Appeal No. SC95707

IN THE SUPREME COURT OF MISSOURI

ROBERT HURST
Plaintiff/Respondent,

v.

NISSAN NORTH AMERICA, INC.,
Defendant/Appellant.

SUBSTITUTE BRIEF OF APPELLANT

Appeal from the Circuit Court of Jackson County, Missouri, at Independence
Honorable Jack R. Grate, Jr.
Division 17
Circuit Court Case No. 0916-CV38388-02
Court of Appeals, Western District Case No. WD78665

John W. Cowden MO # 21447
David M. Eisenberg MO # 54767
Baker Sterchi Cowden & Rice, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, MO 64108-2504
Phone: (816) 471-2121
Fax: (816) 472-0288

Peter J. Brennan (*pro hac vice*)
Zachary C. Schauf (*pro hac vice*)
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654
Phone: (312) 222-9350
Fax: (312) 527-0484

Attorneys for Defendant/Appellant Nissan North America, Inc.

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VERDICT, BECAUSE PLAINTIFF FAILED TO ESTABLISH A SUBMISSIBLE CASE THAT NNA MADE AN ACTIONABLE MISREPRESENTATION IN CONNECTION WITH THE FX'S ADVERTISING, IN THAT THE REPRESENTATIONS CITED BY PLAINTIFF—THAT THE FX WAS "LUXURY," "PREMIUM," OR THE LIKE—WERE NOT ACTIONABLE FACTUAL STATEMENTS, MUCH LESS REPRESENTATIONS THAT THE FX COULD NEVER DEVELOP A DEFECT, AS REQUIRED FOR LIABILITY UNDER THE MMPA; INSTEAD, THEY WERE ONLY INACTIONABLE PUFFERY, AND NONE OF THE OTHER PURPORTED MISREPRESENTATIONS INVOKED BY PLAINTIFF COULD ESTABLISH A SUBMISSIBLE CASE BY THE CLASS.

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JURISDICTIONAL STATEMENT

This appeal is timely filed, and seeks review and reversal of the trial court's final order and judgment in Case No. 0916-CV38388-02 in the Circuit Court of Jackson County, at Independence, entered March 13, 2015. The Court of Appeals, Western District, had jurisdiction under R.S. Mo. § 512.020, and this case was within the general appellate jurisdiction of that court pursuant to Article V, Section 3 of the Missouri Constitution. The case was properly before the Court of Appeals as it does not invoke the validity of any treaty or statute of the United States, and Nissan North America, Inc. ("NNA") does not challenge the validity on its face of any statute or provision of the Constitution of this State, or any other matter within the exclusive or original jurisdiction of the Supreme Court of Missouri.

The Court of Appeals handed down its opinion ("Op.") on March 22, 2016. *See* A21-38.[1] The opinion reversed the circuit court's judgment

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[1] "A___" is the required Appendix; "PX___" are Plaintiff's trial exhibits; "DX___" are NNA's trial exhibits; "T___" is the trial transcript contained in Volume I of the Record on Appeal; "L.F.___" is the Legal File; "S.L.F.___" is the Supplemental Legal File; "W.D. Resp. Br." is Respondents' Brief filed in the Court of Appeals, Western District, on December 7, 2015;

and remanded for the circuit court to enter a judgment notwithstanding the verdict in favor of NNA. Op. 18, A38. After the Court of Appeals denied Respondent's Application for Transfer, Respondent filed an Application for Transfer with the Supreme Court. By Order of the Supreme Court dated June 28, 2016, the Application was granted and the matter was ordered transferred. Mandate was issued by the Court of Appeals on June 29, 2016, ordering that the cause be transferred to the Supreme Court accordingly.

"App." is Plaintiff's Application for Transfer After Opinion filed in this Court on May 16, 2016; "AG Br." is the Amicus Suggestions of the Attorney General in Support of Transfer filed in this Court on May 19, 2016.

SUMMARY OF THE CASE

When merchants make actionable misrepresentations, the Missouri Merchandising Practices Act ("MMPA") allows injured consumers to recover for losses that result. The judgment here, however, perverts those beneficial purposes by awarding a $2.4 million windfall, even though Plaintiff has never identified an actionable *misrepresentation* and the class (like Plaintiff himself) incurred no *loss*. The Court of Appeals reversed on the first ground and did not reach the second. Both compel judgment for NNA.

Here is the summary version of this case. When certain Infiniti FX vehicles developed dashboard "bubbling," NNA replaced scores of dashboards in Missouri under its four-year warranty, under an extended warranty it voluntarily offered, and via "goodwill." T1097:21-23, T1106:2; L.F.844-857; DX999. Virtually every Missouri owner who experienced bubbling received a no-cost replacement, including Plaintiff himself. *See infra* at 12-13. Plaintiff nevertheless pressed a class action under the MMPA, and obtained a judgment that requires NNA to pay an additional $2,000 to him and to each of the 325 other class members ($652,000 total), plus $1.8 million in attorney's fees. A6. Plaintiff alleged that NNA made a misrepresentation when it advertised the FX as "premium" (or "luxury," or similar). The claim was *not* that the FX failed

generally to perform as a premium or luxury vehicle; to the contrary, owners repeatedly praised the vehicle, and they enjoyed its high-performance transportation throughout the decade in which many owned the car. *Infra* at 13. Instead, Plaintiff's theory was that NNA's use of words like "premium" promised a vehicle that could never develop a defect. *E.g.*, T336:18-22. Via this theory, Plaintiff procured $2,000 each for a class composed almost entirely of owners who either *never* experienced bubbling or who, like Plaintiff, have *already* received free new dashboards at NNA's expense. *Infra* at 21-22, 24.

