family or household purposes"). Relators do not cite a single case standing

for the proposition that dining is not primarily for personal purposes. Instead, Relators are left relying on *McNeil v. Best Buy Co.*, No. 4:13-cv-1742, 2014 WL 1316935 (E.D. Mo. April 2, 2014), which is severely inapposite. *See* Relators' Br. at 26. *McNeil* involved a plaintiff who hired Best Buy to transfer business records and his company's financial data between his two computers. *Id.* at *1. The *McNeil* plaintiff sued Best Buy under the MMPA after Best Buy allegedly lost the plaintiff's data. *Id.* at *3. The *McNeil* plaintiff ***admitted in his petition that his purchase of services from Best Buy was primarily for business purposes***. *Id.* Thus, this case is clearly distinguishable from the present matter.

Moreover, the "business meal" question actually supports certification because it is a question that (as Relators allege) applies to numerous class members such that the question can be answered on a class-wide basis. Whether a meal can be excluded from the contours of the MMPA is a question of law that could and should be determined for the class in one proceeding. *See* Rule 52.08(a) (noting that common questions can be legal or factual questions).

2. Even if the MMPA Business Exclusion Applies, it Does Not Preclude Certification.

Courts routinely permit consumer protection claims to move forward even if a sub-set of the class may fall within a recognized "business exclusion." For example, the District of Kansas recently found the "business entity" exclusion of the Kansas Consumer Protection Act does not frustrate certification of a consumer class because, although it may require some future determination, the class was still nonetheless "precise and objective." *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 608 (D. Kan.

2014). Missouri case law is in accord. *See Dale*, 204 S.W.3d at 177 (rejecting the defendant's argument that "the issue of whether a Durango ***was purchased for business or commercial purposes*** can be resolved only with individual proof from each class member," and ruling "we fail to see how this would prevent the respondent from carrying its burden as to the common-question-predominance requirement . . . the fact that some issues may require individualized fact-finding does not prevent the satisfaction of the common-question-predominance question.") (emphasis added).

Similarly, another federal court recently conducted a full analysis of this issue and concluded: "***The majority of courts…have concluded that factual questions related to personal use do not prevent the certification of consumer protection class actions***." *Yazzie v. Gurley Motor Co.*, No. CIV 14-555, 2015 WL 10818834, at *5 (D. N.M. 2015) (citing cases) (emphasis added); *see also Irwin v. Mascott*, 96 F. Supp. 2d 968, 973 (N.D. Cal. 1999) (stating "the fact that defendants do not maintain information that allows a precise determination of the nature of each purchase should not be a bar to proceeding" as a class action); *Butto v. Collecto Inc.*, 290 F.R.D. 372, 383 (E.D.N.Y. 2013) (noting it is not "particularly arduous to ask potential class members the simple question of whether the individual's debt at issue qualifies as a consumer debt."). Realtors' argument here fails for these same reasons: the trial court was within its discretion in finding any necessary factual distinction between "business" and "personal" purchases (assuming the argument has any merit) does not defeat predominance.

iii. The Voluntary Payment Doctrine Defense Does Not Defeat Certification.

Similarly, Relators' voluntary payment doctrine argument (*i.e.* that certain class members voluntarily paid the CDF and, thus, are barred from making a claim under the voluntary payment doctrine) is a premature merits-based argument. *See* Section III(A)(i) *supra*.

To the extent Relators attempt to apply the voluntary payment doctrine defense to Plaintiff's MMPA claim, this defense fails outright. *See Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 725-26 (Mo. banc 2009) (ruling the MMPA "is so strong that parties will not be allowed to waive its benefits" and "to allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statute useless and meaningless."); *see also Damon v. City of Kansas City*, 419 S.W.3d 162, 192-93 (Mo. App. 2013) (holding the voluntary payment doctrine is not a viable defense to an MMPA claim).

Moreover, this defense fails with respect to Plaintiff's common law claims because the charge was illegal and void under Mo. Rev Stat. §§ 407.456 & .462. *See Damon,*, 419 S.W.3d at 192-93 (noting that voluntary payment doctrine "is not always available" including under circumstances when the charged fee is prohibited by a Missouri statute) (citing *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339 (Mo. banc 2007)); *see also Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 703 (Mo. banc 2008) ("to hold the consumer, not the mortgage lender, responsible for recognizing the unauthorized practice of law and precluding recovery because of a voluntary payment

would be 'illogical and inequitable.'") (quoting *Eisel*, 230 S.W.3d at 339-40). Because the fee is unlawful pursuant to Mo. Rev. Stat. §§ 407.456 & .462, the voluntary payment doctrine fails as to Plaintiff's common law claims just as it does as to Plaintiff's MMPA claim.

In addition, the doctrine is only available against "a person who voluntarily pays money with *full knowledge* of all the facts in the case, and in the absence of fraud and duress, cannot recover it back." *Carpenter*, 250 S.W.3d at 703. Plaintiff has properly pled (and, indeed, will likely be able to conclusively prove) that Relators fraudulently obtained and concealed the nature of the fee in several respects. *See* Relators' Exh. 3 at 008 (Plt.'s Pet. ¶¶ 9-12). For example, Relators did not properly disclose the fee to their customers and never disclosed that the monies being charged were being used for Mr. Fogle's personal benefit. Moreover, in addition to the monies diverted for personal softball ventures, the evidence also demonstrated that Relators used the money for their own business purposes as well — for advertising, equipment and other reasons — a far cry from the purpose for which Relators allegedly disclosed the funds would be used. Accordingly, Relators' voluntary payment doctrine defense is destined to fail on a class-wide basis.

B. Imposing a "Heightened Ascertainability" Standard Would Not Protect Defendants' Due Process Rights But Would Imperil the Viability of Low-Dollar Consumer Class Actions.

Relators also argue that the class definition is improper because the class definition does not meet the "ascertainability" prerequisite. *See* Relators' Br. at 28-33. In

addition to the express requirements of Rule 52.08, Missouri courts considering class certification have recognized an "implied prerequisite" that proposed classes must be capable of legal definition. *See Craft*, 190 S.W.3d at 387. Relators, however, seek to have the Court adopt a "heightened" standard of ascertainability recognized by a minority of federal circuits. *See* Relators' Br. at 28-29 (citing cases from the 2nd and 11th Circuits which have adopted the "heightened" ascertainability standard, discussed further *infra*).

Plaintiff defines the class as all consumers who paid the CDF.[2] This is an objective definition that is neither vague nor amorphous. The criteria — having paid the CDF in the past five years — are objective standards that do not rely upon any subjective facts. This is sufficient to satisfy the recognized Missouri standard. Indeed, Missouri courts recognize that it is not a requirement that the identities of class members be known in cases involving consumer retail purchases. *See State ex rel American Family Insurance Co. v. Clark*, 106 S.W.3d 483, 491 (Mo. banc 2003) (Wolff J. concurring) ("individual notice would be virtually impossible in a class action on behalf of consumers of a particular product purchased at retail; as to those class members, notice by publication may well be the only means available.").

