No. SC95707

IN THE
SUPREME COURT OF MISSOURI

ROBERT HURST,

Plaintiff/Respondent,

v.

NISSAN NORTH AMERICA,

Defendant/Appellant.

Appeal from the Circuit Court of Jackson County
at Independence,
The Honorable Jack R. Grate, Jr., Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL

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INTEREST OF THE AMICUS

The Attorney General is authorized to submit amicus curiae briefing before the Court under Supreme Court Rule 84.05(f)(4). At issue in this case is the scope and meaning of the Missouri Merchandising Practices Act. Sec. 407.010 et al. RSMo 2014 ("MMPA"). The MMPA charges the Attorney General with the duty to police the marketplace and "to preserve fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973). Decisions from this Court which interpret and apply key provisions of the MMPA including the definitions of misrepresentation and deception under § 407.020.2, will directly impact the scope of future enforcement actions by the Attorney General.

ARGUMENT

Introduction

On March 22, 2016, the Missouri Court of Appeals for the Western District released a slip opinion in *Hurst v. Nissan North America, Inc.*, --- SW3d --- (2016 WL 1128297), which overturned a jury verdict in favor of the plaintiff class against Nissan. On June 28, 2016, this Court transferred the case.

In a case of first impression, Western District held any statements which are puffery cannot be the basis for an MMPA claim generally, all of the statements by Nissan that Hurst submitted as evidence of MMPA violations were puffery, and therefore Hurst did not make a submissible case to the jury for claims of misrepresentation or deception. Slip Opinion at 3.[1] The Slip Opinion explicitly adopted the Eighth Circuit's definition of fact, which excludes puffery, from *Am. Italian Pasta Co. v. New World Pasta Co.,* 371

[1] Some of the statements deemed as puffery by the Western District include "premium", "leader in style", "High Tech Interior Accentuated with Luxurious Comfort", "[a]n ergonomically designed, sport-inspired cockpit [that] embraces the driver and elevates the driving experience", "premium automotive machinery", and similar statements in marketing materials, including those that showed views of the dashboard. Slip Opinion at 8.

F.3d 387, 391 (8th Cir. 2004), that "[t]o be actionable, the statement must be a 'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.'" Slip Opinion at 17. The opinion also quoted *Am. Italian Pasta* regarding the difference between facts and opinion:

> A factual claim is a statement that "(1) admits of being adjudged true or false in a way that (2) admits of empirical verification." To be actionable, the statement must be a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." Generally, opinions are not actionable.
>
> . . . If a statement is a specific, measurable claim or can be reasonably interpreted as being a factual claim, i.e., one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.

Slip Opinion at 11, quoting *Am. Italian Pasta Co* 371 F.3d at 391.

The Western District acknowledged that puffery has never been applied to the MMPA before, but has been applied in common law fraud and

breach of warranty actions. The Court also added an unprecidented reliance element, similar to one found in common law fraud and breach of warranty, but which is not found in text of the MMPA, holding "[u]nder the MMPA, plaintiffs need not show individualized reliance upon alleged misrepresentations, but they cannot base their claims on alleged misrepresentations upon which no reasonable consumer would rely." Slip Opinion at N.9.

The Attorney General urges this Court to reverse the decision of the Western District in so far as it creates a limited definition of misrepresentation or deception. The Attorney General does not take a position on the validity of the underlying verdict or whether the statements attributed to Appellant Nissan are, in fact, puffery. Instead, the Attorney General requests that this Court refrain from altering the definition of misrepresentation or deception to add an exclusion for puffery. Additionally, the Attorney General asks this Court to leave the MMPA without a reliance element.

I. The Western District Opinion Improperly Defined Misrepresentation to Exclude Puffery And Opinions.

The MMPA is deliberately broad in scope and in language in order to be flexible enough to address the infinite variety of unlawful business practices. "There is no definitive definition of deceptive practices. Section 407.020 is broad in scope in order to prevent evasion by overly meticulous definitions; the determination of whether fair dealing has been violated turns on the unique facts and circumstances of each case." *Clement v. St. Charles Nissan, Inc.,* 103 S.W.3d 898, 900 (Mo. App. 2003) (*citing State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988). Instead, the MMPA was intended to supplement the common law and statutory law that existed in 1967 when it was first enacted. *Independence Dodge, Inc.*, 494 S.W.2d at 368 ("The purpose of these statutes is to supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions.") Demonstrating this expansion of legal protection for consumers, this Court has adopted the characterization of Chapter 407 as "paternalistic legislation designed to protect those that could not otherwise protect themselves." *High Life Sales Co. v. Brown-Forman, Corp.*, 823 S.W.2d 493, 498 (Mo. 1992), *quoting Electrical and Magneto Service Co. v. AMBAC Intern'l Corp.*, 941 F.2d 660, 663 (8th Cir. 1991).

