IN THE SUPREME COURT OF MISSOURI

No. SC95949

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

Relators,

v.

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

Respondent.

RELATORS' BRIEF

- Oral Argument Requested -

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JURISDICTIONAL STATEMENT

This is an action seeking the issuance of an original remedial writ to review the Honorable Laura J. Johnson ("Respondent")'s Order granting class action certification in *Richard McMillin v. Fogle Enterprises, Inc., et al*, Case No. 14AF-CC00145-01 (the "Underlying Litigation"). Pursuant to Rule 84.035, Relators/Defendants Fogle Enterprises, Inc., and Nolan Fogle sought permission from the Missouri Court of Appeals, Southern District, to appeal Respondent's Order granting class action certification in *Richard McMillin v. Fogle Enterprises, Inc., et al.*, Case No. SD34593, and permission to appeal was therein denied.

Pursuant to Rule 84.035, upon denial of permission to appeal a trial court's order granting or denying class action certification, further review, if any, "shall be by petition for original remedial writ filed directly in this Court." *See* Mo. S. Ct. R. 84.035(j). This Court has "general superintending control over all courts and tribunals," and "may issue and determine original remedial writs." *See* Mo. Const. art. V, § 4.1; *see also State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 859-860 (Mo banc 2008) (holding that where a party petitions the court of appeals for permission to appeal and permission is denied, "this Court's power to grant a remedial writ directed at the circuit court" is "properly invoked.").

STATEMENT OF FACTS

A. Plaintiff's Claims

On February 28, 2014, Plaintiff Richard McMillin ("McMillin") filed his Petition for Damages ("Petition") in the Circuit Court of Taney County, Missouri. *See* Exhibit 1 (001).[1] McMillin's Petition alleges that Fogle Enterprises, Inc., and its owner, Nolan Fogle (collectively, "Relators" or "Fogle Enterprises")' collection of contributions to a Branson, Missouri-area "Community Development Fund" ("CDF") violated the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq*. ("MMPA"), giving rise to a private right of action for damages under the MMPA, along with common law claims for money had and received and unjust enrichment. *See* Exhibit 3 (007-016). McMillin asserted these claims "on behalf of himself and all other members of a proposed plaintiff class" defined as:

> Defendants' customers within the last five years who were charged a CDF fee.

See id. at ¶ 17 (009).

In his Petition, McMillin alleged that "[t]he precise number of Class members and their addresses can be obtained from information and records in

[1] All citations to the record refer to the exhibits filed in support of Relators' Petition for Writ of Prohibition, which constitute the record in this proceeding pursuant to Mo. S. Ct. R. 84.24(g).

Defendants' possession and control, including credit card records." *See id.* at ¶ 20 (010).

McMillin identified eight questions that he alleged were common legal and factual questions that exist as to all members and predominate over questions affecting only individual class members:

(1) Whether [Fogle Enterprises'] fee scheme is unconscionable or otherwise violates the MMPA;

(2) Whether [Fogle Enterprises] failed to disclose material information regarding the nature of the fee;

(3) Whether [Fogle Enterprises] unjustly retained a monetary benefit from charging customers a fee;

(4) The amount retained from the fee;

(5) Whether [Fogle Enterprises] violated Missouri law by engaging in deception, fraud, false pretenses, false promise, misrepresentation, bait and switch, unfair practices or the concealment, suppression, or omission of any material fact;

(6) Whether [Fogle Enterprises is] liable for money had and received;

(7) Whether [McMillin] and the other Class members are entitled to equitable relief, including declaratory relief, restitution,

rescission, corrective notice, a preliminary and/or permanent injunction; and

(8) Whether [McMillin] and the other Class members are entitled to damages and/or other monetary relief.

See id. at ¶ 21 (010-011).

On May 12, 2014, McMillin filed his Motion to Transfer Venue Due to Population, which was granted on April 8, 2015. *See* Exhibit 1 (001, 003). The action was then transferred to the Circuit Court of Christian County, Missouri.

On February 29, 2016, McMillin filed his Motion and Memorandum in Support of Motion for Class Certification ("Motion for Class Certification"). *See* Exhibit 2 (004). In connection with his Motion for Class Certification, McMillin sought certification of his claims as a class action under Rule 52.08(b)(3).[2] *See* Exhibit 6 (042).

[2] McMillin originally sought certification under Rule 52.08(b)(3) or, in the alternative, Rule 52.08(b)(1). *See* Exhibit 6 (042). In its Suggestions in Opposition to Plaintiff's Motion for Class Certification, Fogle Enterprises challenged McMillin's alternative claim for certification pursuant to Rule 52.08(b)(1) as inappropriate. *See* Exhibit 7 (128). In his Reply, McMillin did not respond to Fogle Enterprises' challenge, *see* Exhibit 8 (211-242), and appears to have abandoned his claim for alternative certification.

B. Undisputed Evidence Presented to Respondent

i. History of Fogle Enterprises

Nolan Fogle moved to Branson in 1989, after growing up near the small town of Plato, Missouri. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 3 (163). After several years spent working in the food service industry as a dishwasher and server, Nolan decided to open a restaurant of his own. *See id.* at ¶ 4 (163). Nolan and his wife, Babette, incorporated Fogle Enterprises on September 28, 1993. *See id.* Nolan and Babette Fogle, as husband and wife, remain the only shareholders of the company. *See id.* at ¶ 5 (163).

Shortly after its incorporation, Fogle Enterprises opened its first restaurant in Branson, Missouri called Whipper Snappers Seafood Buffet ("Whipper Snappers"). *See id.* at ¶ 6 (163). Over the years, Fogle Enterprises has grown and has opened numerous other restaurants, all in the Branson area. *See id.* During the period relevant to this lawsuit, Fogle Enterprises owned and operated five restaurants in Branson: Whipper Snappers, Fall Creek Steak & Catfish House ("Fall Creek"), The Great American Steak & Chicken House (the "Chicken House"), Plantation Restaurant ("Plantation"), and Baldknobbers Restaurant ("Baldknobbers"). *See id.* at ¶ 7 (163).

ii. The Community Development Fund

In the 1990s, a large number of Branson area restaurants, hotels, and other businesses began collecting a voluntary fee on sales to support, originally, the Ozarks Marketing Council and marketing partnerships of the Branson Chamber of Commerce. *See* Exhibit 7, *Exhibit B (Nov. 25, 2013 E-mail from Ross Summers, President of the Branson/Lakes Area Chamber of Commerce and Convention & Visitors Bureau)* (179). The City of Branson, the Missouri Attorney General's Office, and the Missouri Department of Revenue were all aware of the "long history" of Branson area businesses collecting money for this "Community Development Fund" ("CDF"). *See* Exhibit 7, *Exhibit A-1 (February 6, 2012 Letter from City of Branson Finance Department)* (166). At no time during the class period did the City of Branson, the Attorney General's office, or the Department of Revenue express to Fogle Enterprises that the practice of collecting CDF contributions was improper. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 8 (163). In fact, the City of Branson provided guidance related to the CDF, explaining to area businesses that the City "endorses a policy of posting a notice near the cash register or on the menu that the fee is being added to the bill and can be removed if requested by the customer." *See* Exhibit 7, *Exhibit A-1 (February 6, 2012 Letter from City of Branson Finance Department)* (166).

Fogle Enterprises posted written notice of the CDF contribution at the cash register and at the host/hostess station at each of its restaurants. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 9 (164). Fogle Enterprises trained its employees to disclose the CDF contribution to customers and to explain what it was and where the CDF contributions went. *See id.*at ¶ 10 (164). In this regard, Fogle Enterprises' training materials provide, in part, that "customers must know about [the CDF]," "don't let this be a surprise to them," and "make sure customers are aware of sign posted when they come in." *See* Exhibit 7, *Exhibit A-3 (Fogle Enterprises' Training Materials)* (169-174).

Fogle Enterprises further trained its employees to remove the CDF line item if a customer did not want to make the contribution. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 10 (164). Fogle Enterprises' training materials provide, in part, that "if a customer does not want to pay it. Take it off right off with no discussion," "remove when a customer does not want to pay it," and "take it right off and make sure the customer understands what it is and where it goes." *See* Exhibit 7, *Exhibit A-3 (Fogle Enterprises' Training Materials)* (169-174).