Missouri courts have applied these concepts in class actions that involve large amounts of consumers who may be difficult to identify at the outset (such as here) but nevertheless are members of an objectively-defined class. For example, in *Craft v. Philip Morris Cos.*, the Court of Appeals affirmed certification of a class of all Marlboro Light cigarette smokers in the state. *Craft*, 190 S.W.3d at 388. The *Craft* defendants made the

[2] With certain exclusions, for example, Judges, Jurors, and Counsel for the parties.

same primary arguments advanced by Relators here: (1) that the proposed class would be difficult to manage and (2) the class was not ascertainable. *Id.* at 386-387. The court rejected both arguments. *Id*. While a class of all Marlboro Light purchasers may have been a difficult class to identify at the outset, the court nonetheless found the class definition was sufficiently based on objective criteria. *Id.* As a result, the court found the class defined as: "All Missouri residents who purchased Lights during the relevant time period but who do 'not have a claim for personal injury related to smoking'" was ascertainable. *Id.*

It is important to note that the *Craft* court did not require the plaintiff to proffer a class list or opine as to how the class members would eventually be identified at the initial certification stage — as Relators attempt to require of Plaintiff here. Instead, the court stated that the class definition merely needed to be based on "objective criteria that do not depend on the consumer's subjective state of mind or the merits of the case." *Id.* at 388. Indeed, the court stated that "the primary concern underlying the requirement of a class capable of definition is that the proposed class not be amorphous, vague, or indeterminate." *Id.* at 387. Here, as in *Craft*, Plaintiff's proposed class definition is based on objective criteria which do not require an impermissible merits-inquiry.

Similarly, in *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409 (Mo. App. 2015), the Western District Court of Appeals found a class that was composed of individuals exposed to asbestos in the Jackson County Courthouse for a specific period of time to be ascertainable. The defendant argued the class definition was ill-defined and unascertainable because it required the court to determine how long someone spent in the

courthouse and their level of exposure. *Id*. at 425-426. The court rejected this argument and reversed the trial court's denial of certification noting: "There is nothing imprecise about this definition. One can objectively determine who is in the class." *Id*. at 426.

The *Elsea* court went on to reject arguments about the difficulty in identifying the class: "the circuit court expressed concern that the class definition would result in a proliferation of mini-hearings to determine residency and time of exposure. ***Individualized fact-finding necessary in determining class membership does not necessarily render a class definition infirm***. As Plaintiff points out, in class action cases, class members are required to affirm their membership in a class by verifying satisfaction of class criteria." *Id*. at 426 (internal citation omitted) (emphasis added).

Numerous recent federal court decisions have adopted similar reasoning as the *Craft* and *Elsa* decisions and also support certification of Plaintiff's proposed class. *See 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); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015).

i. *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015).

In *Mullins*, the Seventh Circuit considered an appeal of an Illinois district court's decision to certify a class of dietary supplement purchasers. *Mullins*, 795 F.3d at 657. The *Mullins* court was faced with many of the *exact same* arguments Relators make here throughout their Points Relied On: (1) that the proposed class stood to pose manageability issues due to a lack of retail records (*id.* at 664-65); (2) that identifying the

proposed class could violate the defendant's due process rights (*id.* at 669); and (3) that self-identification is not an appropriate way to determine class membership (*id.* at 669-71). The *Mullins* court found each of these arguments to be without merit. The court held that the inability to identify class members at the class certification stage does not defeat certification. *Id.* at 663-65. Instead, it held that the ascertainability requirement only defeats certification when class definitions are "too vague or subjective, or when class membership was defined in terms of success on the merits." *Id.* at 657. Moreover, the Court strenuously rejected the invitation to adopt a more stringent ascertainability requirement:

> The stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do. Accordingly, we conclude that the district court here did not abuse its discretion by deferring until later in the litigation decisions about more detailed aspects of ascertainability and the management of any claims process. At bottom, the district court was correct not to let a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all.

Id. at 662. The court further observed that heightened ascertainability arguments often fail to balance the benefits of the class action device in that they improperly focus on manageability issues but do not weigh the benefits of the class action:

> A reader might fairly ask whether there is any practical difference between

> addressing administrative inconvenience as a matter of ascertainability versus as a matter of superiority. In fact, there is. When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action. But when courts approach the issue as part of a careful application of Rule 23(b)(3)'s superiority standard, they must recognize both the costs *and benefits* of the class device.
>
> Rule 23(b)(3)'s superiority requirement, unlike the freestanding ascertainability requirement, is comparative: the court must assess efficiency with an eye toward "other available methods." In many cases where the heightened ascertainability requirement will be hardest to satisfy, there realistically is no other alternative to class treatment.

Id. at 663-64 (inner quotations and citations omitted).

The *Mullins* court observed that a heightened ascertainability requirement has "the effect of barring class actions where class treatment is most often needed in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase." *Id.* at 658. Furthermore, the court explained, the heightened standard ignores the "important policy objective of class actions: deterring and punishing corporate wrongdoing." *Id*. at 668. That is, "refusing to certify on this basis effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions." *Id.*

The *Mullins* court was faced with facts that are highly analogous to the facts of the present matter (a class of consumers of a low-value product seeking redress from a defendant's deceptive conduct). And, as discussed further herein, the *Mullins* opinion has recently been expressly adopted by other federal circuit courts of appeals. Accordingly, this Court should view the well-reasoned *Mullins* opinion as persuasive authority.

ii. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

The Ninth Circuit found *Mullins* persuasive in affirming certification of a class of consumers who purchased the defendant's cooking oil. *Briseno*, 844 F.3d at 1123. Again, the *Briseno* court tackled each of Relators' arguments here (*i.e.*, manageability issues caused by a large potential class without retail records, due process concerns, and sufficiency of self-identification of class members) and categorically rejected each one. *Id.* at 1128-29, 1132. The *Briseno* court was faced with a potential class of consumers with low-value claims (under $10 per person) who likely lacked objective proof of class membership other than self-identification. *Id.* at 1129. Yet the court found that Rule 23 does not impose a freestanding prerequisite requiring a class list or ability to obtain the identities of the class other than through self-identification. *Id.* at 1132.

The *Briseno* court determined a heightened ascertainability standard does not comport with Rule 23, stating:

> Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal: the manageability criterion of the superiority requirement. Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy,"

> and it specifically mandates that courts consider "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(D).
>
> Moreover, as the Seventh Circuit has observed, requiring class proponents to satisfy an administrative feasibility prerequisite "conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." *Mullins*, 795 F.3d at 663.