The sort of overly meticulous definition of misrepresentation implemented by the Western District is the opposite of the intent of the MMPA and the historically broad interpretation it has been given. Instead, the opinion limited misrepresentations to facts that are "capable of being proved false or capable of being reasonably interpreted as a statement of objective fact." Slip Opinion at 12. The Western District further held that all statements in the underlying case could not be the basis for liability under the MMPA because

> [t]he exaggerations, sales propaganda, and expressions of opinions in this case are not statements "not in accord with the facts" and are not statements that create a false impression because there is no way that such statements are measurable or are capable of being proved false.

Slip Opinion at 17. Defining misrepresentation in such a narrow way has the potential to significantly limit the scope of the MMPA by narrowing the scope of the law beyond what the legislature intended.

The Court below did not appear to consider applicable state regulations that provide additional interpretation and direction in the application of the MMPA. The legislature, after prohibiting misrepresentations in connection with the sale of merchandise in § 407.020, authorized the Attorney General to promulgate rules necessary to the administration and enforcement of chapter

407. § 407.145; *State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 597 (Mo. 1993). The Code of State Regulation defines misrepresentation as "an assertion that is not in accord with the facts." 15 CSR 60-9.070. Assertion is also defined: "Assertion may be words, conduct or pictorial depiction, and may convey past or present fact, law, value, *opinion*, intention or other state of mind." 15 CSR 60-9.010(1)(A) (emphasis added). As properly promulgated regulations, these Rules have the force and effect of law in construing the MMPA. *United Pharmacal Co. of Missouri, Inc. v. Missouri Board of Pharmacy*, 159 S.W.3d 361, 365 (Mo. 2005).

Missouri courts have consistently interpreted both the fact and assertion elements of misrepresentation broadly. *See Areaco Inv. Co.,* 756 S.W.2d at 637 (purchasing decisions rarely turn on a single inducement, but on the overall package. If that package contains misrepresentations or misleading information, it is an unlawful practice under the MMPA); *State ex rel. Nixon v. Beer Nuts, Ltd.,* 29 S.W.3d 828, 838 (Mo. App. 2000) (solicitations for memberships in a club that does not reveal that fact that it does not comport with state law constitutes misrepresentations); *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.,* 199 S.W.3d 228, 232 (Mo. App. 2006) (selling merchandise with a lifetime warranty and not honoring that warranty means the original sales solicitations contained misrepresentations).

Thus, Missouri law expressly allows an assertion to include an "opinion," an assessment of "value" and a "state of mind." An assertion may consist of "conduct" or a "pictorial depiction," in complete absence of a statement or actual words whatsoever. An assertion is also clearly not limited to an affirmative statement, but, rather, might be conveyed either directly or indirectly, explicitly or implicitly, as a "fact, law, value, opinion, intention or other state of mind." Whether a particular assertion is in "accord with the facts," is, of course, a critical question, but clearly actionable misrepresentations under the MMPA include statements that, under common law and other statutory actions, have long been characterized as "puffery." The array of examples of puffery found through case law in Missouri and elsewhere demonstrates that the puffery doctrine is not compatible with Missouri's MMPA and its regulations on misrepresentation. *See, e.g. Morehouse v. Behlmann Pontiac-GMC Truck Service., Inc., et al,* 31 S.W.3d 55 (Mo. App. 2000) (statements a car was "in excellent condition," "in good condition," "in tip-top shape" and "would be reliable" were misrepresentations).

Finally, while the Court below may have been attracted to the puffery doctrine's requirements that actionable statements be "measurable, capable of verification, or capable of being proved false," it overlooked the fact that the MMPA already requires that any assertions be subjected to the crucible

of truth before it offers a basis for liability as a misrepresentation. A fact finder might have found that some number of the statements were assertions that were in accord with the facts, i.e., were truthful. This analysis requires that the assertions be identified, that they be understood by consumers to assert something, and that something must, in part or in whole, be not in accord with the facts. In other words, false.

In this case, the Court characterizes the collection of statements to suggest the representation of a warranty that "basically everything would be guaranteed forever." Slip Opinion at 17. Appellant Nissan argues that the statements did not, in fact, make any such promise. Appellant's Supplemental Brief at 59. It is for the fact finder to determine whether a representation has been made and whether it is truthful. Perhaps the better question is why shouldn't there be consequences for the merchant who controlled all of those representations?