Fogle Enterprises stopped collecting contributions to the CDF in each of its restaurants as of December 31, 2013. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 14 (164).

iii. Fogle Enterprises' Customers and Contributions to the CDF

Fogle Enterprises' customers during the proposed class period included Branson area residents, as well as out of town, out of state, and out of country visitors. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 15 (164). Conservatively, for the 2009-2013 time period at issue, Fogle Enterprises served between 750,000 and 1,000,000 customers per year, for a total of between 3,750,000 to 5,000,000 customers. *See id.*

The uncontroverted evidence before Respondent established that customers at Fogle Enterprises' restaurants included a wide variety of persons and entities, including a variety of businesses. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 20-22 (165). For example, and without limitation, a large portion of Fogle Enterprises' business is comprised of tour bus groups, business meetings, and other groups (e.g., church conferences). *See id.* When a group such as a tour bus came to one of Fogle Enterprises' restaurants, the members of the group did not pay for their own meals or have any financial transaction with Fogle Enterprises. *See id.* Instead, their meals were paid for by the tour company as part of that company's business operations. *See id.* Similarly, many business meetings, both large and small, were not paid for by individuals, but were instead paid for by the businesses to further their business purposes. *See id.*

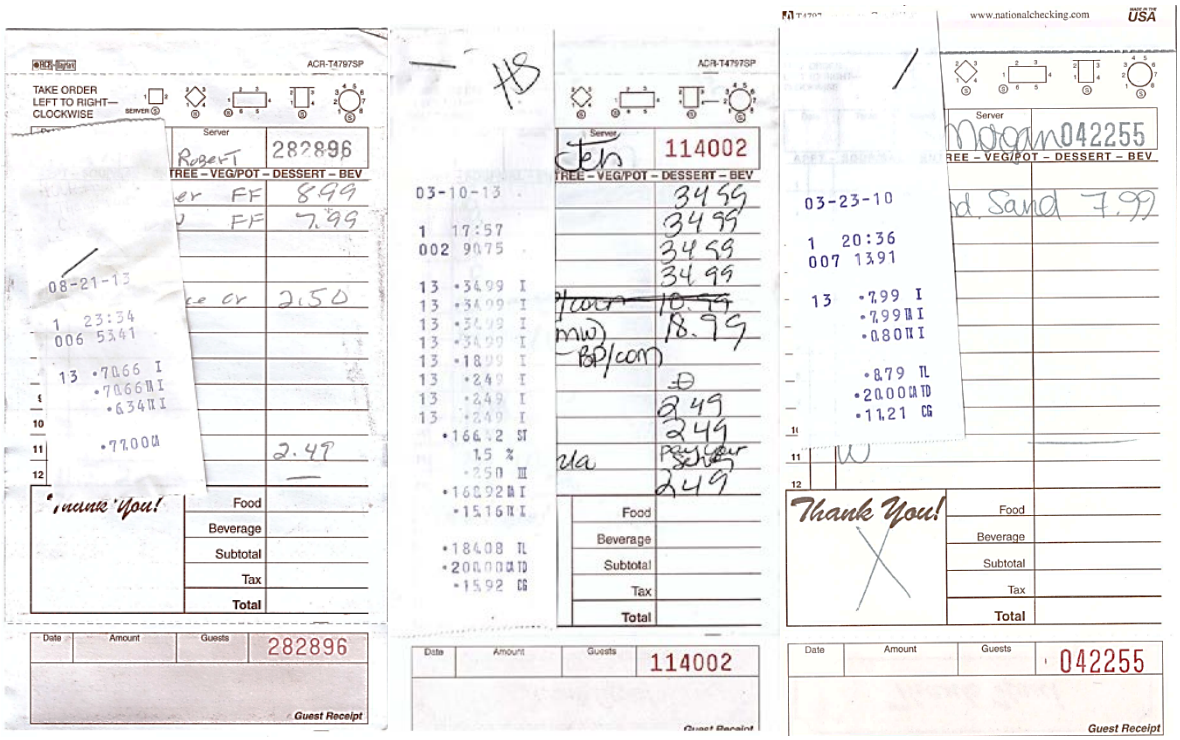
It is undisputed that a significant number of Fogle Enterprises' customers did not contribute to the CDF. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 11-13 (164). In fact, the evidence before Respondent demonstrated that more than 1 out of every 20 customers during the relevant time period did **not** contribute to the CDF – up to 250,000 customers. *See id.* Of those that did contribute, a substantial number were aware of the CDF prior to their transaction with Fogle Enterprises and expressly agreed to voluntarily contribute. *See id.* It is undisputed that it is impossible to identify these customers.

iv. Cash Transactions

It is further undisputed that the majority of Fogle Enterprises' customers paid for their meals with cash. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 16-17 (164). Naturally, there are no records from which to identify cash-paying customers. *See id.*

During the relevant time period, the majority of Fogle Enterprises' customers paid for their meals with cash. *See id.* at ¶ 16 (164). Fogle Enterprises did not create or maintain records identifying cash-paying customers. *See id.* at ¶ 17 (164). For example, cash transaction records created and maintained by Fogle Enterprises often appeared as follows:

[IMAGES APPEAR ON NEXT PAGE]



See Exhibit 7, *Exhibit A-6 (Cash Transaction Receipts)* (177). These and similar cash transaction records (comprising over half of Fogle Enterprises' customers) do not reflect the identities of the individual customers. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶¶ 16-17 (164) Moreover, these records illustrate that not every Fogle Enterprises customer contributed to the CDF, as only the middle receipt contains the 1.5% line-item reflecting a CDF contribution. *See id.* at ¶ 18 (164-165).

v. Credit Card Transactions

The records of credit card transactions, similarly, often do not reflect the identity of customers (other than by the customer's signature, which is regularly illegible), and do not show whether any individual customer actually contributed to

the CDF. *See id.* at ¶ 19 (165). Again by way of example, credit card transaction records maintained by Fogle Enterprises often appear as follows:

BRANSON MO 65616
417 334 7800

Merchant ID: 000003438887
Term ID: 00376361 Ref #: 0021

Sale

XXXXXXXXXXXX[redacted]
MASTERCARD Entry Method: Swiped

Amount: $ 26.87
Tip:
Total:

03/28/10 11:17:33
Inv #: 000021 Appr Code: 166172
Apprvd: Online Batch#: 000581

I agree to pay above total amount according to card issuer agreement (Merchant agreement if credit voucher)

X

Merchant Copy

John

Sale

Tip: 3.00
3.95

Inv #: 000028
Apprvd: Online

I agree to pay above total amount according to card issuer agreement (Merchant agreement if credit voucher)

X

Great American
Steak & Chicken House
Branson, MO

Date: Nov16'13 06:19PM
Card Type: Visa
Acct #: XXXXXXXXXXXX[redacted]
Card Entry: KEYED
Trans
Auth
Check. 7
Server: 9015 joseph G

Subtotal: 6.49
Tip:
Total 6.49

Signature
I agree to pay above total according to my card issuer agreement.

**** Merchant Copy ****

WHIPPER SNAPPERS
2421 W 76 COUNTRY BLVD
BRANSON MO 65616
417-335-6699

Merchant ID: 000005206407
Term ID: 00740124 Ref #: 0020

Sale

XXXXXXXXXXXX[redacted]
MASTERCARD Entry Method: Swiped

Amount: $ 82.91
Tip:
Total 82.91

03/28/13 19:19:51
Inv #: 000020 Appr Code: 091958
Apprvd: Online Batch#: 000166

I agree to pay above total amount according to card issuer agreement (Merchant agreement if credit voucher)

X

Merchant Copy

JEN

WHIPPER SNAPPERS
2421 W 76 COUNTRY BLVD
BRANSON MO 65616
417-335-6699

Merchant ID: 000005206407
Term ID: 00740124 Ref #: 0019

Sale

XXXXXXXXXXXX[redacted]
VISA Entry Method: Swiped

Amount: $ 38.70
Tip: $ 5.00
Total: $ 43.70

03/28/13 19:25:22
Inv #: 000019 Appr Code: 112257
Apprvd: Online Batch#: 000204

I agree to pay above total amount according to card issuer agreement (Merchant agreement if credit voucher)

X

Merchant Copy

See Exhibit 7, *Exhibit A-7 (Credit Card Transaction Receipts)* (178). Again, these records do not readily identify Fogle Enterprises' customers, or whether they made a CDF contribution. These records simply reflect a lump sum charge to a credit card for an unknown customer's entire transaction (plus, if applicable, a tip).

vi. McMillin's Transaction(s) with Fogle Enterprises

McMillin is a resident of Las Vegas, Nevada. *See* Exhibit 7, *Exhibit C (Deposition of Richard McMillin)* at 4:19-21 (180). He started visiting the Branson area approximately 40 years ago. *See id.* at 18:25-19:2 (184). He has owned a vacation home in the Branson/Reeds Spring area for approximately four years. *See id.* at 19:6-13 and 19:24-25 (184). Prior to owning that home, he stayed in his RV and numerous hotels and condos when visiting. *See id.* at 20:14-22 (184). During the last ten years, McMillin has visited the Branson area at least once a month during the Spring, Summer, and Fall months, and he typically stays for about a week at a time. *See id.* at 20:23-21:7 and 21:15-22 (184-185). He will eat out four to five times in a typical week. *See id.*at 22:15-19 (185).