Id. at 1127-28. Again, the proposed class in *Briseno* is highly analogous to the proposed class here: a consumer class of low-value purchasers who likely lack receipts of their purchases. Accordingly, the *Briseno* decision should be considered persuasive guidance as to instant certification decision.

iii. *Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016).

In *Sandusky*, the Eighth Circuit overturned a Minnesota district court's determination that a proposed class of facsimile recipients was not ascertainable. *Sandusky*, 821 F.3d at 998. The *Sandusky* court conducted a thorough analysis of the circuit split and elected to adopt the Seventh Circuit's lower standard. *Id.* at 995-96. Indeed, the *Sandusky* court acknowledged the "heightened" standard and, citing *Mullins*, chose to stick to the requirements of Rule 23 rather than apply a heightened standard: "this court has not addressed ascertainability as a separate, preliminary requirement.

Rather, this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class 'must be adequately defined and clearly ascertainable.'" *Id.*[3]

C. Relator's Cases Do Not Show the Trial Court Erred.

Relators cite just two Missouri cases in support of their ascertainability argument: *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008) and *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. 2006). Relators' Br. at 28-29. But Relators take *Coca-Cola* and *Dale* entirely out of context. Neither of these cases stands for the blanket proposition that self-identification is inappropriate in consumer class actions, as Relators suggest.

In *upholding* class certification in *Dale*, the Missouri Court of Appeals for the Western District acknowledged that individual fact finding in order to determine class membership is appropriate. *Dale*, 204 S.W.3d at 180-181. The defendant argued (as Relators do here) that "any individualized fact-finding necessary to determine class membership renders the particular class definition in question infirm." *Id*. at 181. The court rejected this argument noting that it found "no support" for such a proposition. *Id*. Instead, the court clearly articulated the difference between class definitions that are impermissibly based upon subjective criteria, as opposed to appropriate definitions that

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[3] *See also Lafollette v. Liberty Mut. Fire Ins.* Co., No. 2:14-CV-04147, 2016 WL 4083478, at *5 (W.D. Mo. Aug. 1, 2016) (following *Sandusky*); *In re: Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591, 2016 WL 5371856, at *2 (D. Kan. Sept. 26, 2016) (expressly adopting *Mullins* and citing *Sandusky* in support).

may potentially require individual fact finding but are nonetheless objective. *Id.*; *see also id*. at 177 ("A sufficiently definite class exists to justify class certification, 'if its members can be ascertained by reference to objective criteria.'") (citing *Craft*, 190 S.W.3d at 387-388.

Likewise, in *State ex rel. Coca-Cola Company v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008), this Court found the class definition infirm because, among other things, the class definition relied upon the class members' inherently subjective "like" or "dislike" for saccharin. *Id.* at 862-864. The plaintiff attempted to certify a class consisting of all individuals who had purchased fountain diet coke in Missouri, despite the fact that ***even under the plaintiff's theory, 80% of the class was not injured***. *Id.* at 859; 862. The plaintiff's theory was that, because some consumers did not like Saccharin, ***those*** consumers suffered harm. *Id.* at 862. The plaintiff presented expert testimony in support of certification that showed a mere 20% of consumers were "injured" under Plaintiff's subjective theory of liability. *Id.* Nonetheless, the class was defined to include all purchasers. *Id.* at 859.

This Court found the proposed class in *Coca-Cola* to be un-certifiable because: (1) the class definition encompassed a large number of ***uninjured*** class members (the plaintiff proffered evidence that nearly 80% of the class did not care about saccharin and was uninjured), (2) the class definition could not be modified to encompass fewer uninjured class members without becoming impermissibly indefinite, and (3) the class damages could not be identified due to the inherent subjectivity in one's "like" or "dislike" for saccharin. *Id.* at 862-864.

In rejecting certification, this Court distinguished the facts in *Coca-Cola* from the facts in *Craft*. *See id.* at 863-864. The Court acknowledged that the plaintiff's theory in *Craft* was that *all* class members were injured by virtue of the defendant's deceptive conduct. *Id.* at 863 (explaining that, in *Craft*, the plaintiff's theory was that "all consumers suffered an economic injury that was based on an objective characteristic"). The Court understandably found this distinction to be critical. *Id.*; s*ee also Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 79-80 (Mo. App. 2011) (finding a class ascertainable where the plaintiff's theory was that all proposed class members were injured, and distinguishing *Coca-Cola* on this basis). [4]

Here, unlike *Coca-Cola*, Plaintiff alleges that ***all individuals who paid the CDF were injured*** because the fee was illegal and could not be lawfully charged in the first place. *See* Relators' Exh. 3 at 013-14 (Plt.'s Pet. ¶¶ 29-31, 34-35). Unlike *Coca-Cola*, determining injury here does not require delving into a class member's subjective state of mind. The question here is not what consumers thought, desired or understood, but rather, whether Relators' practice of charging the CDF violated the MMPA or constitutes unjust enrichment. *See Hope*, 353 S.W. 3d at 80 ("We cannot say as a matter of law that this

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[4] Recognizing that there is no Missouri case law to support an argument against self-identification of class members when there exists an otherwise objective class definition, Relators cite to an ***unpublished opinion***, *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945 (11th Cir. 2015). But *Karhu* is unpersuasive because it has been widely rejected. *See* above (discussing *Mullins*, *Briseno*, and *Sandusky*).

case is like *Coca-Cola*, where the basis of the injury was a subjective consumer *preference*, because the Plaintiffs' theory is that every FX owner has actually been the victim of some economic damage…") (emphasis in original).

D. "Administrative Feasibility"

A requirement that a class be ascertained in an "administratively feasible" manner has recently received much attention from courts. *Compare Briseno*, 844 F.3d at 1133 ("In summary, the language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification"), *and Mullins*, 795 F.3d at 662 (explaining that courts in the Third Circuit employ an "administratively feasible" requirement "to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims"), w*ith Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013), *and Karhu*, 621 Fed. Appx. at 950 (requiring a freestanding showing of "administrative feasibility").

In *Craft* — and again in *Coca-Cola*, citing *Craft* — the term "administrative feasibility" is used. *Craft*, 190 S.W.3d at 387 ("A class is sufficiently definite if it is 'administratively feasible to determine whether a given individual is a member of the class.'"); *see also Coca-Cola*, 249 S.W.3d at 861-862. The term was never discussed or litigated and never given a clear meaning in the Missouri cases. The context of the Missouri authority, however, demonstrates that the Missouri standard is in line with *Mullins*, *Briseno*, and *Sandusky* and not in line with *Karhu* and *Carrera*.