Accordingly, the conclusion by the Court below that an "assertion" must be "a statement of fact" that is "that is measurable, capable of verification, or capable of being proved false," Slip Opinion at 17, is at odds with the MMPA. The Court's construction of the MMPA is too narrow and conflicts with existing law.

II. The Western District Interpretation of Deception was Overly Narrow.

Very little analysis in the Slip Opinion is related to deception. Yet the Western District limited claims of deception to factual statements, going so far as to say that a statement has to be "measurable or are capable of being proved false" to create a false impression. Slip Opinion at 17. If allowed to stand, that ruling will gut the MMPA's protections against deception.

15 CSR 60-9.020(1) defines deception as "any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression." Notably, the Court below omitted the central clause in this definition its opinion – the "capacity to mislead, deceive or cheat" clause. Slip Opinion at 10.

Perhaps, having focused so much of its analysis on searching for fact-based statements to frame "misrepresentations," the Court may have gravitated to the reference to "falsity" reflected in "tends to create a false impression" and simply overlooked the breadth of "tendency or capacity to mislead," which is the traditional touchstone for deception and is clearly not dependent on any "statement," false or otherwise. This narrowed point of view would also explain the court's ultimate conclusion that "[t]he exaggerations, sales propaganda, and expressions of opinions in this case are not statements "not in accord with the facts" and are not statements that

create a false impression because there is no way that such statements are measurable or are capable of being proved false." Slip Opinion at 17. Essentially, the Court below held that deception requires statements of fact.

Deception may be employed through a nearly endless list of techniques and practices. In this case, the Plaintiff submitted its case on the theory that the Defendant engaged in deception based on the use of representations to cause deception.

While the word "representation" is not separately defined by the regulations, it would seem consistent to view it in contrast to "misrepresentation," which is defined, and adopt the broad definition of "assertion" discussed above, at a minimum. Thus, deceptive representations may be express or implied and may convey any "fact, law, value, opinion, intention or other state of mind." 15 CSR 60-9.010.1

Importantly, the representations themselves, which may mislead, deceive, or cheat a consumer, or cause a consumer to form a false impression, do not need to be "false." The use of vague expressions of value, and opinion and many other less-than-concrete representations are often used by scammers to mislead consumers, trick them, lull them, and foster false impressions about a transaction.

As Missouri courts have long recognized, the MMPA does not attempt to define each potentially deceptive practice so as to "prevent ease of evasion

because of overly meticulous definitions." *Independence Dodge*, 494 S.W.2d at 368. Indeed, "[f]or better or for worse, the literal words [of the statute] cover every practice imaginable and every unfairness to whatever degree." *Ports Petroleum Co. v. Nixon,* 37 S.W.3d 237, 240 (Mo. 2001).

One of the reasons that the Western District's reliance on "falsity" of statements in this case is misplaced is because case law has long held "literal truth" may not avoid deception. For example, numerous consumer protection cases have held that literal or technical truth of statements does not prevent them from conveying a deceptive impression to a consumer. *E.g., Miller v. American Family Publishers, Inc.*, 663 A.2d 643 (N.J. Chanc. 1995) (Literally true statements in mailed advertisements were alleged to imply that purchases would increase a consumer's chance of winning, which was misleading). The truth is not a defense to deception, since the MMPA prohibits the use of any deception in connection with the sale. If deceptions are made, the statute has been violated whether or the truth is later disclosed. 15 CSR 60-9.020(2); *Areaco Inv. Co.*, 756 S.W.2d at 636.

In its brief, Appellant Nissan seems to recognize that truthful statements can be used to mislead consumers, but makes a somewhat contorted effort to pigeon-hole the breadth of deception within its overarching contention that specific statements of fact, that are false, are still required.

Appellant Nissan argues that "[a] 'false impression' case differs only in that the alleged misrepresentation occurs not via 'literally false' statements, but 'literally true' statements that, combined, 'implicitly convey' a false assertion." Appellant's Supplemental Brief p. 42, citing *United Industrial Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

Thus, Appellant Nissan contends that deception allegations are necessarily "false impression" allegations and, in its view, still "require specific 'statement[s] of fact,' *Clark v. Olson*, 726 S.W.2d 718, 719-720 (Mo. 1987), and claims 'susceptible of exact knowledge,' *Constance v. B.B.C. Development Co.*, 25 S.W.3d 571, 587 (Mo. App. 2000), which simply may be implicit rather than explicit. And vague advertising taglines, like 'premium' or 'luxury,' are equally incapable of conveying such specific, objectively verifiable claims. So, once again, they are inactionable." Appellant's Supplemental Brief, 42-43.