NNA of course wishes the bubbling issue had never occurred, and it has worked to address the problem. But at the end of the day, NNA's engineering and customer-service practices are not on trial. The dispositive question on appeal is whether NNA represented to customers—expressly, or impliedly—that the FX could never develop a defect. The answer to that question is no, as the Court of Appeals properly held (Point I). NNA's use of the term "premium," or similar, in mass-market advertising brochures simply did not promise the FX would remain forever defect-free. Indeed, the Court of Appeals followed decades of precedent—from this Court and nationwide—rejecting attempts, just like Plaintiff's, to obtain windfall recoveries based on similarly vague taglines. "Puffery" has become the catchall term, but this is just

shorthand for the commonsense notion that such vague advertising slogans do not convey objective guarantees.

Unable to prevail under settled law, Plaintiff tries to upend it. He sought transfer by posing the question whether the "puffery doctrine" applies to the MMPA; Plaintiff says it should not, and he accuses the Court of Appeals of creating "new law" by applying "puffery" to the MMPA "for the first time." App. 3, 5. But this argument is as irrelevant as it is meritless. The Court of Appeals *disclaimed* broad pronouncements over whether puffery applies to the MMPA, and this Court can do the same. What dooms Plaintiff's position is his inability to identify any representation guaranteeing the FX would not develop any defects. In any event, Plaintiff's argument fails. For 15 years, Missouri and federal courts have applied the puffery doctrine to MMPA claims, without the dire consequences hypothesized by Plaintiff. So too, *every* state and the Federal Trade Commission has a similar statute, all of which pursue the same consumer-protective polices, yet *not one* has reached the result Plaintiff urges. This Court should reject Plaintiff's unprecedented argument, which would make Missouri a national outlier, and turn every merchant that engages in run-of-the-mill advertising into a lifetime guarantor—eliminating the ability to craft generous, but nonetheless limited, warranties like NNA's.

The Court of Appeals correctly reversed on this ground, but equally dispositive is that Plaintiff failed to established any "ascertainable loss" by the class (Point II). Again, this is not a class of owners with bubbled dashboards; rather, almost exclusively, the class members never experienced bubbling or, like Plaintiff, already received free replacements. *Infra* at 21-22, 24. The *only* way Plaintiff avoided early dismissal was by promising the trial and appellate courts he would prove a "stigma" theory—that "the mere presence of the possible defect … diminishes the vehicle's value, regardless of whether the defect has actually manifested." *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 78 (Mo. App. W.D. 2011).

Plaintiff failed to deliver. If "stigma" existed, it would be child's play for an expert to identify. Plaintiff, however, did not proffer an expert to testify to this point. He could not do so because his expert *admitted* at his deposition that the class was filled with uninjured members. T1354:2-14. Nor did Plaintiff present any other competent evidence of "stigma." The result of the judgment below is thus that NNA must pay $2,000 to hundreds of owners who suffered no loss, even after NNA has *already* paid for free dashboards for many of them. L.F.844-857; DX999.

The Court can and should resolve the case on one of these grounds, which dictate judgment for NNA, but further flaws establish the

trial court's judgment cannot stand. The jury could have seen through the meritless claims here, but Plaintiff triggered error in the conduct of the trial and in class certification. The trial court incorrectly barred NNA from presenting the admission by Plaintiff's expert that Plaintiff's "stigma" theory was false (Point III). It improperly allowed testimony by many non-class members who—atypically—had experienced bubbling but had not received a free replacement dashboard, permitting Plaintiff to paint a misleading picture of the class (Point IV). It incorrectly permitted owners to testify about alleged future reductions in the value of their cars based on sheer guesswork (Point V). And the verdict director was an impermissible "roving commission" that failed to inform jurors of the requisites for liability (Point VI). At minimum, a new trial is required.

Indeed, the trial showed that the class should never have been certified, given Plaintiff's evidence, and that in the alternative, the court should have granted NNA's motion to decertify. In reality, the class here is comprised of myriad differently situated owners—(1) owners who experienced bubbling, and those who did not; (2) the overwhelming majority of owners who received a free new dashboard to remedy any bubbling, and the handful that did not; (3) original owners and secondary purchasers; and (4) those who received the very different advertising that appeared across different model years, among others.

Plaintiff obtained a favorable certification decision from the Court of Appeals by promising his "stigma" theory would render these differences irrelevant. But when Plaintiff was unable to support this theory, his strategy was to invite the jury to hold NNA liable to the *entire* class based on evidence that at best applied to only a *sliver*—supplemented with testimony from non-class members that did not apply to the class *at all*. That abuses the class action, which is reserved for cases in which classwide evidence predominates (Point VII). Missouri law and the due process clauses of the Missouri and federal constitutions do not permit the use of anecdotal evidence to hold NNA liable to hundreds of uninjured class members (Point VIII).