McMillin is the father-in-law of one of the attorneys that filed this lawsuit and who was appointed as counsel for the certified class, Michael Hodgson ("Attorney Hodgson"). *See* Exhibit 7, *Exhibit C (Deposition of Richard McMillin)* at 35:24-36:2 (188).

McMillin's visit to the Chicken House that led to this lawsuit occurred on November 29, 2013, just three days after a news story ran on the KY3 television station concerning collection of the CDF at the Chicken House (a text version of which was posted on the KY3 website and was accessible to those outside the viewing area), and just one day after McMillin had spent Thanksgiving Day in the Kansas City area (where his daughter and Attorney Hodgson reside) with his "relatives." *See id.* at 29:19-30:8 (187); *see also* Exhibit 7, *Exhibit E (KY3's Nov. 26, 2013 News Story)* (204-210).

On November 29, 2013, McMillin did not enter the Chicken House through the front door, but instead entered from the back-side of the building, through another restaurant located a floor beneath the Chicken House. *See* Exhibit 7, *Exhibit C (Deposition of Richard McMillin)* at 26:15-28:1 (186). As he came up the stairs, he was greeted by an employee who helped him find a table before he ever reached the host/hostess station. *See id.* at 28:3-10 (186). Later, after eating, McMillin did not pay his bill at the cash register, but instead gave his credit card to his waitress, who ran his credit card and brought it back to him. *See id.* at 31:6-17 (187). In connection with this transaction, Fogle contributed $0.22 to the CDF. *See id.* at 56:6-9 (193). McMillin then left the restaurant the same way that he came in. *See id.* at 29:3-6 (187). McMillin alleges that he did not see Chicken House's posted notices concerning the CDF and was not otherwise advised of Fogle

Enterprises' collection of money for the CDF or the voluntary nature of the contribution. *See id.* at 34:25-35:11 (188).

McMillin has eaten at (at least) two of the restaurants owned by Fogle Enterprises – the Chicken House and Fall Creek. *See id.* at 23:19-24:5 (185). He has eaten at Fall Creek only once in the last couple years, but he used to eat there more often prior to purchasing his vacation home. *See id.* at 25:2-7 (186). He has eaten at the Chicken House at least twice, with the most recent time being the November 29, 2013 visit. *See id.* at 25:8-10 (186). McMillin does not remember whether he has paid money to the CDF during any visit to a Fogle Enterprises restaurant other than on November 29, 2013. *See id.* at 32:12-25 (187). McMillin kept a receipt from his November 29, 2013 visit to the Chicken House, but he does not believe he has receipts from any of his other visit(s) to that restaurant or any of his visits to other restaurants owned by Fogle Enterprises. *See id.* at 49:16-50:8 (192).

vii. Summary of Uncontroverted Evidence

Despite McMillin alleging that he would identify his proposed class "from information and records" discovered from Fogle Enterprises, *see* Exhibit 3 at ¶ 20 (010), the uncontroverted evidence before Respondent demonstrated that from the available records it is not possible to (1) identify the majority of Fogle Enterprises' customers, (2) determine or verify whether the majority of customers that could be

identified had, in fact, contributed to the CDF, (3) determine the purpose of each individual customer's transaction(s), and (4) determine whether any customer that did contribute to the CDF did so voluntarily with full knowledge of the CDF (through Fogle Enterprises' signage, conversations with employees, or otherwise). Further, McMillin's concession that he could not remember whether he had contributed to the CDF on any occasion but one, demonstrated that it would likely not be possible to rely upon the memory of individual customers concerning their transactions with Fogle Enterprises.

C. Arguments Made to Respondent

Fogle Enterprises, in opposition to McMillin's Motion for Class Certification, argued that the class definition was overly broad because it included a significant number of members that lack standing to maintain a claim under the MMPA because their transactions were not entered into primarily for personal, family, or household purposes, and were instead entered into for business purposes. *See* Exhibit 7 at pp. 12-14 (137-139). Fogle Enterprises further argued – supported by substantial, uncontroverted evidence – that the class was not ascertainable because there is no administratively feasible method of identifying the members of the proposed class, including (1) a complete inability to identify cash-paying customers, (2) an inability to identify a significant number of customers that used credit cards, and (3) that it is impossible to determine whether

customers that could be identified actually contributed to the CDF. *See id.*at pp. 15-22 (140-147). Fogle Enterprises additionally argued that the overly broad class definition and inability to ascertain the class deprived Respondent of the ability to meaningfully analyze McMillin's compliance with the prerequisites for class certification under Rule 52.08(a) and Rule 52.08(b)(3) – consisting of numerosity, commonality, typicality, adequacy of representation, predominance, and superiority – and that McMillin failed to meet his burden to establish that these prerequisites were satisfied. *See id.* at pp. 22-34 (147-159).

In his Reply, McMillin conceded the class could not be ascertained from records available to the parties or Respondent as he had pled in his Petition. *See* Exhibit 8 at pp. 11-12 (226-227) ("[McMillin] admits it may be impossible to identify each and every class member…."). McMillin instead proposed a procedure he claimed would address the inability to identify proper class members. *See id.* at pp. 12-13 (227-228). Recognizing it would be impossible to identify the class members prior to trial, McMillin acknowledged the only way to maintain this suit as a class action would be to "first try the case to the court to determine the exact amount of damages available to the entire class" to create an "aggregate judgment fund." *See id.* at p. 12 (227). Then putative class members would be permitted to "self-identify by way of questionnaires" that would require the putative class members to state "(1) the Fogle [Enterprises] restaurant location at which the

individual dined, (2) the approximate date the individual dined at one of the restaurants [during the 2009-2013 timeframe], and (3) whether or not the individual recalls expressly opting-out of [the CDF contribution]." *See id.* at p. 13 (228). McMillin asserted that this process would obviate the necessity of "individual trials on damages." *See id.* at p. 12 (227). McMillin termed this procedure a "fluid recovery" model. *See id.*

D. Respondent's Order

Despite having undisputed evidence – and McMillin's concessions – before it that the class could not be ascertained prior to trial, Respondent certified a class under Rule 52.08(a) and Rule 52.08(b)(3) defined as follows:

> Defendants' customers within five years of the filing of this action who paid a CDF.

See Exhibit 11 (289). Respondent acknowledged the class members could not be identified prior to trial, and adopted the self-identification "fluid recovery" method proposed by McMillin, in stating 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**." *See id.* (emphasis added). Moreover, and critically, Respondent recognized that it was not possible to identify the class members, stating – without any supporting authority – that "Class Certification

should not be defeated because Defendants have not maintained adequate records to assist in identifying class members." *See id.*

POINTS RELIED ON

I. Relators are entitled to an order prohibiting Respondent from maintaining the Underlying Litigation as a class action as certified in the Order, because Respondent abused her discretion in determining that the requirements of Rule 52.08 were met by McMillin, in that (1) the class definition is overly broad and includes a substantial number of persons lacking cognizable claims, (2) the class is not ascertainable, and (3) as a result of the definitional overbreadth and lack of ascertainability, Respondent's determination that the express requirements of Rule 52.08 were satisfied finds no rational basis in the evidence.

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

Green v. Fred Weber, Inc., 254 S.W.3d 874 (Mo. banc 2008)

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

Mo. Rev. Stat. § 407.025

Mo. S. Ct. R. 52.08

II. Relators are entitled to an order prohibiting Respondent from maintaining the Underlying Litigation as a class action as certified in the Order, because Respondent abused her discretion in adopting McMillin's "fluid recovery" plan for determining liability and class-wide damages, in that the "fluid recovery" plan proposed by McMillin (1) violates Relator's right to due process of law by depriving Relators of the ability to present legitimate defenses, and (2) violated Article V of the Missouri Constitution by applying Rule 52.08 in a manner that alters the substantive rights of the parties.

Dumas v. Albers Med., No. 03-0640-CV-W-GAF,

2005 U.S. Dist. LEXIS 33482 (W.D. Mo. Sept. 7, 2005)

Ex parte Nelson, 251 Mo. 63, 157 S.W. 794 (1913)

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)

Mo. Const. art. V, § 5

III. Relators are entitled to an order prohibiting Respondent from maintaining the Underlying Litigation as a class action as certified in the Order, because Respondent abused her discretion in finding that the express requirements of Rule 52.08(a) and (b)(3) were satisfied, in that McMillin failed to present any evidence upon which Respondent could have found that the elements of typicality, commonality, predominance, or superiority were satisfied.