All of this ignores the definition of deception that includes *any* method, act, use, practice, advertisement or solicitation, so long as it either has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression. "Any" advertisement or solicitation must include those that are true and those that are false. One specifically defined type of deception, deceptive format, is a perfect example. "It is deception for any person in an advertisement or sales presentation to use any format which because of its

overall appearance has the tendency or capacity to mislead consumers." 15 CSR 60-9.030. If the deception is in the format and not in the words, than presumably, the statements can be true. This type of deception occurs when a company uses a nearly identical name or logo to encourage a customer believe they are dealing with another, presumably more reputable, company. Deception is expressly not limited to facts, in that "[d]eception may occur in securing the first contact with a consumer and is not cured even though the true facts *or nature* of the advertisement or offer for sale are subsequently disclosed." 15 CSR 60-9.020(1) (emphasis added).

Finally, if both "deception" and "misrepresentation" require a measurable fact that must be capable of being proved false, than there is no reason for both terms to be included in § 407.020. The unlawful methods of deception and misrepresentation, like each the nine practices proscribed by Section 407.020, are separate and distinct ways by which the MMPA may be violated. Statutory interpretation requires that "each word, clause, sentence, and section of a statute should be given meaning." *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. 2009). Likewise, "a court should not interpret a statute so as to render some phrases mere surplusage." *Id.; See Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. 1998). Accordingly, the unlawful practice of "deception" is, and should remain, distinguishable from the unlawful practice of "misrepresentation." Thus,

even if there were not a "misrepresentation," there may still be a "deception" because one unlawful method articulated in the MMPA is not necessarily subsumed in another.

III. Puffery is Not Now and Should Not Become a Defense to the MMPA.

As the Western District noted, no Missouri Court has ever adopted puffery as a defense to an MMPA claim. Nor should they start now.

A. No MMPA Claim has Ever Been Dismissed in a Missouri Court as Puffery.

The Court below noted that neither party had presented a Missouri case deciding whether the puffery doctrine applies to MMPA cases, Slip Opinion at 16, and the Attorney General agrees that no state case until this one sought to make such a determination.

As discussed above, the puffery doctrine is wholly incongruent with the MMPA and the applicable rules. Over the past five decades, no MMPA case has ever been reversed because the claims upon which liability was found were even the rough equivalent of "puffery." This history and the extraordinary effort to which Defendant would have MMPA jurisprudence go to embrace the puffery doctrine underscores how unnecessary the doctrine really is to enforcement of the MMPA.

None of the case law relied upon by the Western Districts for adoption of a "puffery doctrine" in an MMPA case would require application of that defense to MMPA actions. All of the case law cited by the Court was based on

(1) common law and principles of contracts;[2] (2) federal Lanham Act cases brought by competitor businesses seeking to stop commercial competition;[3] (3) cases from other jurisdictions interpreting other states' laws;[4] and (4) a Missouri state court and a federal case which did not provide any analysis that could be isolated to the MMPA claims contrasted to other pending claims

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[2] *Constance v. B.B.C. Development Co.*, 25 S.W.3d 571 (Mo. App. 2000); *Clark v. Olson*, 726 S.W.2d 718 (Mo. 1987); *Carpenter v. Chrysler Corp.*, 853 S.W.2d 349 (Mo. App. 1993); *Guess v. Lorenz,* 612 S.W.2d 831, 833 (Mo. App. 1981)

[3] *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004); *Carrier Corp. v. Royale Investment Co.*, 366 S.W.346 (Mo. 1963)

[4] *Serbalik v. General Motors Corp.*, 667 N.Y.S.2d 503 (N.Y. App. Div. 1998); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964 (N.D. Cal. 2008), aff'd, 322 F.App'x 489 (9th Cir. 2009); *Rasmussen v. Apple, Inc.*, 27 F.Supp. 3d 1027 (N.D. Cal. 2014); *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791 (W.D. Wis. 2006); *Sova v. Apple Vacations*, 984 F.Supp. 1136 (S.D. Ohio 1997); *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877 (C.D. Cal. 2013); *Anderson v. Bungee International Corp.*, 44 F. Supp. 2d 534 (S.D.N.Y. 1999); *Tietsworth v. Harley Davidson, Inc.*, 677 N.W.2d 233 (Wis. 2004)

and in which no effort to analyze the claims under the terms of the MMPA and its regulations was made.[5]

Defendant directs the Court to a handful of recent, unreported, federal decisions purporting to construe the MMPA which find some representations to equate to puffery and then reject them out-of-hand as such, generally resulting in the dismissal of the case. See Appellant's Supplemental Brief at 41-42. None of the decisions reflect an analysis of the representations under the MMPA and its regulations.