STATEMENT OF FACTS

A. Factual history.

1. The Infiniti FX line and NNA's warranty.

Infiniti is a high-end automobile brand manufactured by NNA. PX284 at 55:11-16; T1015:5-7. Beginning in 2003, one of Infiniti's offerings was a "crossover" sport utility vehicle called the FX. T1015:1-

4.[2] The first generation, at issue here, ceased production after 2008. T1126:14-15.

High-end vehicles like the FX offer more sophisticated features and greater amenities—leather seats, automatic seat adjustment, rearview video monitors, and so on. T1015:14-23. Such vehicles do not and cannot offer a promise the vehicle will be problem-free. PX284 at 74:9-75:4. Every automobile is a massive logistical challenge, consisting of thousands of parts produced by a host of suppliers, sub-suppliers, and sub-sub-suppliers. T995:12-997:4. Higher end vehicles are generally more complicated than standard automobiles, and thus there are more chances for problems. T1016:9-18.

Although NNA could not guarantee the FX would necessarily be forever problem-free, NNA provided a warranty with every new FX. PX284 at 74:15-24. That warranty embodied NNA's strong, but not limitless, commitment to resolving problems that might arise. *Id.* The warranty provided coverage for four years or 60,000 miles. T894:3-8. NNA's sales brochures prominently identified that warranty. PX71 at 40; PX72 at 44; PX73 at 43; PX74 at 45; PX75 at 46; PX76 at 47.

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[2] The FX line included the FX35 and FX45. This brief refers to both together as the "FX."

2. Dashboard bubbling in certain FX vehicles.

In September 2005, NNA began to receive warranty claims based on a "bubbling" issue in the dashboards of FX vehicles in the 2004 and later model years. T1113:21-24; DX999. The problem did not arise in all FX vehicles, or even a majority, but over time it did occur in a nontrivial number. T1167:13-15; DX999.

NNA investigated the problem, developed countermeasures, and offered a voluntary warranty extension and reimbursement program. NNA's investigation traced the problem to a change in the sub-supplier for the FX's dashboard cover. T1025:4-5, T1131:13-15. For the 2004 model year, the producer of the FX's "cockpit," Calsonic Kansei, switched the dashboard supplier to Mitsui Chemical ("Mitsui"). T1131:13-15. Mitsui dashboards, it turned out, experienced a significant rate of bubbling under hot and humid conditions. T1051:3-6.[3]

After identifying the issue, NNA set to work on developing a "countermeasure." T1051:14-1052:6. The premise for NNA's first countermeasure, established in 2006, was that the bubbling resulted

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[3] Although the manufacturing change that caused the bubbling issue occurred in the 2004 model year, Plaintiff obtained the certification of a class including *2003* FX vehicles. L.F.48; *see infra* at 96 n.23.

from excess water during manufacturing. T1057:6-16; DX504 at NNA99501. The countermeasure set new standards that required Mitsui to limit the water allowed during manufacturing, to increase furnace temperature, and to check the dashboard's weight. T1057:17-1059:2; DX504 at NNA99462.

NNA installed its first countermeasure—"Countermeasure 1"—in the fall of 2006 on new FX vehicles for the 2007 and 2008 model years. T1225:3-7. In summer 2007, NNA conducted an effectiveness check. T1122:19-24. It did not reveal any bubbling issues in these dashboards. T1126:22-25. But a second check, performed in 2008, revealed that a nontrivial number had experienced bubbling. T1127:4-7.

As a result, NNA developed a second countermeasure for use in future replacements.[4] NNA switched suppliers to Sanyo Chemical Industries, whose dashboards had shown strong field performance, without similar issues, in Infiniti's highest-volume vehicle, the G35. T1148:22-1149:25. These "Countermeasure 2" dashboards came into service in July 2009. T1160:14-15.

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[4] Production of new first generation FX vehicles had now ceased. T1126:14-15.

The change was dramatic. The original dashboards had experienced bubbling at a rate of 18.8% after four years. T1167:13-15. The rate for Countermeasure 2 dashboards was 0.2%—or just 83 replacements of the 45,000 dashboards installed. T1172:8-12, T1173:6-11; DX1082. NNA made another change, in 2012, to further improve performance by adding an "anti-hydrolysis" agent. T1191:10-16.

Meanwhile, given the expiration of the original warranty on the 2004 FX vehicles, NNA voluntarily extended the dashboard's warranty. DX525; DX526. NNA's field quality assurance department decided to seek approval for such a measure in August 2009, DX526; final approval came in early 2010, PX278 at 34:22-25; and NNA made the announcement in a March 2010 letter, PX3. The extended warranty increased coverage to eight years and unlimited miles. PX3. It also offered reimbursement to any customer who had paid to repair or replace a dashboard. *Id.* And NNA provided a free loaner car during warranty repairs, so owners paid nothing out of pocket. T461:8-10, T1349:15-19. Even when warranty coverage did not apply, NNA replaced many dashboards via "goodwill"—used to promote customer satisfaction when NNA had no warranty obligation. T1097:23-T1098:4.

These measures resolved the bubbling issues for the overwhelming majority of Missouri owners. Most never experienced bubbling.