Green v. Fred Weber, Inc., 254 S.W.3d 874 (Mo. banc 2008)

Comcast Corp v. Behrend, 133 S. Ct. 1426 (2013)

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)

Mo. Rev. Stat. § 407.025

Mo. S. Ct. R. 52.08

ARGUMENT

I. Relators are entitled to an order prohibiting Respondent from maintaining the Underlying Litigation as a class action as certified in the Order, because Respondent abused her discretion in determining that the requirements of Rule 52.08 were met by McMillin, in that (1) the class definition is overly broad and includes a substantial number of persons lacking cognizable claims, (2) the class is not ascertainable, and (3) as a result of the definitional overbreadth and lack of ascertainability, Respondent's determination that the express requirements of Rule 52.08 were satisfied finds no rational basis in the evidence.

A. Standard of Review

"Determination of whether an action should proceed as a class action under Rule 52.08 ultimately rests within the sound discretion of the trial court." *State ex rel. Coca-Cola Co.*, 249 S.W.3d at 860 (internal quotation marks omitted). "A circuit court abuses its discretion if its order is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration." *Id.* (internal quotation marks omitted). "A court 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).

B. Principles Governing Class Certification

"Missouri Rule 52.08 and Rule 23 of the Federal Rules of Civil Procedure, both governing class action lawsuits, are essentially identical." *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 75 (Mo. App. W.D. 2011). "It is well established in Missouri that federal interpretations of Federal Rule 23 are relevant in interpreting Rule 52.08." *Id.*; *see also, e.g.*, *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 736 n. 5 (Mo. banc 2004) ("Federal interpretations of [Fed. R. Civ. P.] 23 may be considered in interpreting Rule 52.08.").

Class action lawsuits are exceptions to the "cardinal principal of jurisprudence that one is not bound by a judgment *in personam* entered in litigation to which he was not designated as a party...." *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 794 (Mo. banc 1995); *see also Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979) (class action device is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."). A proposed class action lawsuit remains an individual case between the named plaintiff and the defendant until the class is certified by the trial court. *See Koehr v. Emmons*, 55 S.W.3d 859, 864 (Mo. App. E.D. 2001). "The various provisions of Rule 52.08 (governing class certification) have been carefully drafted… to assure that due process is maintained." *Beatty*, 914 S.W.2d at 795.

"The requirements of this rule are not merely technical or directory, but mandatory." *Id.*

The MMPA expressly requires the application of Fed. R. Civ. P. 23 **instead of** Rule 52.08 where their applications may differ. *See* Mo. Rev. Stat. § 407.025.3 ("An action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 [only] to the extent such state rule is not inconsistent with the federal rule…."). Accordingly, federal case law concerning the application of Fed. R. Civ. P. 23 – and particularly the United States Supreme Court's recent, seminal decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) – are instructive, if not binding precedent, in actions seeking to maintain a class action under the MMPA.

In all class actions, the burden to establish that class certification is proper "rests **entirely** with the plaintiff." *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 878-879 (Mo. banc 2008) (emphasis added). This burden is not only one of pleading, but a "burden of **proof**." *See id.* If the record does not demonstrate "that the requisites for class action have been met," it is an abuse of discretion to certify the case as a class action. *See Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 163-165 (Mo. App. W.D. 2006) (holding that if a class is certified, but the record does not demonstrate that "each and every" element necessary for class

certification have been met, "the trial court has abused its discretion."). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are **in fact** sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350 (emphasis in original).

C. The Class Definition is Impermissibly Overbroad Because it Encompasses a Substantial Number of Persons and Entities that have no Valid Claim Against Fogle Enterprises

This Court has made clear that "[a] class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *See Coca-Cola Co.*, 249 S.W.3d at 861-862 (citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam); and *Vietnam Veterans Against the War v. Benecke*, 63 F.R.D. 675, 679 (W.D. Mo. 1974)). Further, "in the context of certifying class actions [under Fed R. Civ. P. 23], the Eighth Circuit has recently and repeatedly held that a district court may not certify a class if it contains members who lack standing." *Mayo v. USB Real Estate Sec., Inc.*, No. 08-00568-CV-W-DGK, 2012 WL 4361571, at *5 (W.D. Mo. Sept. 21, 2012) (citing *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 616 (8th Cir. 2011) and *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010)).

McMillin wholly failed to demonstrate that the class definition certified by Respondent does not encompass a substantial number of individuals – hundreds of thousands of customers, if not more – who have no valid claims against Fogle Enterprises. For a plaintiff to maintain a cause of action under the MMPA, it is necessary to establish, *inter alia*, that the particular transaction was "primarily for personal, family, or household purposes," and that the person actually "suffer[ed] an ascertainable loss of money or property." *See* Mo. Rev. Stat. § 407.025.1. The class definition approved by Respondent, however, says nothing about whether a class member made the purchase primarily for personal, family or household purposes, as opposed to a business (or any other) purpose.

Under the MMPA, the only customer with standing to complain about any given transaction is one who suffered an "ascertainable loss," i.e., the person paying the bill. *See* Mo. Rev. Stat. § 407.025.1. However, if that person was primarily motivated by a business purpose, they do not have a valid cause of action under the MMPA. *See id.*; *see also McNeil v. Best Buy Co.*, No. 4:13-cv-1742-JCH, 2014 WL 1316935, at *3 (E.D. Mo. Apr. 2, 2014) (dismissing MMPA claim upon finding the transaction at issue involved merchandise purchased primarily for a business purpose).

Respondent's overly broad Order effectively eviscerates the MMPA's requirements. For example, tour buses comprise a large number of the customers at

Fogle Enterprises restaurants. Tour companies typically bring a large bus-load of customers to a restaurant and pay the entire cost of the meal and, if applicable, make the CDF contribution. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 20-21 (165). The tour company is the only customer that could conceivably have suffered an "ascertainable loss" within the meaning of the MMPA by contributing to the CDF, yet the transaction was unquestionably in furtherance of the tour company's business, and not for a personal, family, or household purpose. Accordingly, those innumerable transactions would not fall within the MMPA. The same holds true for a company party, or business or client development related meals that are paid for, or reimbursed by, a company. Respondent's Order included all of these (any many other) business-purpose customers within its certified class.

Similarly, with respect to McMillin's common law claims for money had and received and unjust enrichment, the class definition that Respondent approved includes individuals who made their contribution to the CDF knowingly and voluntarily, and who are therefore barred from recovery against Fogle Enterprises. "The voluntary payment doctrine is a recognized defense to a claim for unjust enrichment and an action for money had and received." *Pitman v. City of Columbia*, 309 S.W.3d 395, 403 (Mo. App. W.D. 2010). "Under the voluntary payment doctrine, a person who has voluntarily paid a defendant with full knowledge of all material facts is not entitled to later recover that payment unless it

resulted from fraud or duress." *Wiley v. Daly*, 472 S.W.3d 257, 262 (Mo. App. E.D. 2015). By failing to exclude those individuals or businesses to whose claim an absolute defense applies, the class definition includes a substantial number of persons to whom Fogle Enterprises can have no liability.

The undisputed evidence presented to Respondent demonstrated that the certified class definition includes a substantial number of customers that contributed to the CDF in connection with a transaction that was primarily for a business purpose (or any purpose other than a personal, family, or household purpose), and a substantial number of customers that cannot recover because their CDF contribution was made voluntarily. Because the class definition includes a substantial number of customers that have no valid claims against Fogle Enterprises, the proposed class definition is fatally overbroad and should not have been certified under the established precedent of this Court. *See Coca-Cola Co.*, 249 S.W.3d at 861.

D. The Class is not Ascertainable Because it is not Administratively Feasible to Identify the Members of the Class

This Court has succinctly explained that, in order for a class to be certified, "the class definition must be sufficiently definite so that it is **administratively feasible to identify the members of the class**." *See Coca-Cola Co.*, 249 S.W.3d at 862 (emphasis added); *accord, e.g., Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945,

947 (11th Cir. 2015) ("In order to establish ascertainability, the plaintiff must propose an administratively feasible method by which class members can be identified."); *Brecher v. Republic of Argentina*, 802 F.3d 303, 304 (2d Cir. 2015) ("[T]he touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."). "An imprecise class definition, which does not give rise to **presently ascertainable** class members, undermines judicial economy and efficiency, thereby interfering with one of the primary purposes of class action suits." *Dale*, 204 S.W.3d at 177-179 (emphasis added). "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**." *Id.* at 178 (emphasis added).