Missouri authority demonstrates the "administrative feasibility" relates exclusively to the sufficiency of the class definition. That is, Missouri courts require an administratively feasible method to test and determine if any individual who eventually comes forth is indeed a class member. And this method must be provided by way of a clear and precise class definition against which each potential class member can be verified. This concept was clarified by the Missouri Court of Appeals for the Western District:

> The "proposed class [cannot] be amorphous, vague, or indeterminate." *Craft*, 190 S.W.3d at 387. "The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite ***so that it is administratively feasible for the court to determine whether a particular individual is a member.***

Dale, 204 S.W.3d at 178 (emphasis added). Importantly, no Missouri court has ever held that self-identification through a claims process is not "administratively feasible." Indeed, all of the Missouri case law anticipates that an individualized claim process will be necessary after trial in class actions. *Id.*; *see also Elsea*, 463 S.W.3d at 426 ("the circuit court expressed concern that the class definition would result in a proliferation of mini-hearings to determine residency and time of exposure. Individualized fact-finding necessary in determining class membership does not necessarily render a class definition infirm. As Plaintiffs point out, in class action cases, class members are required to affirm their membership in a class by verifying satisfaction of class criteria.") (internal citation omitted); *Craft*, 190 S.W.3d at 388 (noting "the class need not be so ascertainable from

the definition that every potential member can be identified at the commencement of the action.") (citations omitted).

The *Mullins* court addressed this issue and declined to adopt a heightened "administrative feasibility" requirement:

> Using the term "ascertainability," at times without recognizing the extension, [the Third Circuit has] imposed a new requirement that plaintiffs prove ***at the certification stage*** that there is a "reliable and administratively feasible" way to identify all who fall within the class definition. These courts have moved beyond examining the adequacy of the class definition itself to examine the potential difficulty of identifying particular members of the class and evaluating the validity of claims they might eventually submit…We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding to certify a class.

Mullins, 795 at 657-58 (emphasis added); *see also Briseno*, 844 F.3d at 1127-28 (same).[5]

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[5] Even judges on the Third Circuit have questioned the wisdom of the heightened ascertainability requirement. *See, e.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 172-73 (3d Cir. 2015) (Rendell Concurring) ("Our heightened ascertainability requirement . . . narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended…We have precluded class certification unless there can be objective proof

This Court should reject Relators tacit invitation to depart from the plain language of the rule and from the existing, well-reasoned case law. In doing so, this Court has an opportunity to expressly align itself with the well-reasoned decisions in *Mullins*, *Briseno*, and *Sandusky*.

—beyond mere affidavits — that someone is actually a class member…I submit that this 'business record' or 'paper trail' requirement is ill-advised. In most low-value consumer class actions, prospective class members are unlikely to have documentary proof of purchase, because very few people keep receipts from drug stores or grocery stores. This should not be the reason to deny certification of a class.").

IV. RESPONSE TO RELATORS' SECOND POINT RELIED ON

Respondent properly exercised her discretion in certifying Plaintiff's proposed class because she correctly applied Rule 52.08, in that (1) Relators charged all class members the same fee and the total amount collected by way of the fee is known, (2) Relators' due process arguments are erroneous and premature, and (3) a class action does not violate Relators' constitutional rights.

Relators' second Point largely consists of re-characterized arguments contained in their first Point and should be rejected for the reasons already stated above. That is, Relators' second Point arguments (*i.e.*, arguments concerning their due process rights and the propriety of Plaintiff's proposed aggregate judgment method) are encompassed within their ascertainability argument from Point One. Indeed, most courts to have considered these issues (*Mullins*, *Briseno*, *Sandusky*) address these arguments within the context of ascertainability. *See, e.g.*, *Mullins*, 795 F.3d at 669 (Noting that some "courts have said the heightened ascertainability requirement is needed to protect a defendant's due process rights" and rejecting this argument); *Briseno*, 844 F.3d at 1132 (assessing the propriety of an aggregate judgment method within the context of ascertainability).

Despite having already considered these arguments with respect to ascertainability, Relators' due process arguments are addressed individually herein. [6]

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[6] Relators attempt to bolster their argument with the following misstatements throughout their Second Point: (1)"It is undisputed that there exists no administratively feasible method of identifying the class members" (Relators' Br. at 36); (2) "it is

A. Certification of a Consumer Class Action Does Not Violate Due Process.

Relators' argue that a class-wide damages mechanism would violate their due process rights. *See* Relators' Br. at 36-40. This argument, however, fails outright under Missouri law. *See Craft*, 190 S.W.3d 385 ("***the trial court's conclusion that it was possible that plaintiff could establish class-wide damages…does not constitute an abuse of discretion.***") (emphasis added).

Moreover, the same Federal circuits that have rejected a heightened ascertainability standard have fully analyzed this issue and categorically rejected each of Relators' due process arguments. For instance, in *Mullins*, the court stated:

> A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage. That does not mean a court cannot rely on self-identifying affidavits . . .. It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability. It does not follow that a defendant has a due process right to a

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undisputed that the total CDF contribution amount clearly includes contributions made by voluminous customers that lack standing" (Relators' Br. at 36); and (3) "Neither [Plaintiff] nor Respondent has disputed that the voluntary payment doctrine, a defense pleaded by [Relators], may properly apply to [Plaintiff's] common law claims" (Relators' Br. at 37). These statements are self-serving and inaccurate. For the litany of reasons stated herein, all of Relators' assertions are rightfully disputed.

> *cost-effective* procedure for challenging every individual claim to class membership. And we should not underestimate the ability of district courts to develop effective auditing and screening methods tailored to the individual case.

Id. at 669 (internal citations omitted). *Mullins* went on to instruct that when, ***as here***, the total amount of damages alleged is known, due process is not violated by a self-identification mechanism after judgment. *Id*. at 670 ("the identity of particular class members does not implicate the defendant's due process interest at all. The addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class.") (citing *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014)); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) (rejecting due process challenge to entry of class-wide judgment and award of aggregate damages); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) *aff'd*, 125 S. Ct. 2611 (2005) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves.").

The *Briseno* court agreed. "The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward." *Briseno*, 844 F.3d at 1132 (citing *Mullins*, 795 F.3d at 670); *see also id.* at 1131 (noting the defendants will have "opportunities to individually challenge the claims of absent class members if and when

they file claims for damages . . . Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability").

Again, consistent with *Mullins* and *Briseno*, Missouri courts have acknowledged that in situations where class members cannot be identified at the outset, it is appropriate to establish a class-wide judgment and allow for a subsequent claims administration process. *See Craft v. Phillip Morris Companies, Inc.*, No. 002-00406A, 2003 WL 23355745, *10 (Mo. Cir. Ct. Dec. 31, 2003) ("it is possible that a common fund may be created, and proof of damages may be handled through a streamlined administrative claims process without the requirement for individual trials on damages.") (internal citation omitted) (*aff'd* in *Craft v. Philip Morris Cos.*, 190 S.W.3d 368 (Mo. App. 2005)); *Collora v. R.J. Reynolds Tobacco Co.*, No. 002-00732, 2003 WL 23139377, at *4 (Mo. Cir. Ct. Dec. 31, 2003) (unpublished) (same) (citing *Buchholz Mortuaries, Inc. v. Dir. of Revenue*, 113 S.W.3d 192, 196 n.1 (Mo. banc 2003) (Wolff, J., concurring) ("In cases where the [potential class members] *cannot be readily identified*, a court can use the 'fluid class recovery' doctrine or escheat the unclaimed funds to the state.") (emphasis added).