T1167:13-15, T1232:22-T1233:1. Those who did generally received a free replacement dashboard—under the original warranty, the extended warranty, or goodwill—and experienced no recurrence; only a small number experienced bubbling without receiving a free replacement. T525:8-16, T538:11-16, T884:9-18 (only two such vehicles); T1211:3-10 (400-500 dashboard replacements in Missouri).

Moreover, the bubbling issue did not affect these vehicles' overall performance or durability: Owners praised the FX as a "great vehicle" in terms of "drivability, performance, handling," and many kept the vehicle for ten years and hundreds of thousands of miles. T530:14-T531:10; *see* T604:25-T605:2, T610:12-16, T619:23-25, T646:23-T647:11, T892:2-24. Indeed, even the owner who would become this suit's sole named Plaintiff, Robert Hurst, agreed that the FX "looks like a luxury vehicle and it drives like a luxury vehicle." PX283 at 32:9-34:8.

B. Procedural history.

1. Plaintiff's initial attempt at class certification.

On December 14, 2009 the petition in this case was filed on behalf of five named plaintiffs as representatives of a putative statewide class. L.F.1. The petition sought damages based on three counts: (1) breach of express warranty; (2) breach of the implied warranty of merchantability; and (3) violations of the MMPA. *Hope*, 353 S.W.3d at 73. Under the

MMPA count—the only one pursued at trial—the petition alleged both that NNA had made affirmative misrepresentations of fact "regarding the quality and future performance" of the FX, and that NNA had omitted material facts regarding the same. L.F.53-55.

Plaintiff moved, pursuant to Rule 52.08 and R.S. Mo. § 407.025.3, to certify a class consisting of "[a]ll persons who purchased and currently own an Infiniti FX35 or FX45, model years 2003 through 2007 inclusive, in the State of Missouri, with the dashboard installed as original manufacturer's equipment." *Hope*, 353 S.W.3d at 73 (quoting trial court). This class included every FX owner statewide for the designated model years, many of whom either did not experience bubbling or received a free replacement from NNA. *Id.* at 80. And the class swept in not just original purchasers from Infiniti-branded dealerships, but also every person who had bought a used FX vehicle, who need not have ever seen marketing by NNA. *Id.* at 73. The trial court certified the class. *Id.*

2. The Court of Appeals' holding that a limited MMPA class could proceed under a "stigma" theory.

The Court of Appeals granted NNA's petition for interlocutory appeal. *Id.* at 72. It reversed the certification of the express and implied warranty claims on the ground that common issues did not

"substantially predominate" over individual issues, as Rule 52.08 requires. *Id.* at 92.

As to the MMPA, the Court of Appeals held that the claim could proceed as a class, but only based on a narrow "stigma" theory proffered by Plaintiff. The court agreed with NNA that a class "that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *Id.* at 77 (quotation marks omitted). That rule created an obvious problem given that "the class definition encompasses many owners who have not experienced dashboard bubbling" or had received a free replacement. *Id.* at 80. The only reason the court did not find this problem to be disqualifying was because Plaintiff represented he would pursue a "stigma" or "diminished value" theory: that "the mere presence of the possible defect … diminishes the vehicle's value, regardless of whether the defect has actually manifested, because the defect places a stigma upon *all* FX Vehicles." *Id.* at 78.

The court relied on this stigma theory to conclude that common questions "substantially predominate[d]" on the MMPA claim, at least in part. *Id.* at 92. The court determined that the "non-scienter claims"—that is, the affirmative misrepresentation claims—relied on "evidence … common to the class as a whole, to the extent we include only original purchasers." *Id.* at 84. These claims were about "only Nissan's conduct,

not its knowledge," and the court found there was no need for "individualized inquiries into Nissan's representations to the original purchasers." *Id.* The court warned that "[b]ecause some owners presumably are secondary owners who did not purchase their vehicles through Nissan's distribution system, the class definition would require adjustment so as not to include such owners." *Id.* By contrast, the omissions claims were inappropriate for Plaintiff's proposed class because they *did* require individualized proof of NNA's knowledge: They required proof that NNA "was aware of the alleged defect … when each putative class member purchased their FX," which required "an individual determination." *Id.* Plaintiff would eventually "abandon[]" these claims at trial, in response to NNA's motion for directed verdict. T956.

As to the MMPA's loss requirement, the court again found that classwide issues predominated based on Plaintiff's representation that he "can show that there is an ascertainable loss … from the alleged stigma." *Hope*, 353 S.W.3d at 84. The court did not "speculate on whether" Plaintiff could "objectively prove" this theory. *Id.* at 80.

3. Remand and trial.

Class certification. On remand, Plaintiff proposed, and the trial court certified, the following class:

> All persons in the State of Missouri who purchased in the State of Missouri an Infiniti FX35 or FX45 model years 2003 through 2008 inclusive ("Subject Vehicle"), through the distribution system of Nissan North America, Inc., and who owned the Subject Vehicle on December 14, 2009, with the dashboard installed as original manufacturer's equipment.

L.F.48-49; *see* L.F.15. The trial court permitted this definition to include both new-car purchasers and secondary purchasers, so long as they had bought from a Nissan- or Infiniti-branded dealer—over NNA's objection that the Court of Appeals' opinion did not permit the inclusion of any secondary purchasers. L.F.93, L.F.195.