Fogle Enterprises serves between 750,000 and 1,000,000 customers per year, *see* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 15 (164), and it is undisputed there is no workable method for identifying a significant number of those customers, e.g., the majority of Fogle Enterprises' customers that paid with cash. Further, even if there was a way to identify all of Fogle Enterprises' customers, it is further undisputed that many of those customers did not contribute to the CDF, and it is impossible to determine who did and did not contribute.

McMillin's concession that the only potential way to identify class members is through self-identification highlights the impropriety of Respondent's class certification Order. As an initial matter, McMillin himself could not recall whether he contributed to the CDF except for one occasion, despite having visited Fogle Enterprises' restaurants on a number of occasions. *See* Exhibit 7, *Exhibit C (Deposition of Richard McMillin)* at 32:12-25 (187). Further, "a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic." *Karhu*, 621 F. App'x at 948; *see also Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 301-302 (S.D. Ala. 2006) (rejecting "plaintiffs' optimistic argument that prospective class members could be counted on to self-select"); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 684 (S.D. Ala. 2005) (holding possibility of publication notice does not establish ascertainability in part because "certain people may respond to publication notice even though they were not [part of the class]"); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003) (holding ascertainability not established when "the only evidence likely to be offered in many instances will be the putative class member's uncorroborated claim that he or she used the product").

"The potential problems with self-identification-based ascertainment are intertwined." *Karhu*, 621 F. App'x at 948. "On the one hand, allowing class members to self-identify without affording defendants the opportunity to challenge class membership provides inadequate procedural protection to defendants and implicates their due process rights." *Id.* (internal quotation and editorial marks omitted); *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012) ("Forcing [defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."). "On the other hand, protecting defendants' due-process rights by allowing them to challenge each claimant's class membership is administratively infeasible, because it requires a series of mini-trials just to evaluate the threshold issue of which persons are class members." *Id.* at 948-949; *see also Perez*, 218 F.R.D. at 269 ("Individualized mini-trials would be required even on the limited issue of class membership.").

McMillin made no effort to alleviate these concerns. Thus, given McMillin's concession that the class members cannot be identified, Respondent had no choice but to address McMillin's failure to satisfy the ascertainability requirement. Respondent did so by stating that "Class Certification should not be defeated because Defendants have not maintained adequate records to assist in identifying

class members." *See* Exhibit 11 (289). This determination was improper for a number of reasons.

First, McMillin bore the burden under Missouri law of demonstrating the requirements for class certification have in fact been met. *See Green*, 254 S.W.3d at 878. McMillin's failure to do so could not be excused by shifting the class identification burden to Relators.

Moreover, this was not simply a matter of Fogle Enterprises not "maintaining" records; McMillin himself has never suggested that Fogle Enterprises failed to maintain records. Instead, Respondent's certification Order imposed an obligation on Fogle Enterprises – and other businesses going forward – to *create* records or else face the consequences of a class action lawsuit. Respondent effectively certified McMillin's requested class as a penalty for Fogle Enterprises' failure to have each of its customers "sign in," provide their name and address, and explain the reason why they were eating at the restaurant (e.g., for business, or with family members).

This is not the law. Fogle Enterprises was not required to create such records, and those records were never created. The question for class certification is whether it is, in fact, "administratively feasible to identify the members of the class," not whether a defendant could have (although it was not required to) created and maintained records that would have made it easier to identify the class.

In this respect, Respondent's certification Order represents a drastic departure from established class certification precedent, as it effectively moots the administrative feasibility requirement adopted by this Court in *Coca-Cola Co. See* 249 S.W.3d at 862.

E. The Definitional Overbreadth and Lack of Ascertainability Necessarily Deprived Respondent of the Ability to Determine Whether the Express Requirements for Class Certification Were Met

In failing to properly define an ascertainable class, Respondent was deprived of the ability to determine that Rule 52.08's express requirements were met: that there are in fact sufficiently numerous class members that have suffered the harm McMillin alleges; that those members' claims truly involve common issues (and that, if there are common issues, they predominate over issues involving individual class members); that McMillin's experience with Fogle Enterprises is typical of the other class members' experiences; and that maintenance of the class action is superior to other available methods of adjudication.

In order to evaluate whether a class satisfies the express requirements for certification, a court must be able to determine whom and what the class representative purports to represent. *See Simer v. Rios*, 661 F.2d 655, 687 (7th Cir. 1981); *DeBremaecker*, 433 F.2d at 734; William B. Rubenstein, NEWBERG ON

CLASS ACTIONS § 3.2 (5th ed. 2015). Here, McMillin's failure to appropriately define the class, or to demonstrate that it is administratively feasible to identify the class members, necessarily deprived Respondent of the ability to ensure that the express requirements for class certification were **in fact** met. "[A]ctual, not presumed, conformance" with the express requirements for class certification "remains… indispensable." *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372 (1982).

Respondent's Order certifying the class demonstrates a lack of careful consideration of the evidence presented by the parties and an erroneous application of the law such that Respondent's certification of the class action constitutes an abuse of discretion. Accordingly, this Court's Preliminary Writ of Prohibition should be made permanent.

II. Relators are entitled to an order prohibiting Respondent from maintaining the Underlying Litigation as a class action as certified in the Order, because Respondent abused her discretion in adopting McMillin's "fluid recovery" plan for determining liability and class-wide damages, in that the "fluid recovery" plan proposed by McMillin (1) violates Relator's right to due process of law by depriving Relators of the ability to present legitimate defenses, and (2) violated Article V of the Missouri Constitution by applying Rule 52.08 in a manner that alters the substantive rights of the parties.

A. Standard of Review

"Determination of whether an action should proceed as a class action under Rule 52.08 ultimately rests within the sound discretion of the trial court." *State ex rel. Coca-Cola Co.*, 249 S.W.3d at 860 (internal quotation marks omitted). "A circuit court abuses its discretion if its order is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration." *Id.* (internal quotation marks omitted). "A court 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*, 357 S.W.3d at 599.

B. McMillin's Proposed "Fluid Recovery" Procedure is Constitutionally Infirm

It is undisputed that there exists no administratively feasible method of identifying the class members in this case. Recognizing this impediment to class certification, McMillin proposed a process he termed "fluid recovery," which Respondent adopted. This process, however, is grounded on the erroneous suggestion that Respondent may properly determine and enter a judgment against Fogle Enterprises for money damages without first ascertaining the proper members of the class and the amount of damages due to those persons. This is not possible in a manner that comports with due process. Nor is an interpretation of Rule 52.08 that permits McMillin's "fluid recovery" model permissible, as such an interpretation of the Rule alters the substantive rights of the parties, contrary to Article V of the Missouri Constitution.

i. McMillin's "Fluid Recovery" Procedure Does not Comport with Due Process

As described above, it is undisputed that the total CDF contribution amount clearly includes contributions made by voluminous customers that lack standing to maintain a private action under the MMPA, and/or who made their contributions voluntarily such that their common law causes of action are susceptible to

Relators' voluntary payment defense.[3] In an individual proceeding, the defendant would have a full opportunity to challenge the nature of the underlying transaction, including whether or not it was primarily entered into for personal, family, or household purposes, and whether the plaintiff voluntarily made the CDF contribution. That opportunity cannot be compromised in the name of the efficiencies of class adjudication. *See Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate its… defenses to individual claims.").

As recognized by the United States District Court for the Western District of Missouri in *Dumas v. Albers Med.*, "*[c]y pres* relief, or 'fluid recovery,' while it may be appropriate in certain circumstances because of the infeasibility of ***distributing*** the proceeds of a settlement or judgment, is not appropriate when it is used to ***assess the damages*** of the class without proof of damages suffered by individual class members." *See* No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS

[3] Respondent's Order does not specifically address McMillin's claims for unjust enrichment and money had and received, and it is unclear whether Respondent intends the action to proceed as a class action with respect to those common law claims. Neither McMillin nor Respondent has disputed that the voluntary payment doctrine, a defense pleaded by Fogle Enterprises, may properly apply to McMillin's common law claims.