B. Relators Will Have the Opportunity to Litigate Their Defenses and Arguments to the Contrary are Speculative and Premature.

The trial court's certification order does not suggest in any way that Relators will be prohibited from asserting its defenses. First, as discussed at length (*see* Section III(A)(ii)-(iii) *supra*) Plaintiff may very well prevail as a matter of law on the alleged business meal exclusion and voluntary payment doctrine defense. But if Relators were to

make a submissible case on either of these defenses, then they will still be able to obtain meaningful relief by having the jury reduce the amount of the award to remove damages otherwise attributable to either group.

Even if the award were to include uninjured class members, that does not defeat certification. The United States Supreme Court recently instructed that aggregate damages class actions are permissible *even if the award includes uninjured class members*. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 10361, 1044 (2016). There, the plaintiffs obtained a class-wide jury verdict for unpaid overtime. *Id.* The defendant argued that there existed class members upon whom the aggregate class-wide damages award was based who did not have unpaid overtime and were improperly included in the class. *Id.* Nonetheless, and over arguments significantly similar to Relators' arguments here, the Court held that even after the jury's aggregate class damages award, the question is not "yet fairly presented . . . because the damages award has not yet been disbursed." *Id.* The Court held that whether some "methodology will be successful in identifying uninjured class members is a question that, on this record, is premature." *Id.*

As in *Bouaphakeo*, in the event a jury award included uninjured class members, there would be multiple methodologies to avoid any due process infringements. First, Relators will have the opportunity to challenge any claims submitted by class members. *See Briseno*, 844 F.3d at 1131 (noting the defendants will have "opportunities to individually challenge the claims of absent class members if and when they file claims for damages . . . Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability"). And to the extent there are improper claims

or uninjured class members, another option could be a reversion to the defendant for amounts not claimed by class members with injuries.[7]

In Missouri, "when courts are faced with distributing unclaimed funds from a class action, they have four options: a pro rata distribution to the class members who have already made claims; escheat to the government; reversion to the defendant; or a *cy pres* distribution." *Kansas Association of Private Investigators v. Joseph Mulvihill*, 159 S.W.3d 857, 860 (Mo. App. 2005). However, this is a question for future determination. *See id.* at 862 ("The trial court abused its discretion when it distributed the unclaimed funds without providing the parties with notice and an opportunity for a hearing"); *see also Barfield v. Sho-Me Power Elec. Co-op.*, 309 F.R.D. 491, 497 (W.D. Mo. 2015) (observing that when the "claims process has not yet occurred, the appropriate disposition of unclaimed funds — if unclaimed funds exist at all — is a matter not yet ripe for determination…"); *Bouaphakeo*, 136 S. Ct. at 1050 (rejecting arguments about uninjured class members as premature).

Plaintiff explained these options to the trial court, but noted that, consistent with *Bouaphakeo*, it would be premature to determine the appropriate distribution plan. Rather than accepting that the class certification order is preliminary in nature, Relators predict a

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[7] Considering the relatively low value at stake for each class member, it is likely the judgment fund will not be fully depleted following a claims period. *See Mullins*, 795 F.3d at 669 ("it is not unusual to have participation rates of 10 to 15 percent") (citation omitted).

future "parade of horribles" that could someday violate their due process rights. But a ruling on whether Relators' due process rights *might* be violated someday is premature. *Id.* It is currently unknown what rulings may occur. It is unknown what the jury may find. In the meantime, however, this Court ought to provide the appropriate deference to the trial court's ability to properly oversee the class. *See Mullins*, 795 F.3d at 664 ("A district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors.") (internal quotation omitted); *see also Bouaphakeo*, 136 S. Ct. at 1050.

C. Relator's Fluid Recovery Strawman Argument Fails.

Ignoring the above wealth of authority, Relators cite several "fluid recovery" cases from federal trial courts for the proposition that class-wide aggregate damages awards are inappropriate. But none of Relators' cases is factually analogous to this case. In fact, these cases largely demonstrate something that Plaintiff does not dispute: a plaintiff may not circumvent his elements of proof through conjecture about injury and damages. In sum, the plaintiffs in Relators' cases were cutting corners in an effort to avoid proving that all class members were injured, and the amount of any such damages; or proposed classes that caused the trial court to *exercise discretion* in finding them unmanageable from the start.

For example, in *Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 WL 2172030 (W.D. Mo. Sept. 7, 2005), the plaintiff attempted to circumvent proving that he and other class members actually purchased the product complained of. In *Dumas*, the

plaintiff openly admitted that there was no way to tell if he had purchased and consumed the complained of counterfeit Lipitor as opposed to the genuine product provided from one of the other distributors. *Id.* at *6 ("*Thus, Dumas himself is quite possibly not a member of the class he seeks to certify*.") (emphasis added). The court exercised its discretion and declined to certify a class action due to "the difficulty (perhaps the impossibility) of proving that the pills [the potential class members] received were counterfeit . . . it is likely that a substantial number of proposed class members would not know, and indeed would have no way of determining, whether they were members of the class."). *Id.* Unlike that circumstance, here, Plaintiff alleges every single person who paid the CDF at one of Relators' restaurants was injured. And determining whether a class member ate at one of Relators' restaurants is much more manageable than the "impossible" task with which the *Dumas* court was tasked.

Relators' other "fluid recovery" cases are even less convincing. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 222-28 (2d Cir. 2008) (attempting to circumvent a requisite showing of reliance, causation, and damages through use of conjecture and estimation); *Land Grantors in Henderson, Union, Webster Ctys., KY v. United States*, 86 Fed. Cl. 35, 77 (2009) (reversing class certification primarily due to inadmissible hearsay evidence and the only reference to fluid recovery was one judge's view *in favor of* fluid recovery); *Fun Servs. of Kansas City, Inc. v. Love*, No. 11-cv-0244, 2011 WL 1843253 (W.D. Mo. May 11, 2011) (granting defendant's motion for remand and in no way ruling upon a fluid recovery model).

Plaintiff agrees that elements of proof may not be circumvented through the use of fluid recovery. But Plaintiff's claims are more cohesive than the claims brought in the cases cited by Relators. Most importantly, Plaintiff will likely be able to prove at trial that the CDF was illegal as to all class members and the amount charged is definite and verifiable. As a result, none of Relators' cases support a finding of decertification. At most, these cases stand for the proposition that a trial court has the discretion to deny class certification if it believes common questions do not predominate, or if challenges in determining class membership will frustrate certification. Something the trial court did not find here.