Despite the absence of precedent, the Court below suggested that some cases from other jurisdictions supported the application of the puffery doctrine to MMPA causes of action. First, the Court pointed to *In re General Motors Corporation Anti-Lock Brake Products Liability Litigation*, 966 F.Supp. 1525 (E.D. Mo. 1997), which is troubling because of the absence of any indication that the federal court actually considered the MMPA and its interpretive rules. Slip Opinion 12. This federal District Court opinion reveals only that court's conclusion that "[p]laintiffs' claims under the state

[5] *Morehouse v. Behlmann Pontiac-GMC Truck Services, Inc.*, 31 S.W.3d 55 (Mo. App. 2000); *In re General Motors Corp. Anti-Lock Brake Products Liability Litigation,* 966 F. Supp. 1525 (E.D. Mo. 1997), aff'd sub nom. *Breihl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999)

consumer fraud statutes are based on the same statements relied on for their claims for breach of express warranty and common law fraud. As discussed at length in those sections, these statements are puffery and cannot serve as the basis for liability." 966 F.Supp. at 1537.

When one considers some of the statements in issue in that case, such as GM's representation that "crash-avoidance systems, such as anti-lock brakes, '[are] 99 percent more effective than protective systems'" and "[a] driver is 100 times more likely to benefit from a vehicle's crash-avoidance capabilities (such as anti-lock brakes) than from its crash-survival capabilities (such as air bags)," it is impossible to say these statements could not have been "assertions" under 15 CSR 60-9.010.1. These representations may or may not have been "in accord with the facts," so whether they could have been misrepresentations is unknown because the court failed to engage in that analysis. Instead, the court dismissed these statements out of hand as puffery on the bases that the statements were in publicly-disseminated advertising and "a consumer cannot reasonably believe that there is a test behind the claim." 966 F.Supp. at 1531. Because the decision does not reflect the application of the MMPA, its conclusions are not helpful for this court's analysis.

Similarly, the Court's reliance on *Serbalik v. General Motors Corp.*, 667 N.Y.S.2d 503 (1998), does not provide a sound example for this case. There,

the New York Supreme Court, Appellate Division, characterized a salesman's statements as "nothing more than innocent puffery," but did so after finding that the consumer, "a regular purchaser of Cadillac automobiles for 25 years [who] had been awaiting the release of this particular model, had read about it in automotive magazines and, on the morning of his purchase, went to the dealership intending to order it," and that the consumer had not offered any evidence that the salesman's representations had, in any way, influenced him in making that purchase. 667 N.Y.S.2d at 504. Not only did the *Serbalik* court not consider the MMPA, there is no analysis of how New York's consumer protection statute compares to Missouri's statutes, case law, or regulations.

In Footnote 9 of the Western District's opinion, the Court references an unpublished federal District Court memorandum finding that the puffery doctrine applies to MMPA cases, *Wright v. Bath & Body Works Direct, Inc.*, No. 12–00099–CV–W–DW, 2012 WL 12088132 (W.D.Mo. Oct. 17, 2012). This case, dismissed at the pleadings stage, surrounded allegations of an omission of material fact under the MMPA, a separate and distinct violation with its own regulations. However, the federal court did not evaluate an alleged misrepresentation by the defendant that its home fragrance diffuser was the "world's most innovative home fragrance diffuser, with a state-of-the-art design" under the MMPA and its regulations. The federal court offered no

reasoning for its application of the puffery doctrine to the MMPA claim before it. Therefore, we do not know how that statement was conveyed, whether that statement was consistent with the facts, and whether class members were even aware of it in making their purchasing decisions. It is entirely possible that a court evaluating that case under the MMPA and its regulations – without reference to the puffery doctrine – would reach a similar conclusion as to whether a cause of action was properly pleaded.

Footnote 9 also asserts that the Eastern District Court of Appeals applied the "puffery" doctrine" to the MMPA in *Morehouse,* 31 S.W.3d 55. Defendants assert this in their brief to this Court as well. Appellant's Supplemental Brief at 41; also at 5 ("For fifteen years, Missouri and federal courts have applied the puffery doctrine to MMPA claims…") and at 54-55 ("Indeed, given that the puffery doctrine has now been applied to the MMPA for nearly two decades…"). The application of the puffery doctrine by the appellate court is actually less than clear because the court's opinion discusses both the consumer's common law fraud claim and her MMPA claim, reinstating both causes of action in its reversal of a directed verdict entered by the trial court; its opinion reiterates that, even in a common law fraud action, an actionable "representation can be an expression of opinion or a statement of fact depending upon the circumstances surrounding the representation." 31 S.W.3d at 59, *citing Clark*, 726 S.W.2d at 720.