33482, at *22 (W.D. Mo. Sept. 7, 2005). Judge Fenner explained that "[i]t is inappropriate to use fluid recovery as a means of rendering manageable – by rendering unnecessary any proof of damages to individual class members – an otherwise unmanageable class action." *See id.*

"Federal courts that have confronted the use of fluid recoveries in class action litigation have found that they are impermissible." *Land Grantors in Henderson, Union, Webster Ctys., KY v. U.S.*, 86 Fed. Cl. 35, 77 (2009). "Use of a fluid recovery has been found to contravene the Due Process Clause of the Constitution when it is used to mask the prevalence of individual issues, thus undermining the right of defendants to challenge the allegations of individual plaintiffs." *Id.* "The [fluid recovery] doctrine has been rejected in the class certification context in part because it risks imposing liability on a defendant for damages it did not cause." *Fun Servs. of Kan. City, Inc. v. Love*, No. 11-0244-CV-W-ODS, 2011 U.S. Dist. LEXIS 52011, at *6 (W.D. Mo. May 11, 2011); *see also Dumas*, 2005 U.S. Dist. LEXIS 33482 at *22; *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-232 (2d Cir. 2008) (rejecting a "fluid recovery" method of determining individual damages, in which aggregate damages would be based on estimates of the number of defrauded class members and their average loss); *Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a

defendant] will not be entitled to litigate its statutory defenses to individual claims").

Further, this Court has long held that due process requires an opportunity for a defendant to present its defenses prior to judgment. In *Ex parte Nelson*, this Court explained:

> [D]ue process of law is synonymous with "the law of the land," and states that the definition most often quoted and approved is that given by Mr. Webster in the Dartmouth College case, 4 Wheat. 518, which is as follows:
>
> > "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry; and renders judgment only after trial."
>
> Professor McGehee, in his work on "Due Process of Law," says at page 73: "Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or due process of law."

See 251 Mo. 63, 106, 157 S.W. 794, 808-809 (1913).

Due process guarantees Fogle Enterprises "an opportunity to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), including

challenges to (1) whether a particular class member, in fact, contributed to the CDF, (2) whether the contributions were made voluntarily with full knowledge, and (3) whether the contributions were, in fact, made primarily for personal, family, or household purposes. The undisputed evidence presented to Respondent demonstrated that the certified class consists of a substantial number of customers that have no valid claims against Fogle Enterprises.

Respondent's certification Order allows this action to proceed to trial on the issue of liability and aggregate damages, to then take that aggregate amount from Relators, and to only permit Relators to raise any available defenses to class members' claims **after** a monetary judgment has been entered against them and collected. This is not the process that Relators are due under the law. *See Lindsey*, 405 U.S. at 66. Accordingly, Respondent's certification of the class violates Article I, Section 10, of the Missouri Constitution, and cannot stand.

ii. An Interpretation of Rule 52.08 that Permits McMillin's "Fluid Recovery" Model Violates Constitutional Limitations Placed upon the Judiciary

The Missouri Constitution provides that "[t]he supreme court may establish rules relating to practice, procedure and pleading for all courts… which shall have the force and effect of law," however, "[t]he rules shall not change substantive rights…." *See* Mo. Const. art. V, § 5. To permit McMillin's "fluid recovery"

procedure would violate Article V of the Missouri Constitution, because it alters the substantive rights of the parties. Specifically, McMillin's "fluid recovery" model (1) alleviates the statutory burden for each plaintiff asserting a cause of action under the MMPA to prove they have standing to maintain a private right of action, (2) denies Fogle Enterprises the opportunity to present all of its available defenses to each class member's claim, and (3) exposes Fogle Enterprises to what is, in essence, an unauthorized civil penalty for its alleged violation of the MMPA, by awarding the class damages without first requiring proof of those damages.

Similar to Missouri's constitutional limitation on the permissible scope and effect of Court rules, the federal Rules Enabling Act provides that a federal court rule cannot be used to "abridge, enlarge, or modify any substantive right," *see* 28 U.S.C. § 2072(b). In application, the Rules Enabling Act dictates that "[t]he Federal Rules of Civil Procedure cannot work as substantive law." *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). As a result, the Rules Enabling Act stands as "an ever-antecedent and overarching limitation on class-action litigation…." *See id.* "Because the Rules Enabling Act forbids interpreting [Fed. R. Civ. P.] 23 to 'abridge, enlarge or modify any substantive right,'… a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its… defenses to individual claims." *See Dukes*, 564 U.S. at 367 (internal citations omitted).

The Rules Enabling Act has been interpreted as preventing the very type of "fluid recovery" damage calculation proposed by McMillin here. *See, e.g.*, *McLaughlin*, 522 F.3d at 231-232 (holding that a proposed "fluid recovery" process that would first determine "gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability"); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (rejecting a fluid recovery argument because "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights," in violation of the Rules Enabling Act).

The "fluid recovery" procedure approved by Respondent provides for an aggregated trial on liability and damages prior to any class-claimant procedure. Relators thus would necessarily not be permitted to challenge the standing of any class member to bring a private right of action under the MMPA, or raise affirmative defenses as to any class member's claim, at or prior to the determination of damages. Accordingly, Relators may be found liable, and be ordered to pay damages into the "aggregate damage fund," based upon the monetary value of contributions to the CDF by persons or entities to which Relators have no liability.

Under this "fluid recovery" procedure, Relators would only be able to challenge those individuals' or entities' claims to receive a distribution from the post-trial "aggregate damage fund." While such a challenge might conceivably prevent those persons or entities from recovering, it would not prevent Relators from incurring the liability those persons' or entities' claims represent. As proposed by McMillin, money that remained in the "aggregate damage fund" would then escheat to the State or would be distributed through a *cy pres* distribution – even if Relators were successful in challenging class members' individual claims. McMillin's "fluid recovery" procedure thus permits class-wide monetary recovery against Relators, regardless of whether the individual claims represented by the aggregated monetary amount are, in fact, legally or factually viable.[4]

The use of "fluid recovery" cannot "alleviate a plaintiff's burden of meeting statutory requirements or dispense with the necessity of individualized proof." *Wright v. Dep't of Ala. VFW*, No. CV-07-S-2071-NE, 2010 U.S. Dist. LEXIS 145397, at *28-29 (N.D. Ala. Mar. 24, 2010). In *Wright*, the United States District Court for the Northern District of Alabama found that the very same procedure

[4] Obviously, even this post-trial process would require hundreds of thousands, if not millions, of mini-trials to determine whether each "claimant" is entitled to recovery; providing none of the efficiencies touted by McMillin.

adopted by Respondent was impermissible. *Wright* involved an action to recover monies obtained by the defendant in an allegedly illegal gambling operation. *See id.* at *2. In that case, the plaintiff asserted that "the amount of aggregate damages is allegedly known," rendering a fluid recovery procedure "a suitable method of resolving the individual issues" involved in the case. *See id.* at *26. Specifically, the plaintiff proposed, like McMillin here, that the damages be aggregated, that notice be sent to potential class members by publication, and that "claimants would be allowed an allotted amount of time to come forward and state their losses by filing a sworn claim." *See id.* at *27.

Rejecting this "fluid recovery" approach, the *Wright* court held that "effort to bypass the presentation of individualized proof is unpersuasive," because the substantive law underlying the plaintiff's claims require that "each plaintiff must prove that he or she incurred a loss." *See id.* The court determined that the use of a "fluid recovery" model is not appropriate to establish aggregate liability, and instead can only be used as a means of distributing proven damages once liability to each of the class members has been proven. *See id.* at 26-30. Relying on a "reputed legal treatise on the topic of class certification," the court explained:

> Fluid recovery provides a mechanism for the distribution of damages only if plaintiffs have established liability to class members consistent with the applicable substantive law, and the amount of damages.

> **Courts have repeatedly rejected the use of fluid recovery as a substitute for individualized proof when the class pursues claims that require proof of actual damages…. The purported substitution of the "class as a whole" for its individual members on damages issues would almost inevitably violate Rule 23, due process, the Seventh Amendment and the Rules Enabling Act; difficulties in proving individualized actual damages more often denote unsuitability for class proceedings than a need for abbreviated proceedings in derogation of important rights.**

Wright, No. CV-07-S-2071-NE, 2010 U.S. Dist. LEXIS 145397 at *29 n. 44 (quoting 2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 8:16 (5th ed. 2008)) (emphasis in original).

By depriving Relators of a meaningful opportunity to establish that the individual members of the class are not entitled to a monetary judgment against them, Respondent's certification Order significantly alters Relators' substantive rights, and thus impermissibly applies Rule 52.08 in a manner that violates Article V of the Missouri Constitution.

Respondent lacks the power to proceed with this litigation as a class action in a manner that violates Relators' due process rights, and exceeds the scope of constitutionally permissible application of judicial rules. McMillin's class action

claims cannot be maintained (1) in a manner that comports with due process, and (2) without altering the substantive rights of the parties. Accordingly, this action simply cannot be allowed to proceed as a class action as certified by Respondent's Order, and the Court's Preliminary Writ of Prohibition should be made permanent.