Trial—misrepresentation. Given Plaintiff's decision to abandon his omissions claims, the only way forward was to prove NNA had made actionable affirmative misrepresentations in connection with the FX's advertising—that is, untrue statements of "material fact," R.S. Mo. § 407.020.1, or assertions tending to convey a "false impression" concerning a fact, 15 CSR § 60-9.020(1).

The class could not rely on testimony from the sole named Plaintiff, Mr. Hurst: he testified that he had not "receive[d] anything in writing from any source" that he "considered to be false or misleading" regarding the FX. PX283 at 39:25-40:4. Witness Shirley McMillan illustrates the

testimony Plaintiff elicited instead. She opined that her "experience with [her] dashboard was" not "consistent with the expectations that [she] had for the vehicle" after reviewing the FX's marketing brochures and forming the impression the FX was "luxurious." T593:8-T594:9, T610:5-9; *see also* T456:21-T457:9 (similar testimony by non-class-member Ginger Bridger).

The FX's marketing materials were the focus of Plaintiff's misrepresentation claim. The statements Plaintiff invoked before the jury and on appeal included, for example, that the FX was "[d]esigned to attract a glance. That evolves into a stare. And provokes a desire," and that "you can't tear your eyes from" the FX, with the result that "[n]ow it's double parked in your central nervous system." PX286 at NNA122869, NNA122872; *see* T944:1-8. Indeed, in closing Plaintiff asked the jury to hold NNA liable based on the product line's very name—because "Infiniti means forever." T1464:7. Plaintiff also invoked various other statements from NNA's marketing brochures. Here is a representative sample of the statements Plaintiff relied on in opening and closing:

- The FX was a "premium" vehicle, and "premium automotive machinery is only part of a premium automotive experience." T336:18-20, T1407:9-16, T1416:4-6; *see* PX71 at 40.

- In the FX, there was "room for everything except compromise," and the FX was a "unique blend of uncompromising style and luxury." T1415:21-25, T1471:7-10; *see* PX286 at NNA00121309.
- NNA had a "commitment to offer a superior product representing excellent value" and "to ensure total satisfaction for our customers." T1467:21-24; *see* PX71 at 40.

These statements did not apply to the entire class: NNA's marketing materials changed over time, and the just-quoted statements—concerning the FX's "premium" and "uncompromising" nature, and NNA's commitment to customer "satisfaction"—appear only in the brochures for the 2003-2005 FX models, even though the class also included the 2006-2008 model years and the brochures substantially changed. PX284 at 60:14-20.[5] The 2006-2008 brochures do not contain equivalent statements. *See generally* PX74, PX75, PX76. Indeed, from the latter period, the only statement invoked by Plaintiff in opening or

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[5] In particular, the statements cited by Plaintiff came predominantly from the brochure page describing the FX's ownership experience and warranty. PX71 at 40; PX72 at 44; PX73 at 43. That section substantially changed in the later brochures. PX74 at 44-45; PX75 at 45-46; PX76 at 46-47.

closing was a press release regarding the 2006 model, which stated that the FX "combin[ed] design and performance in one luxurious package," T1470:5-7; PX286 at NNA121188, and there was no evidence any class member ever saw or heard of this press release.

Although Plaintiff had succeeded in including certain secondary purchasers in the class, he did not introduce evidence that any secondary purchaser in the class had ever received the brochures containing the above-quoted statements. Instead, Plaintiff offered only testimony from a *non*-class member, Ginger Bridger, that she had requested and received FX brochures before purchasing a used FX vehicle at a Toyota dealer. T431:15-24, T435:20-T436:8, T458:16-19.

Trial—ascertainable loss. Plaintiff had relied on his "stigma" theory to convince the Court of Appeals to certify an MMPA class, but he did not present any evidence to support this theory at trial. *Hope*, 353 S.W.3d at 84. Plaintiff presented no expert testimony showing that FX vehicles in the relevant model years had decreased in value due to "stigma." Plaintiff could not present such testimony because his then-designated expert, Dr. Michael Kelsay, testified at his deposition that many class members had *not* suffered any loss:

Q: "And so for all the people who have had their vehicle repaired with the new dashboard, you believe they have been made whole, correct?"

A: "And we're simply talking about Missouri people where there has been no reoccurrence?"

Q: "Right."

A: "Correct."

Q: "And you're not suggesting those people should get any additional amount of money, correct?"

A: "That's correct."

T1354:2-14 (NNA's proffer). When NNA sought to introduce Dr. Kelsay's testimony at trial, Plaintiff successfully opposed it. T43:4-6.

Plaintiff instead relied on anecdotal testimony from a handful of owners who, atypically, had experienced bubbling but had not received a free replacement under warranty or goodwill. *See, e.g.*, T526:18-21, T887:11-20. This testimony did not address Plaintiff's stigma theory, which posited a reduction in value "*regardless* of whether the defect has actually manifested" or the owner has received a free replacement. *Hope*, 353 S.W.3d at 78. Moreover, even as to these owners, Plaintiff faced another problem: He could only identify *two* such owners in the class. T525:8-16, T527:5-9, T538:11-16, T883:14-17. So Plaintiff sought to

make this scenario appear more representative by introducing, over NNA's objection, testimony from non-class members. T644:3-6, T646:11-14, T838:7-10, T841:18-21, T853:9-11, T856:1-5.