Accordingly, the court held that representations that the minivan was "in excellent condition," "in good condition," "in tip-top shape" and would be "reliable," could not be discounted as puffery. *Morehouse,* 31 S.W.3d at 59. While the Court of Appeals in Morehouse did find some phrases constituted puffery, the case does not present a clear illustration of a Missouri court applying the "puffery doctrine" to the MMPA and certainly did not focus any of its discussion on the MMPA claims.

Several cases on which the Court relies arise under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) (2000), which allows competitors to sue each other over advertising practices that, because of their alleged falsity or deception, may give one competitor an advantage over the other. None of those cases discuss the MMPA.

Conversely, several cases involving statements similar to those used by Appellant Nissan in this case have been subject to liability under the MMPA. In *Andra v. Left Gate Prop. Holding, Inc.,* 453 S.W.3d 216, 223 (Mo. 2015), this Court allowed an action brought, *inter alia*, under the MMPA to go forward after a seller represented a vehicle "was in excellent condition" while the buyer alleged "the interior cloth was water stained; the dash was scratched; the remote start, heated seats, windshield fluid sprayer, moon roof, and DVD overhead screen did not functioned properly; and the navigational system did not work." As noted above, in *Morehouse* generic

representations were made about the quality of a vehicle that turned out not to be in the represented "tip-top shape" were actionable under the MMPA. 31 S.W.3d at 59. Finally, in *Grabinski v. Blue Springs Ford Sales, Inc.,* the 8th Circuit determined that a salesman stating a vehicle was "very nice" was an actionable representation under the MMPA. 136 F.3d 565, 569 (8th Cir. 1998), citing *Carpenter v. Chrysler Corp.,* 853 S.W.2d 346, 358 (Mo. App.1993) ("A given representation can be an expression of opinion or a statement of fact depending upon the circumstances surrounding the representation.").

B. Adding the Puffery Doctrine as a Defense to MMPA Claims Will Allow For More Unlawful Business Practices.

The puffery doctrine does not offer any more of a "bright line" for liability than adherence to the MMPA's existing proscriptions and rules because even instances of possible puffery varies based on context.

An illustration of how a term traditionally characterized as puffery can constitute actionable misrepresentation or deception is the word "easy." In *F.T.C. v. Trudeau*, the term "easy" was used to describe a diet plan set forth in a book the defendant was selling. 579 F.3d 754 (7th Cir. 2009). Trudeau argued the term was mere puffery, based on the same word being construed as puffery in an earlier diet plan decision. In distinguishing that earlier decision, the Court of Appeals for the 7th Circuit explained that it had "examined what the diet actually required and then determined, under those

circumstances, that the advertised claim that the diet was easy was not misleading," in stark contrast to the plan Trudeau was now characterizing as "easy." The court also observed that, [g]iven the large number of weight loss programs on the market, we think a reasonable person would rely on statements about the relative ease of the program being marketed." *Id.*at 765. The court further warned that "subjective, comparative terms are not always purely innocuous." *Id.* at 766.

One of the hazards of creating a puffery doctrine is revealed in the Court's reasoning below, as well as in Appellant Nissan's brief, which illustrate an effort to deconstruct the underlying transactions to isolated words and phrases that are then equated to similar words or phrases found in unrelated cases in which those words or similar phrases were deemed to be "puffery" and, on that basis and without further analysis, remove those advertisements from further consideration of violations of the MMPA. The Court's effort to identify cases in which some particular terms, like "luxury" and "quality engineered" and "uncompromising" and "premium" illustrate the misguided effort. Slip Opinion at 12-14.

However, when the MMPA is applied to the advertisement or sale of merchandise, the statements along with any other conduct that induced a consumer to purchase, or even which just induced the consumer to visit the store, are not to be viewed in isolation from each other. Rather, one should

consider the entire impact on the consumer's being subjected to all of the representations, auditory and visual, so as to appraise the entirety of the transaction, because it is the totality of that experience that likely induced the consumer to make their decision to purchase. See, e.g. 15 CSR 60-9.030.