D. Relators' Rules Enabling Act Argument is Without Merit.

As an extension of its due process argument, Relators argue that Plaintiff's proposed recovery model violates the federal Rules Enabling Act and is, thus, unconstitutional. *See* Relators' Br. at 40-46. But Missouri does not have a Rules Enabling Act. Nor is this matter pending in federal court. In fact, Relator cites no Missouri state, or even Eighth Circuit authority for this premise.

Relators again rely exclusively on clearly inapposite federal case precedent to support their argument. *See McLaughlin*, 522 F.3d at 231 (declining invitation to use speculative damages modeling that would have "little or no relationship to the amount of economic harm actually caused by defendants."); *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974) (affirming denial of class certification in case involving over six hundred defendants where the plaintiffs "virtually insured that the litigation would be intolerably time-consuming and, because of the legal nature of the claims, involve a great

variety of individual questions."); *Wright v. Dep't of Ala. VFW*, No. 07-cv-2071 (N.D. Ala. March 24, 2010) (trial court exercising discretion to deny class certification because it found the litigation would be unmanageable and the case involved "highly individualized fact issues").

V. RESPONSE TO RELATORS' THIRD POINT RELIED ON:

Respondent properly exercised her discretion in certifying Plaintiff's proposed class because she correctly applied Rule 52.08, in that (1) the record supports the elements of typicality, commonality, predominance, and superiority were satisfied and (2) Respondent followed well-settled Missouri case law in determining those elements had been satisfied by Plaintiff.

In their Third Point, Relators recycle the same primary arguments; only this time their arguments are made with respect to the express requirements of Rule 52.08 (*i.e.*, typicality, commonality, predominance, superiority). But Missouri appellate courts only find an abuse of discretion if the trial court's ruling is "so arbitrary and unreasonable as to **shock one's sense of justice and indicate a lack of careful consideration.**" *Karen S. Little, L.L.C.*, 306 S.W.3d at 580 (emphasis added). Indeed, in evaluating potential class actions under Rule 52.08, the court should "***err on the side of upholding certification in cases where it is a close question*** because Rule 52.08(c)(1) provides for de-certification of a class before a decision on the merits." *Hale*, 231 S.W.3d at 221 (quoting *Dale*, 204 S.W.3d at 164) (emphasis added) (internal quotations omitted).

This case demonstrates the wisdom of this rule in practice. If through the trial court's legal rulings, the presentation of the case proves unmanageable, the trial court always has the discretion to modify (or even decertify) the class. But the Court should not reject certification on the mere chance that the administration of the case *could possibly* prove challenging.

A. Plaintiff Demonstrated Typicality is Satisfied.

"The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Hale*, 231 S.W.3d at 223 (quoting *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). "If the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory, factual variations in the individual claims will not normally preclude class certification." *Hale*, 231 S.W.3d at 223 (citations omitted). Typicality is satisfied, "even when there is a variance in the underlying facts of the representative's claim and the putative class members' claims." *Dale*, 204 S.W.3d at 169. The class representative need not "show a probability of individual success on the merits." *Dale*, 204 S.W.3d at 172. Indeed, the mere fact that the respondent may not ultimately recover, depending on the various defenses that may be asserted, is irrelevant to whether his claim is typical of the claims of the class members. *See id*.

Applying these standards, arguments like Relators' (that there may be defenses to some class members' claims)[8] have been summarily rejected. The Western District Court of Appeals observed: "appellant's unique-defense contention has nothing to do with the typicality standard." *Dale*, 204 S.W.3d at171-72; *see also Plubell*, 289 S.W.3d at 716

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[8] Each of Relators' arguments rests upon the incorrect assertion that Plaintiff agrees there are uninjured members in the class. Plaintiff does not agree. As stated in more detail above, Plaintiff's theory alleges that all class members were injured.

(Mo. App. 2009) (finding a standing defense did not defeat typicality because "defenses that go to the merits of the case and are not properly considered in class certification.").

Further, Plaintiff's theory of the case does not depend on what he uniquely read, saw or heard (or did not read). Nor does Plaintiff's class claim depend on what he or other customers understood or didn't understand about the CDF. Plaintiff's claim is that the CDF was illegal regardless of any class member's state of mind because, among others, it violates Mo. Rev. Stat. §§ 407.456 & .462 in that Relators were not registered as a charity eligible to collect such funds. As a result, whether or not an individual wished to pay the fee is irrelevant because, as Plaintiff claims, the fee was illegal and *void ab initio*.

Relators also argue — with no credible evidence — that some class members may not have suffered loss because they may have desired to pay the CDF. *See* Relators' Br. at 49. Relators' argument, then, is that Plaintiff's experience was atypical because he may have not seen a sign that others may have seen. But specific individualized knowledge, desires and reliance are simply not relevant under the MMPA. *See* 15 CSR 60-8.020(2) & 60-9.110. In rejecting a similar causation argument, the Western District Court of Appeals found that the loss that occurs as a result of the unlawful conduct can be proven on a class-wide basis and does not require individualized proof of specific causation. The Court stated:

> Merck argues that in order to prove "loss," each plaintiff will have to show causation—that they would not have used Vioxx had the risks been known—as well as demonstrate the amount the plaintiff would have paid

> for alternative therapy. However, Plaintiffs' claim does not require these subjective, individualized inquiries.
>
> ***The MMPA does not require that an unlawful practice cause a "purchase."*** A civil suit may be brought by "[a]ny 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* [an unlawful practice]." Mo. Rev. Stat. § 407.025. "[A]s a result of" modifies "ascertainable loss"; it does not modify "purchases or leases." Thus, a plaintiff's *loss* should be a result of the defendant's unlawful practice, but the statute does not require that the *purchase* be caused by the unlawful practice. Therefore, the class members are not individually required to show what they would or would not have done had the product not been misrepresented and the risks known.

Plubell, 289 S.W.3d at 714 (emphasis added). As in *Plubell*, it is not required to prove that each class member's CDF payment was in reliance on Relators' deceptive conduct.

Indeed, the "omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" is a violation of the MMPA. Mo. Rev. Stat. § 407.020. The law is clear that such an "omission" does not require a showing of actual reliance upon the omission, but rather, that the "reasonable consumer" would have found it important to have additional information. *See* 15 CSR 60-9.010. The Missouri Supreme Court has recognized the difference between common law fraud and

the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773-74 (Mo. banc 2007) (observing MMPA claim looks to objective consumer and not individual deception).