Plaintiff's only other loss evidence was testimony from one husband and wife—the McMillans. They received a free new dashboard from NNA, and they testified that they "love[d] the Infiniti" and "would like to have another one some day"—praising its "drivability, … performance, … sporty look and everything about it." T604:25-T605:2, T609:24-T610:4, T619:23-25. Nonetheless, they opined that the now-remedied bubbling would reduce the vehicle's value when, in the future, they ultimately decided to sell it. T607:22-T608:2, T619:17-T620:3. Over NNA's objection, the trial court permitted this testimony on the ground that "the law in Missouri" is that "we can each testify to the value of our own personalty." T526:8-10. That couple did not, and could not, testify about the value of other FX vehicles in Missouri that had received free replacement dashboards. *See generally* T588:16-T620:15. Moreover, Plaintiff introduced no testimony at all—even anecdotal—about the category of owners who made up most of the class: owners whose vehicles had *never* experienced bubbling.

NNA moved for a directed verdict, but the trial court denied the motion, except regarding the omissions claim Plaintiff had abandoned. T961:10-19.

Verdict. Plaintiff proposed a verdict director that permitted the jury to hold NNA liable to the entire class so as long as the jury found that, "in connection with the advertising of the Infiniti FX," NNA had made either representations "that were not in accord with the facts regarding the quality of the vehicle" or "that tended to create a false impression regarding the quality of the vehicle," and "that as a direct result of such conduct, Class Plaintiffs sustained damage." A20. This instruction did not identify any specific misrepresentation that NNA allegedly made, and it did not inform the jury that it could find NNA liable only based on evidence that would apply to the entire class. NNA duly objected that the instruction was an impermissible "roving commission," T1382:14-T1383:17, but the trial court gave it.

The jury, by a vote of 10-2, returned a verdict holding NNA liable under the MMPA and requiring it to pay $2,000 to every class member. T1477:19-23, T1478:2-9.

4. Post-trial proceedings.

Plaintiff conducted a claims process to identify the final list of class members. A total of 599 individuals returned claims forms, but the trial

court determined only 326 were class members. A2. Of these, the evidence identified only two that experienced bubbling without receiving a free replacement dashboard. T525:8-16, T527:5-9, T538:11-16, T883:14-17. At least 119 demonstrably *had* received a free replacement. L.F.844-857; DX999. And there is no evidence that any of the hundreds of others experienced bubbling. Yet on March 13, 2015, the trial court entered judgment entitling each and every one to $2,000 apiece, and requiring NNA to pay $652,000 in damages. A2-A3, A6.

Plaintiff also requested a $3.8 million award of fees for his attorneys—based on a claimed $1.9 million "lodestar," doubled via a "multiplier." A3-A4. The trial court granted the lodestar but denied a multiplier. *Id.*

The trial court denied NNA's motions for judgment notwithstanding the verdict, for a new trial, and to decertify the class. L.F.2442-43. On May 25, 2015, NNA filed a timely notice of appeal. L.F.2444.

5. The Court of Appeals' reversal.

On appeal, NNA raised nine Points, including Plaintiff's failure to establish a submissible case that NNA "made an actionable misrepresentation in connection with the FX's advertising," and Plaintiff's failure to establish any ascertainable loss by the class. Op. 9, A29.

NNA's first Point required reversal, so the Court of Appeals did not reach the others. Op. 18 n.11, A38.

The court noted a dispute over whether "to apply the puffery doctrine to MMPA actions," with Plaintiff arguing "it does not apply and … that the puffery doctrine typically applies to fraud and breach of warranty actions only." Op. 15-16, A35-36. The court found it "unnecessary … to declare that the puffery doctrine applies in all MMPA cases," because it was "confident that in this case the statements made by Nissan are not actionable under the MMPA." Op. 16, A36. That was so, said the court, because "[a]ll of the statement[s] made by Nissan … are vague and highly subjective claims of product superiority" that did not explicitly or impliedly promise the FX would never develop a defect. Op. 16, A36.

In so holding, the Court of Appeals followed this Court's recognition in *Clark v. Olson* that "[m]any statements made in advertising … are not actionable … but are merely the '[p]uffing of wares, sales propaganda, [or] expression of opinion,'" Op. 10, A30 (quoting *Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 587 (Mo. App. W.D. 2000) (quoting *Clark v. Olson*, 726 S.W.2d 718, 720 (Mo. banc 1987))), and that such nonsubstantive slogans "'are common, are permitted, and should be expected,'" Op. 11, A31 (quoting *Clark*, 726 S.W.2d at 720). Indeed, the

court observed, that rule is the *only* thing that allows "a pasta maker [to] declare that it is 'America's Favorite Pasta' and Papa John's [to] proclaim 'Better Ingredients. Better Pizza' without incurring liability" to every dissatisfied customer. Op. 11, A31 (citing *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004); *Pizza Hut, Inc. v. Papa John Int'l, Inc.*, 227 F.3d 489 (5th Cir. 2000)).