This general principle is long-standing in the application of the MMPA. In *Areaco Investment Co.*, the Court of Appeals for the Eastern District observed that

> A decision to purchase a membership in Rocky Ridge would not normally turn on a single inducement. It is the overall package that defendant is attempting to make attractive. If he does so by misrepresentations or misleading information, he is engaging in an unlawful practice. Memberships sold by such devices result in money being acquired by defendant by means declared unlawful under the statute.

756 S.W.2d at 637.

The need to consider the entirety of an advertisement and the consumer's experience in a transaction is consistent with federal and state consumer protection across the country. *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976) ("The parties agree that the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context."); *FTC v.*

Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) ("It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately.")

As Appellant Nissan has also done in its brief, the Court below sought to identify other cases (and generally *not* cases brought under the MMPA) where the particular words or phrases were found to constitute puffery and held not actionable. Such an exercise, while possibly informative as to how consumers might understand similar words and phrases on some contexts, is prone to over-simplify the analysis of deception by simply exempting lists and categories of "magic words" that can be used without concern as to their impact on consumers in any transaction. The identification of a word or phrase as puffery in one instance should not give a seller carte blanche on its use in other cases. But that is extent of reasoning presented in the Court's opinion and the arguments raised by the Defendant in this case.

Situations abound in which sellers use terms that contain, in whole or in part, terms that would be subject to the puffery doctrine in other cases but which should not be exempt from the MMPA. Auto dealers may represent vehicles are "in perfect shape" and could "make it to 400,000 miles" if the consumer took care of it, when the vehicle was actually two vehicles welded together and had a broken heater, power locks, fuel pump, and a damaged

radiator, and was using 4 quarts of oil in the first 120 miles (*Krysa v. Payne,* 176 S.W.3d 150 (Mo. App. 2005), or they may represent that vehicles are in "excellent condition," when in fact the interior cloth is water stained, the dash is scratched, and other features do not function properly, as was the case in *Andra*, 453 S.W.3d at 223. Under this Court's definition, many of the particular phrases or topics could be considered non-actionable puffery, never being subjected to any analysis under the MMPA and its regulations.

Therefore, there is no need for a "puffery" exception to the MMPA through the adoption of the puffery doctrine.

IV. The Western District Erred by Adding a Reliance or Reasonable Consumer Standard to the MMPA.

In a footnote to its opinion, the Court below stated that "under the MMPA, plaintiffs need not show individualized reliance upon alleged misrepresentations, but they cannot base their claims on alleged misrepresentations upon which no reasonable consumer would rely." Slip Opinion at N.8. The Court's reference appears to invoke a "reasonable person" reliance standard in the application of the MMPA, which is both unnecessary under the terms of the statute and may disserve many consumers for whom the MMPA provides important protections. The practical implication of such a standard would result in courts evaluating each and every consumer's experience individually to see if a "reasonable consumer" would have relied on the same representation. Yet many consumers are particularly vulnerable, often due to the seller's bad acts. It also is contrary to the legislative intent behind the MMPA.

Debate over whether a "reasonable person" standard should be applied to consumer protection laws was prevalent in the 1980's, and was the prevailing reason the Missouri legislature amended the MMPA in 1986. See, *Telco Directory Publishing*, 863 S.W.2d at 602 and *Concurring Opinion of Judge Thomas* at 603-604. This amendment was made after the FTC had, in 1984, adopted its Policy Statement on Deception in 1984, which established

the "reasonable person" standard, along with a "materiality" standard, in its interpretation of federal law under the FTC Act. Federal Trade Commission Policy Statement on Deception, 103 F.T.C. 174 (1984) (*appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-66 (1984). The Missouri legislature removed the ability of defendants to claim their conduct complied with the FTC's rules and decisions as a defense to an MMPA action and authorized the Attorney General to promulgate his own regulations interpreting the prohibitions of the MMPA. The Attorney General subsequently adopted the "capacity to deceive" standard, which had been the standard prior to the FTC's 1984 Policy Statement. The "capacity to deceive" standard has been codified in Missouri's Rules since 1990.

Consideration of how a consumer behaving "reasonably" would understand or react to advertising works well for the majority, but the MMPA is intended to reach all lines of commerce and the myriad of consumers across Missouri; what may be viewed as "reasonable" in some settings would be highly unreasonable in other circumstances. Consumers find themselves in circumstances in which they make hasty decisions or are more vulnerable to deceptive practices or misrepresentations which, in other circumstances, they may have been more cautious or better scrutinized a seller's claims. Indeed, many deceptive practices and scams rely on reaching the elderly, vulnerable, or putting consumers in positions to make poor

decisions, such as high pressure sales tactics. In addition to the surrounding physical circumstances, consumers are themselves different in how they process and understand information and advertisements.