III. Relators are entitled to an order prohibiting Respondent from maintaining the Underlying Litigation as a class action as certified in the Order, because Respondent abused her discretion in finding that the express requirements of Rule 52.08(a) and (b)(3) were satisfied, in that there was no rational basis upon which Respondent could have found that McMillin demonstrated this case satisfied the elements of typicality, commonality, predominance, or superiority.

A. Standard of Review

"Determination of whether an action should proceed as a class action under Rule 52.08 ultimately rests within the sound discretion of the trial court." *State ex rel. Coca-Cola Co.*, 249 S.W.3d at 860 (internal quotation marks omitted). "A circuit court abuses its discretion if its order is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration." *Id.* (internal quotation marks omitted). "A court 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*, 357 S.W.3d at 599.

B. The Evidence Presented to Respondent Provides No Rational Basis Upon which Respondent Could Have to Determined that McMillin Satisfied the Express Requirements of Rule 52.08(a) and (b)(3)

As discussed in Section I, above, McMillin bears the burden to **prove** that this action satisfies each of the required elements for class certification. *See Green*, 254 S.W.3d at 878-879. Here, McMillin failed to meet this burden. The record does not demonstrate that "the requisites for class action have been met," and Respondent's certification of the class was thus an abuse of discretion. *See Dale*, 204 S.W.3d at 163; *see also Dukes*, 564 U.S. at 350 (holding that a plaintiff must "affirmatively demonstrate" that the action "in fact" satisfies the requirements for class certification).

i. McMillin Failed to Demonstrate that the Express Requirement of Typicality was Satisfied

With respect to his claim under the MMPA, McMillin alleges that his particular purchase from Fogle Enterprises was for personal, family, or household purposes. However, due in large part to McMillin's inability to identify a single other member of the certified class, he presented **no evidence** that a single other person contributed to the CDF in connection with a purchase that was made for personal, family, or household purposes. The only evidence before Respondent

was that a substantial, but unknown, number of persons and entities meeting the class definition contributed to the CDF in connection with a purchase that was primarily for business purposes. Accordingly, McMillin failed to present any affirmative evidence that his MMPA claim is typical of the claims of the other class members that he seeks to represent. Respondent's implied finding of typicality on this claim was an abuse of discretion. *See State ex rel. McKeage*, 357 S.W.3d at 599 (holding that it is an abuse of discretion to certify a class where "the evidence provides no rational basis for certifying the class.").

With respect to his claims for money had and received and unjust enrichment, McMillin claims he was unaware that his payment to Fogle Enterprises included a CDF contribution. However, due in large part to McMillin's inability to identify a single other member of the certified class, he presented **no evidence** that a single other person made a CDF contribution unknowingly or involuntarily. Moreover, he presented no evidence that any other person did not see the signage posted by Fogle Enterprises and was not informed about the CDF verbally, or was not otherwise fully informed of the CDF. Instead, the evidence before Respondent was that Fogle Enterprises trained its employees to explain the CDF and to ensure that customers knew the CDF contribution was voluntary, and that a substantial number of persons meeting the class definition contributed voluntarily after having been fully informed of the CDF. Thus, the evidence

showed that his claims for money had and received and unjust enrichment also were not typical of the defined class, and Respondent's implied finding of typicality on these claims was also an abuse of discretion. *See State ex rel. McKeage*, 357 S.W.3d at 599.

ii. McMillin Failed to Demonstrate that the Express Requirement of Commonality was Satisfied

McMillin failed to meet his burden to affirmatively demonstrate that there exist common issues of fact or law between his claims and those of the class he sought to represent. In *Dukes*, the United States Supreme Court examined the issue of "commonality" in-depth, and explained:

> The crux of this case is commonality – the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." That language is easy to misread, since any competently crafted class complaint literally raises common questions. For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean

merely that they have all suffered a violation of the same provision of law.

See 564 U.S. at 349-350 (internal citations omitted). "What matters to class certification… is not the raising of common 'questions' – even in droves – but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350. "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.*

A majority of the "common questions" identified by McMillin are not common at all, and **none** of the questions he identified, if resolved, is apt to drive resolution of the litigation.

For example, "whether [Relators] failed to disclose material information regarding the nature of the [CDF]," *see* Exhibit 3 at ¶ 21.b. (010), is not a common question, and instead would require individualized inquiry concerning what information was provided to each individual consumer. The evidence before Respondent was that notice of the CDF was posted near the host/hostess stand and cash-register in each Fogle Enterprise restaurant, and that the CDF was routinely explained verbally by Fogle Enterprises' employees to its customers. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶¶ 9-10 (164). "Whether [Relators] unjustly retained a monetary benefit from charging customers a fee," *see* Exhibit 3 at ¶ 21.c.

(010), and "[w]hether [Relators] are liable for money had and received," *see id.* at ¶ 21.f. (010), similarly turn on what information was provided or told to each individual Fogle Enterprises customer as a result of the voluntary payment doctrine defense raised by Fogle Enterprises.

Similarly, "[w]hether [Relators]' fee scheme is unconscionable or otherwise violates the MMPA," *see id.* at ¶ 21.a. (010), and "[w]hether [Relators] violated Missouri law by engaging in deception, fraud, false pretenses, false promise, misrepresentation, bait and switch, unfair practices or the concealment, suppression, or omission of any material fact," *see id.* at ¶ 21.e. (010), are not questions the resolution of which are apt to drive the litigation, as the resolution of those questions do not resolve any of the primary issues of the litigation. The issue of standing as to McMillin's MMPA claims – i.e., whether the class members can even assert a cause of action under the MMPA – is a threshold issue that makes proof of a theoretical violation of the MMPA immaterial. If the class members are not proper plaintiffs under the MMPA, proof of a violation does not make Fogle Enterprises' liability any more or less likely – there simply can be no liability. A finding that Fogle Enterprises violated the MMPA in some instance does not establish any liability on the part of Fogle Enterprises to the class members, nor does it entitle the class members to any relief.

"The amount retained from the fee," *see* Exhibit 3 at ¶ 21.d. (010), also, is not a question that satisfies commonality. Establishing the total amount of CDF contributions collected by Fogle Enterprises does not establish any meaningful element of McMillin's class claims. The MMPA does not provide a mechanism for a consumer to right all alleged wrongs done by a defendant by obtaining restitution for a violation of the MMPA (a right given only to the Missouri Attorney General). *See* Mo. Rev. Stat. § 407.100.4. Instead, the MMPA provides a private right of action only to those consumers that made a purchase "primarily for personal, family or household purchases" from the defendant and "thereby suffer[ed] an ascertainable loss." *See* Mo. Rev. Stat. § 407.025.1. Accordingly, the question is **not** what total amount of CDF contributions were collected by Fogle Enterprises, and is, instead, what amount of CDF contributions were collected by Fogle Enterprises **from proper class members** – those individuals who, at a minimum, have standing to maintain a private right of action.

Finally, "[w]hether Plaintiff and the other Class members are entitled to equitable relief, including declaratory relief, restitution, rescission, corrective notice, a preliminary and/or permanent injunction," and "[w]hether Plaintiff and the other Class members are entitled to damages and/or other monetary relief," are not common questions. They are merely the products of a finding of Fogle Enterprises' liability to each of the class members. In the absence of liability to any

individual class member (because, for example, (1) that individual does not have standing to maintain a private right of action under the MMPA, or (2) that individual made the CDF contribution voluntarily with full knowledge of the CDF such that the voluntary payment doctrine bars their common-law claims), the hypothetical relief available to a proper plaintiff is, again, immaterial and not apt to drive the litigation forward.

McMillin, while purporting to identify droves of "common questions" (as any well pleaded complaint would do), failed to identify a single question common to the class that has the capacity "to generate common **answers** apt to drive the resolution of the litigation." *See Dukes*, 564 U.S. at 350. Accordingly, there was no rational basis upon which Respondent could have determined that the "commonality" prong of Rule 52.08(a) or Fed. R. Civ. P. 23(a) was satisfied, and thus abused her discretion. *See State ex rel. McKeage*, 357 S.W.3d at 599.

iii. McMillin Failed to Demonstrate that the Express Requirement of Predominance was Satisfied

Even if the Court were to find that McMillin may have demonstrated a question of fact or law common to the class, McMillin certainly failed to demonstrate that common issues would predominate over individual issues. Instead, Fogle Enterprises presented evidence that individual mini-trials would be required for each class member on each of the claims asserted by McMillin.