The Court of Appeals marched through all of Plaintiff's alleged misrepresentations and found none was "capable of being reasonably interpreted as" a promise the FX could never develop a defect. Op. 12, A32. "Statements that the FX was a 'premium' vehicle with a 'premium automotive experience,' a 'leader in style,' a 'luxury' car, a 'superior product representing excellent value,' and a vehicle of 'uncompromising style and luxury' are classic examples of statements not 'susceptible of exact knowledge.'" Op. 12, A32 (quoting *Constance*, 25 S.W.3d at 587). These "'very general' statements," the court explained, Op. 12, A32 (quoting *Guess v. Lorenz*, 612 S.W.2d 831, 833 (Mo. App. E.D. 1981)), were "not 'capable of being proved false or of being reasonably interpreted as a statement of objective fact,'" Op. 12, A32 (quoting *Am. Italian Pasta*, 371 F.3d at 391).

Indeed, the Court of Appeals noted, "courts from other jurisdictions have considered statements similar to those made by Nissan in its

advertising and have concluded that the statements are not actionable." Op. 12, A32. The court cited cases from across the country concerning statements that a car was "luxury," "quality engineered," or "high quality"; that a product was of "uncompromising" quality; or that "satisfaction is guaranteed." Op. 12-13, A32-33. In particular, the court pointed to numerous cases holding that "the word 'premium,' which is the statement upon which [Plaintiff] principally relies for his claims" does not guarantee that a product will be of a particular quality, or that it cannot develop defects. Op. 13-14, A33-34. Many of these decisions were based on state false-advertising or consumer-protection statutes like the MMPA. *See* Op. 12-14, A32-34 (citing *In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525 (E.D. Mo. 1997) (California, Mississippi, and Texas), *aff'd sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008) (California), *aff'd*, 322 F. App'x 489 (9th Cir. 2009); *Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027, 1040 (N.D. Cal. 2014) (California); *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 806 (W.D. Wis. 2006) (Wisconsin); *Tietsworth v. Harley Davidson, Inc.*, 677 N.W.2d 233, 246 (Wis. 2004) (Wisconsin)).

The Court of Appeals considered and rejected the arguments Plaintiff raised in support of the circuit court's judgment. First, it

acknowledged Plaintiff's argument that certain words, like "premium," may be inactionable "in isolation," yet still convey definite promises "when considered in … context." Op. 14, A34. "[W]hether a given representation is" actionable, the court agreed, "may depend upon 'the circumstances surrounding the representation.'" Op. 14, A34. But the court found that "even when we consider the statement[s]" relied on by Plaintiff "in … context, there is nothing specific … that is measureable, capable of verification, or capable of being proved false." Op. 15, A35.

The court also acknowledged the testimony by certain witnesses that their expectations had been disappointed, but it explained that such assertions alone did not render NNA liable: "To hold Nissan liable … because the consumers deemed their expectations unmet … would essentially obviate Nissan's limited warranty because basically everything would be guaranteed forever." Op. 16-17, A36-37.

Finally, the Court of Appeals acknowledged Plaintiff's observation that the MMPA was framed in "broad" terms, but it explained that these broad terms did not relieve Plaintiff of his burden "to show that Nissan made an actionable misrepresentation in connection with the FX's advertising." Op. 17, A37 (quotation marks omitted). Because Plaintiff had "failed" to do so, the Court of Appeals held that "the circuit court erred in denying Nissan's motion for judgment notwithstanding the

verdict." Op. 17, A37. It therefore "reverse[d] the circuit court's judgment and remand[ed] for the circuit court to enter a judgment notwithstanding the verdict in favor of Nissan." Op. 18, A38.

POINTS RELIED ON

I. The trial court erred in denying NNA's motions for directed verdict and for judgment notwithstanding the verdict, because Plaintiff failed to establish a submissible case that NNA made an actionable misrepresentation in connection with the FX's advertising, in that the representations cited by Plaintiff—that the FX was "luxury," "premium," or the like—were not actionable factual statements, much less representations that the FX could never develop a defect, as required for liability under the MMPA; instead, they were only inactionable puffery, and none of the other purported misrepresentations invoked by Plaintiff could establish a submissible case by the class.

R.S. Mo. § 407.020.1, 15 CSR §§ 60-9.020(1), 60-9.070(1)

Clark v. Olson, 726 S.W.2d 718 (Mo. banc 1987)

Carrier Corp. v. Royale Inv. Co., 366 S.W.2d 346 (Mo. 1963)

Turner v. Cent. Hardware Co., 186 S.W.2d 603 (Mo. 1945)

II. The trial court erred in denying NNA's motions for directed verdict and for judgment notwithstanding the verdict, because Plaintiff failed to establish a submissible case of any "ascertainable loss" by the

class, in that Plaintiff introduced no competent evidence in support of the "stigma" theory that he concedes is the only possible ground for identifying an ascertainable loss; the vast majority of class members either never experienced dashboard bubbling or received a free replacement dashboard; and none of Plaintiff's other evidence could establish an ascertainable loss by the class, as was his burden.

R.S. Mo. § 407.025.1

Binkley v. Am. Equity Mortg. Inc., 447 S.W.3d 194 (Mo. banc. 2014)

Hope v. Nissan N. Am., Inc., 353 S.W.3d 68 (Mo. App. W.D. 2011)

Smith v. Am. Family Mut. Ins. Co., 289 S.W.3d 675 (Mo. App. W.D. 2009)

III. The trial court erred in denying NNA's motion for a new trial because the trial court improperly and prejudicially excluded the testimony of Plaintiff's expert, Dr. Michael Kelsay, in that Dr. Kelsay admitted in his deposition that many class members had suffered no injury and this testimony was admissible as a party admission.