Moreover, even if this consideration were relevant, Relators have not come forward with a single customer who purports to have understood the nature of the CDF, understood how the CDF revenues were *actually used* (*i.e.*, spent on Nolan Fogle's travelling softball team rather than donated to charities as Relators advertised) and then voluntarily paid the CDF. Such speculation does not defeat certification. *See Mayo v. UBS Real Estate Securities, Inc.*, No. 08-00568, 2011 WL 1136438 at *6 (W.D. Mo. March 25, 2011) (noting the defendant's asserted individualized defenses were speculative and premature and that "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones").

Finally, Relators' argument that there are no other class members who paid the CDF defies the record, common sense, and Relators' own admissions. *See* Relators' Br. at 8-9 (Relators statement of facts alleging millions of customers paid the CDF).

Because Plaintiff claims that all class members were harmed by paying an illegal fee, Plaintiff is entirely typical of the class. He made a purchase and was charged (he alleges unlawfully) a CDF. He alleges that all class members were similarly charged an unlawful CDF. And there is no dispute that all class members paid the same CDF that was charged to Plaintiff.

B. Plaintiff Demonstrated Commonality is Satisfied.

The commonality element only requires that there exists a single common question of law or fact. Indeed, even the more stringent predominance standard (discussed below) only requires a single common question and it need not be dispositive of the case: "predominance does not require that a single body of evidence satisfy the *prima facie* elements of an MMPA claim on behalf of every putative class member. Rather, it requires 'at least one significant fact question or issue, dispositive or not,' that is common within the class's claim." *Plubell*, 289 S.W.3d at 713 (citing *Dale*, 204 S.W.3d at 176).

It cannot seriously be contested that there are numerous common questions of fact and law. First and foremost, Plaintiff claims that Relators were not permitted to charge the CDF to begin with. The question of "whether Missouri law precludes Relators from charging the fee because they did not register as a charity pursuant to Mo. Rev. Stat. § 407.450 *et seq*." is common to all individuals who paid the fee. Similarly, it is a common question whether Relators conduct constitutes a "negative option" (*i.e.*, charging for something not solicited by the customer) and whether such conduct is a violation of the MMPA. The answer to either of these questions, and many others, will apply to each and every class member. Even Relators identify numerous common questions in their brief. For example, is the purchase of food with a business credit card an exception to the MMPA? This question, as Relators allege, applies to many class members and should be answered commonly. As another example, can the voluntary payment doctrine be viable as a matter of law when the conduct at issue is prohibited by §407.450 *et seq*.?

Missouri case law instructs that all the foregoing questions are, in fact, common questions. *See Plubell*, 289 S.W3d at 714-15 (finding question of whether defendant's conduct was a violation of the MMPA a common question which predominated over individual questions); *see also Hale*, 231 S.W.3d at 225-26 (finding the question of whether the defendant was unjustly enriched a common question which predominated over individual questions because "the unjust enrichment claim does not go to the named plaintiffs' conduct but rather Wal-Mart's conduct."); *Craft*, 190 S.W.3d at 381-82 (rejecting the defendant's argument that common questions did not predominate because the questions depended "on each consumer's individual smoking behavior"); *Dale*, 204 S.W.3d 177 (rejecting defendant's argument that the question of "whether a Durango was purchased for business or commercial purposes" necessarily made the defendant's MMPA liability an individualized issue); *Karen S. Little, L.L.C.*, 306 S.W.3d at 582-83 ("The predominating issue is whether [the defendant's] conduct violated the TCPA and this issue is common to all class members").

Finally, Relators' reliance on *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011) is misguided for several reasons. *See* Relators' Br. at 50-51. First, *Dukes* was a Title VII case which required a manager-by-manager review of motives for hiring and firing decisions. *Id.* at 2545. Second, importantly, the court found that the plaintiffs alleged no common illegal hiring policy. *Id.* Naturally, a hiring manager's motives would be unique to each individual manager and, therefore, the reasons behind that manager's hiring decision made each class member's claim unique — especially in the absence of an illegal policy common to the class. *Id.* at 2554-55. As such, the central questions about

the defendant's conduct in *Dukes* necessarily depended on the answer to individualized questions.

But here, Missouri case law is clear that state-of-mind, motive, and other types of scienter are not required elements of Plaintiff's claims. Thus, the question is not *why* Relators violated the MMPA, but rather *whether* Relators violated the MMPA. Therefore, the focus is on Relators' uniform conduct in commonly charging the CDF to all class members. Unlike *Dukes*, here there exists a common bond among class members — the charging and paying of the CDF that was applied identically to all class members. Even the United States Supreme Court has recognized the limited reach of *Dukes. See, e.g.*, *Bouaphakeo*, 136 S. Ct. at 1048 (observing that *Dukes* was inapplicable in a non-Title VII case because "[t]he plaintiffs in Wal-Mart did not provide significant proof of a common policy of discrimination to which each employee was subject.").

C. Plaintiff Demonstrated Predominance is Satisfied.

Again, Relators recycle the same arguments they made throughout their brief regarding their two "individual" issues. As already discussed *in detail*, it is highly questionable whether these issues have any merit whatsoever. And again Relators cite no Missouri authority whatsoever in support of their argument; but rather, Relators manage to ignore the Missouri authority which overwhelmingly supports the trial court's certification ruling.

The predominance requirement is not a numerical test comparing the sheer number of common issues with the number of individual issues. *See American Family Mut. Ins. Co.*, 106 S.W.3d at 488. Instead, a single common issue may be, and often is,

the overriding one in the litigation, despite the fact that suit also entails numerous individual issues:

> The 'predominance' requirement...does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues. The predominate issue need not be dispositive of the controversy or even be determinative of the liability issue involved. The need for inquiry as to individual damages does not preclude a finding of predominance. *A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.*

Id. (internal citations omitted) (emphasis added).

This standard is well-recognized in Missouri. *See Wright*, 269 S.W.3d at 466 ("the predominance requirement of Rule 52.08(b)(3) does not demand that every issue in a matter be common to all the class members, only that substantial common issues exist which predominate over the individual issues. A single common issue may be the overriding one in a matter, despite the existence of numerous remaining individual questions. Moreover, the predominant issue need not dispose of the controversy or even determine liability.") (internal citations omitted); *Hale*, 231 S.W.3d at 224-25 (Mo. App.

2007) ("A single common issue may be the overriding one in the litigation") (citing *American Family Mut. Ins. Co.*, 106 S.W.3d at 488).[9]

Again, in *Craft*, the defendant made very similar arguments as Relators with respect to predominance; that numerous individual issues, including the reasons for purchase, reliance on the deceptive marketing and personal knowledge, preclude a finding of predominance. *See Craft*, 190 S.W.3d at 382-83. The court, however, found that the *focus of the case was upon the defendants' conduct*, not individual variations among the class members: "Plaintiff's allegations go to the condition and labeling of the product at the time it was sold; they do not make defendant's liability dependent on each consumer's individual smoking behavior." *Id.* at 382. Relators' "what the customers knew" argument, therefore fails to defeat predominance.