Courts across the country routinely deny class certification where there is evidence that a substantial number of the proposed class members are not entitled to relief, or where their right to relief would require individualized fact inquiry because whittling the class membership down from an overly broad class definition to identify viable, or potentially viable, claimants would predominate the litigation post-certification. For example, in *Mwantembe v. TD Bank, NA*, 268 F.R.D. 548 (E.D. Pa. 2010), the United States District Court for the Eastern District of Pennsylvania denied certification of a claim arising under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* ("UTPCPL"), brought by a putative class of gift card users that were charged a dormancy fee. The court found that "determining membership and liability in each putative class member's case will require an individual fact intensive inquiry that will overshadow any common questions." The court explained:

> [T]o have standing to bring a UTPCPL claim, the plaintiff must show that the card was used for personal or household purposes, not for business. This would exclude any recipient who spent the card on items used for business purposes, such as parts or equipment in a business. Presumably, the vast majority of cardholders used the cards for personal or household products or services. That does not preclude the probability that some, albeit a much smaller number, used them for

> business purposes. Thus, individualized inquiry would be required to determine a necessary element of the UTPCPL cause of action.

See Mwantembe, 268 F.R.D. at 561.

In *Corder v. Ford Motor Co.*, 297 F.R.D. 572 (W.D. Ky. 2014), the United States District Court for the Western District of Kentucky denied certification of a claim brought under the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.110, *et seq.* ("KCPA"), on behalf of a class of persons that purchased a particular type of automobile that was alleged to have a problematic engine. The court explained:

> the KCPA restricts claims to those purchasers whose *primary* purpose was for a personal, family, or household use, but it does not require that the customer's *sole* purpose was for a personal, family, or household use. Accordingly, distinguishing between the customers who registered their trucks as commercial vehicles… and those customers who did not register their trucks as commercial vehicles would not, as Corder claims, resolve the preliminary inquiry required by the KCPA. The court would still need to determine whether the customers who did not register their trucks as commercial vehicles… had the primary purpose, at the time of purchase, to use their trucks for personal, family, or household purposes. And because the KCPA explicitly requires that a

> person have purchased a product primarily for personal, family, or household use prior to a finding of liability, Ford is entitled to demand a full litigation of that element for each potential class member.

See Corder, 297 F.R.D. at 578-579 (internal citations omitted).

Here, regarding his MMPA claim, McMillin presented no evidence from which Respondent could have rationally determined that individual determinations concerning the primary purpose of the transactions at issue would not predominate over any common issues identified by McMillin.

Similarly, regarding his common law claims, McMillin presented no evidence from which Respondent could have rationally determined that individual determinations concerning what each customer knew about the CDF and the voluntariness of contributions would not predominate over any common issues. Where the voluntary payment doctrine has been asserted as a defense to liability, courts routinely find predominance lacking and deny class certification. *See, e.g.*, *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 98 (S.D.N.Y. 2010) (denying class certification for lack of predominance, noting that "numerous courts have found that the predominance requirement is not satisfied where class claims are subject to a unique defense under the voluntary payment doctrine"); *Gawry v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 942, 957-959 (N.D. Ohio 2009) (denying class certification for lack of predominance because resolution of defendant's voluntary

payment doctrine defense "is not subject to generalized proof" and "will require individualized evidence[,] as the circumstances surrounding payment for each putative… class member will certainly differ"); *Endres v. Wells Fargo Bank*, No. C 06-7019 PJH, 2008 U.S. Dist. LEXIS 12159 (N.D. Cal. Feb. 6, 2008) (denying class certification for lack of predominance because defendant's voluntary payment doctrine defense "would require individualized inquiries into the circumstances of each member of the class").

Further, as the United States Supreme Court held in *Comcast*, to establish that individual issues will not predominate over issues common to the class, a plaintiff must demonstrate that damages are "capable of measurement on a classwide basis." *See* 133 S. Ct. at 1433. Instead of meeting this burden, McMillin merely alleged that the class was entitled to all monies collected for the CDF during the class period, and that amount was known. Respondent expressly adopted this theory of damage calculation in her Order, and this determination was clearly an abuse of discretion because "plaintiff's damages case must be consistent with its liability case." *See id.*

The total amount of money collected for the CDF is not indicative of the amount of Fogle Enterprises' liability because the uncontroverted evidence establishes that (1) a substantial number of customers entered into their transaction with Fogle Enterprises for a business purpose, and (2) a substantial number of

customers had full knowledge of the CDF and elected to voluntarily contribute. Calculation of the amount of damages for which Fogle Enterprises could properly be liable under McMillin's theories will require individualized proof not only of to which class members Fogle Enterprises is liable, but also how much each of those persons contributed to the CDF. Accordingly, McMillin simply did not and "cannot show… predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class." *See id.* Respondent's certification Order was an abuse of discretion and cannot stand. *See State ex rel. McKeage*, 357 S.W.3d at 599.

iv. McMillin Failed to Demonstrate that the Express Requirement of Superiority was Satisfied

McMillin failed to demonstrate that a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority), an express requirement of Rule 52.08(b)(3) and Fed. R. Civ. P. 23(b)(3). As discussed in Section I.D., above, McMillin failed to demonstrate that it is administratively feasible to identify those individuals that are properly a part of his class. In this regard, McMillin failed not only to meet the preliminary showing required by the implied ascertainability requirement, but also that the class members could **ever** be identified absent, quite literally, hundreds of thousands or millions of mini-trials.

The existence of numerous individual inquiries "weighs against a finding of superiority: A suit could become unmanageable and little value would be gained in proceeding as a class action… if significant individual issues were to arise consistently." *See In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.* No. MDL No. 1967, 2011 U.S. Dist. LEXIS 150015, at *23 (W.D. Mo. Dec. 22, 2011) (internal quotation marks omitted); *see also* 1 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 5:56 (8th ed.) ("The individual inquiries required to ferret out those who do have claims from those who do not …would make a class action unmanageable.").

This is particularly true when the issue is "who is in the class." *See id.*; *see also Dumas*, 2005 U.S. Dist. LEXIS 33482 at *21 ("Whether addressed under the heading of 'ascertainability' or 'manageability,' the fact remains that in order for a class to be certified, the proposed class must be both ascertainable in theory and readily identifiable (thus, administratively manageable) in fact.").

In an effort to overcome this defect, McMillin proposed his "fluid recovery" procedure. Aside from the constitutional problems presented by this procedure, for purposes of superiority, a potential class member merely "coming forward and identifying himself or herself does not **prove** a person is in the class." *See In re Bisphenol-A (BPA)*, 2011 U.S. Dist. LEXIS 150015 at *24 (internal quotation marks omitted). "A plaintiff in a typical case is not allowed to establish an element

of a defendant's liability merely by completing an affidavit swearing the element is satisfied, and this should be no different for a class action." *Id.* A defendant is "entitled to cross-examine each and every alleged class member regarding his or her memory." *See id.*

Accordingly, McMillin's only proposed plan to render this suit manageable as a class action utterly fails to do so. As Fogle Enterprises demonstrated through uncontroverted evidence, there is no way to identify the members of the proposed class short of a trial on each putative class member's claims. McMillin failed to demonstrate otherwise, and failed to meet his burden of showing that maintenance of a class action was superior to other methods of adjudication. Respondent's class certification Order cannot stand. *See State ex rel. McKeage*, 357 S.W.3d at 599.

CONCLUSION

The class definition certified by Respondent is improper. It is overly broad because it encompasses a substantial number of persons and entities that do not have standing to maintain a private right of action under the MMPA, and a substantial number of persons and entities that are barred from recovery for money had and received and unjust enrichment by the voluntary payment doctrine. The class is not ascertainable, as it is not administratively feasible to identify the members of the class, either now or at any point in the future. As a result of Respondent's acceptance of an improper class definition, she was deprived of the opportunity to ensure that the express requirements for class certification were in fact satisfied.

McMillin's "fluid recovery" procedure, adopted by Respondent, is unconstitutional. This procedure violates Fogle Enterprises' due process rights by depriving it of the right to meaningfully challenge the validity of each class member's claim, or to present its defenses to liability. Further, the procedure violates Article V of the Missouri Constitution, and the limits imposed upon the judiciary, by interpreting Rule 52.08 in a manner that alters the substantive rights of the parties.

Finally, McMillin presented no evidence showing that this action satisfies the express requirements for class certification. While McMillin was required to

prove actual conformance with the requirements for certification, he wholly failed to meet this burden.

Accordingly, Respondent abused her discretion in certifying the class, and the Court should make permanent its Preliminary Writ of Prohibition.

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 14,468 words, as determined by the word-processing system used to prepare the brief.

/s/ *Jason C. Smith*

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on this 3rd day of February, 2017, the foregoing instrument was electronically filed with the Clerk of the Supreme Court, and was delivered to the following in the manner indicated:

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