This is why, example, the Price Gouging Rule specifically prohibits sellers from taking advantage of physical or mental impairment or hardship caused by extreme temporary conditions, 15 CSR 60-8.030, and why it is an unfair practice to take advantage of an unequal bargaining position and obtain a contract which results in a gross disparity of values exchanged. 15 CSR 60-9.080. Importantly, it is an unfair practice for a merchant to violate the duty of good faith or to fail to act in good faith. 15 CSR 60-9.040. Missouri Courts have said consumers are assured by the MMPA that merchants will act in good faith in all transactions. "The entire thrust of the Merchandising Practices Act is that consumers rely upon the fair dealing of those selling merchandise and services. When that fair dealing obligation has been breached, the customer may, in the discretion of the court, rescind the transaction. It is presumed from the statute that the customer has relied upon the obligation of fair dealing in making his purchase." *Areaco Investment Co.*, 756 S.W.2d at 637.

A consumer's extra gullibility should not offer an exception to that duty. Indeed, some states have adopted a "least sophisticated consumer" standard for assessing possible deception, such as Texas's capacity to deceive

an "ignorant, unthinking, or credulous person." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 480 (Tex. 1995); *Spradling v. Williams*, 566 S.W.2d 561, 562 (Tex. 1978).

Instead, Missouri focuses on the seller's actions or inactions rather than the consumer's understanding. The focus of the MMPA is so completely on the seller, that the consumer is never even mentioned in §407.020. The responsibility for truthfulness and accuracy in advertising has been placed on sellers by the statute's clear language, not on the reasonableness of the consumer. For example the definition of "material fact," which is an element of the offense of omission, suppression or concealment of fact, specifies that any fact is deemed material if "the seller knows [it] would be likely to induce a particular consumer to manifest his/her assent," regardless of whether that consumer is "reasonable." 15 CSR 60-9.020(1)(C). Furthermore, the law explicitly states that reliance is not an element of either deception or misrepresentation. 15 CSR 60-9.020(2); 15 CSR 60-9.070(2). *See also Plubell v. Merck & Co.,* 289 S.W.3d 707, 714 (Mo. App. 2009)*; Schuchmann,* 199 S.W.3d at 232 (there is a "plethora of case law holding that the MMPA serves as a supplement to the definition of common law fraud; it eliminates the need to prove an intent to defraud or reliance.); *Independence Dodge, Inc.*, 494 SW2d 362; *State ex rel. Ashcroft v. Marketing Unlimited*, 613 SW2d 440 (Mo. App. 1981); *Areaco Investment Co.,* 756 SW2d 633.

This unique history of the MMPA and its divergence from the FTC's standard for deception also distinguishes Missouri law from the many "Little FTC Acts" in other states and their own interpretation of the deception standard because, like Missouri before 1986, many of them have statutory terms essentially harmonizing their laws to the FTC's Act and FTC interpretive policies. This distinction means that, while Missouri courts may look to federal case law due to its similarity, they are not bound by it. Consequently, while the FTC and some states may have a reliance element (or even recognize the puffery doctrine as limiting the reach of their consumer protection laws, as noted by Appellant Nissan's, Appellant's Supplemental Brief at 55-56), there is no need for Missouri to do so.

CONCLUSION

It is hard to imagine that a law passed intended to "preserve fundamental honesty, fair play and right dealings in public transactions" might have also intended to pre-emptively carve out from its reach any amount of advertising to prospective purchasers because it states an opinion rather than a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." That is what the Western District did in this case, making a judicial pronouncement that any advertising which may be construed as puffery is exempt from liability under the MMPA. "The entire thrust of the Merchandising Practices Act is that consumers rely upon the fair dealing of those selling merchandise and services." *Areaco*, 756 S.W.2d at 637. The Western District decision also shifts the focus from the party making misrepresentations and using deception to the consumer, instituting a "reasonable consumer" standard of reliance contrary to statute, regulations, and long established case law.

The Attorney General urges this Court to consider, when making its decision on the validity of the judgment, the impact that narrow definitions like the ones imposed by the Western District will have on consumers. Therefore, the Attorney General requests that this Court refrain from altering the definition of misrepresentation or deception to add an exclusion

for puffery. Additionally, the Attorney General asks this Court to refuse to add a reliance, or even a reasonable consumer, element to the MMPA.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on September 12, 2016, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, with copies automatically generated to all counsel of record. I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6984 words as counted using Microsoft Word.

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