Relators' business meal exception argument also fails to defeat predominance. As previously discussed, in *Dale*, the defendant made the *exact same* argument, that "the issue of whether a Durango was purchased for business or commercial purposes can be resolved only with individual proof from each class member," and therefore defeated a finding of predominance. *Dale*, 204 S.W.3d at 177. The court flatly rejected this argument and instead held: "we fail to see this would prevent the respondent from carrying its burden as to the common-question-predominance

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[9] *See also, e.g.*, *Mayo*, 2011 WL 1136438 at *6 (noting the defendant's individualized defenses did not defeat predominance and were speculative and premature).

requirement . . . the fact that some issues may require individualized fact-finding does not prevent the satisfaction of the common-question-predominance question." *Id.*[10]

In sum, "predominance of the common issues is not defeated simply because individual questions may remain… [including] questions of damages or possible defenses to the individual claims." *Craft*, 190 S.W.3d at 383. "Even if other important matters will need to be tried separately, a case may proceed as a class action if one or more of the central issues are common to the class and can be said to predominate." *Doyle*, 199 S.W.3d at 790 (citing *Craft*, 190 S.W.3d at 381-82).

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[10] *See also Nieberding*, 302 F.R.D. at 608 (certifying class over the defendant's personal use / business use argument); *Yazzie*, 2015 WL 10818834 at *5 ("The majority of courts…have concluded that factual questions related to personal use do not prevent the certification of consumer protection class actions."). Similarly, Relators' citation to Comcast provides no support. *See Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 559 (W.D. Mo. 2014) (rejecting Comcast outside of the antitrust context and stating the case is "inapposite where the measure of damages will be single, uniform and purely mechanical") (internal quotations omitted); *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (determining Comcast does not apply when "damages [can] feasibly and efficiently be calculated once the common liability questions are adjudicated" such as here).

D. Plaintiff Demonstrated Superiority is Satisfied.

Relators again ignore the well-established Missouri authority that holds consumer classes are manageable and superior to individual claims despite the fact that there may be numerous claims among class members and that there could be individual questions that remain after trial. *See, e.g.*, *Elsea*, 463 S.W.3d at 423 ("Class actions which aggregate small claims that could not otherwise be brought are exactly the type of claims that satisfy the superiority requirement.") (citing *Hale*, 231 S.W.3d at 229)*; see also Dale*, 204 S.W.3d at 182-83 (finding that judicial economy of the class action device outweighed the possibility of a parade of manageability problems); *Craft*, 190 S.W.3d at 386-87 (noting that failure to certify based on manageability concerns is disfavored and that the possibility of complications in distributing damages does not make a class action unmanageable).[11]

In *Elsea*, the Missouri Court of appeals reversed a trial court's refusal to certify a class based on manageability and ascertainability grounds. In doing so, it stated:

> Generally ... class action status will be denied on the ground of unmanageability only when it is found that efficient management is *nearly impossible*; some courts have stated that there is a presumption against refusing to certify a class on manageability grounds.

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[11] Relators cite *Dumas* again in support of this argument. *See* Relators' Br. at 60. As previously discussed, *Dumas* is entirely inapposite for a host of reasons. *See* Section IV(C) *supra*.

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> Denial of class certification because of suspected manageability problems is disfavored ... because a court refusing to certify a class action on the basis of vaguely perceived manageability obstacles is acting counter to the policy behind [the class certification rule], and because that court is discounting unduly its power and creativity in dealing with a class action flexibly as difficulties arise.

Elsea, 463 S.W.3d at 423 (emphasis in original) (inner quotations omitted). Here, as in *Elsea*, Relators' manageability arguments are based on conjecture. Relators do not identify any real obstacles. In fact, there is no suggestion that this class action trial would take any longer than an individual trial.

In contrast, it is the most efficient to determine whether Relators' conduct was improper as to the class members in a single proceeding. All of the evidence, including the testimony of the parties can take place before one judge, and all of the legal issues can be decided for the entire class rather than just one individual. This is especially so when the value of class member claims is measured in the cents. *Mullins*, 795 F.3d at 658 ("class treatment is often most needed [] in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase"). Indeed, no rational plaintiff would pursue this case on an individual basis and Relators would likely escape any liability for its fraud. *See Mullins*, 795 F.3d at 665 ("only a lunatic or a fanatic" would litigate a low value consumer claim individually). As such this case falls squarely within the purpose of the class action mechanism. The trial court was well

within its discretion in finding that a class action focused on a single alleged improper fee charged to all class members is superior to individual litigation.

CONCLUSION

The foregoing all points to one conclusion: the trial court followed established Missouri law in certifying this case as a class action. And tellingly, Relators have not come forth with any Missouri case to prove otherwise. Accordingly, Relators are unable to "overcome[e] the presumption of right action in favor of the trial court's ruling." *Ford*, 12 S.W.3d at 391. Nor can Relators show the trial court's decision is "so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration," as is required to have its decision overturned. *Karen S. Little, L.L.C.*, 306 S.W.3d at 580. The Court should deny Relators' Petition for Writ of Prohibition, quash the preliminary writ of prohibition, and allow this case to proceed forward.

Respectfully submitted,

WILLIAMS DIRKS DAMERON, LLC

/s/ Eric L. Dirks

Eric L. Dirks MO Bar No. 54921
John F. Doyle MO Bar No. 66626
1100 Main Street, Suite 2600
Kansas City, MO 64105
dirks@williamsdirks.com
jdoyle@williamsdirks.com
Tel: (816) 876-2600
Fax: (816) 221-8763

Michael Hodgson MO Bar No. 63677
THE HODGSON LAW FIRM
3699 SW Pryor Rd.
Lee's Summit, MO 64082
Tel: (816)945-2122
mike@elgkc.com

Jeff Bauer MO Bar No. 48902
STRONG GARNER BAUER P.C.
415 E. Chestnut Expressway
Springfield, MO 65802
Phone 417-887-4300
Fax 417-887-4385
jbauer@stronglaw.com

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 15,404 words, as determined by the word-processing system used to prepare the brief.

/s/ Eric L. Dirks

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2017, I filed a copy of the foregoing with the Court's ECF system which sent notification of the same to:

Jason C. Smith Mo. Bar No. 57657
Derek A. Ankrom Mo. Bar No. 63689
Spencer Fane Britt & Browne LLP
3259 East Ridgeview St.
Springfield, Missouri 65804
(T) (417)888-1000
(F) (417)881-8035
jcsmith@spencerfane.com
dankrom@spencerfane.com

ATTORNEY FOR RELATORS

/s/ *Eric L. Dirks*
Attorney for Respondent