Bynote v. Nat'l Super Markets, Inc., 891 S.W.2d 117 (Mo. banc 1995)

Gordon v. Oidtman, 692 S.W.2d 349 (Mo. App. W.D. 1985)

Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980)

IV. The trial court erred in denying NNA's motion for a new trial because the trial court improperly and prejudicially permitted testimony by numerous witnesses who were not members of the class, in that this testimony painted a misleading picture of the experiences of class members and its prejudicial effect far outweighed its nonexistent probative value.

Anderson v. Kohler Co., 170 S.W.3d 19 (Mo. App. E.D. 2005)

V. The trial court erred in denying NNA's motion for a new trial because the trial court improperly and prejudicially permitted testimony by individual owners concerning alleged future reductions in the value of their vehicles, in that these owners lacked expertise to testify concerning diminished value, their testimony was based on guesswork, and testimony on the value of individual vehicles was irrelevant in this class action.

Coach House of Ward Parkway, Inc. v. Ward Parkway Shops, Inc., 471 S.W.2d 464 (Mo. 1971)

Carmel Energy, Inc. v. Fritter, 827 S.W.2d 780 (Mo. App. W.D. 1992)

State ex rel. Missouri Highway & Transp. Comm'n v. Pracht, 801 S.W.2d 90 (Mo. App. E.D. 1990)

VI. The trial court erred in denying NNA's motion for a new trial because the verdict director was an impermissible "roving commission"

that did not allow the jury to render an informed verdict, in that the verdict director did not identify any specific misrepresentation that NNA was alleged to have made and did not instruct the jury on the need to identify a misrepresentation and a resulting ascertainable loss for all class members across every model year.

Scanwell Freight Express STL, Inc. v. Chan, 162 S.W.3d 477 (Mo. banc 2005)

Rice v. Bol, 116 S.W.3d 599 (Mo. App. W.D. 2003)

Smith v. Am. Family Mut. Ins. Co., 289 S.W.3d 675 (Mo. App. W.D. 2009)

VII. The trial court erred in certifying the class in the first instance, as the trial showed, and the trial court erred in denying NNA's motion to decertify after trial, because the evidence at trial confirmed that common issues of fact and law did not substantially predominate over individual ones, as Rule 52.08 requires, in that Plaintiff repeatedly presented evidence of asserted misrepresentations and injuries that applied to only a sliver of class members and did not apply classwide, and permitting the judgment to stand violates NNA's due process and jury trial rights.

Rule 52.08

State ex rel. Am. Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. banc 2003)

Hope v. Nissan N. Am., Inc., 353 S.W.3d 68 (Mo. App. W.D. 2011)

Smith v. Am. Family Mut. Ins. Co., 289 S.W.3d 675 (Mo. App. W.D. 2009)

VIII. The trial court erred in certifying the class in the first instance, as the trial showed, and the trial court erred in denying NNA's motion to decertify after trial, because uninjured individuals impermissibly dominated the class, contrary to Rule 52.08, in that the vast majority of class members either never experienced dashboard bubbling or received a free replacement dashboard.

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

IX. The trial court erred in awarding attorney's fees because the MMPA authorizes attorney's fees only for a "prevailing party," in that the trial court should have granted NNA's motions for judgment notwithstanding the verdict, for a new trial, and to decertify the class, and if this Court reverses the trial court's judgment, the class will no longer be a prevailing party.

R.S. Mo. § 407.025.1

ARGUMENT

STANDARDS OF REVIEW

Judgment notwithstanding the verdict. This Court reviews the denial of motions for directed verdict and for judgment notwithstanding the verdict "*de novo*," asking whether the plaintiff "made a submissible case." *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014). A case is not submissible "unless each and every fact essential for liability is predicated on legal and substantial evidence." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011) (quotation marks omitted); *Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 299 (Mo. banc 2007). The question whether the evidence is substantial is one of law for the court. *Moore*, 332 S.W.3d at 756. A plaintiff must present "[s]ubstantial evidence [of each fact] which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide [the] case." *Hurlock v. Park Lane Med. Ctr., Inc.*, 709 S.W.2d 872, 880 (Mo. App. W.D. 1985) (citing *Zeigenbein v. Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966)). Although the Court views the evidence in the light most favorable to the plaintiff, the Court must not "supply evidence" or give the plaintiff the benefit of "unreasonable, speculative, or forced inferences." *Adler v. Laclede Gas Co.*, 414 S.W.2d 304, 306 (Mo. 1967)

New trial. Rule 78.01 permits a new trial of any issue upon good cause shown. A new trial may be granted "on the ground that the verdict is against the weight of the evidence," *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. banc 2013); when the trial court has admitted evidence whose prejudicial impact outweighs its probative value, *Anderson v. Kohler Co.*, 170 S.W.3d 19, 24 (Mo. App. E.D. 2005); or based on errors in the verdict director. *See, e.g.*, *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 482 (Mo. banc 2005). This Court generally reviews denial of a motion for a new trial for abuse of discretion, *Don Shrum, Inc. v. Valley Mineral Products Corp.*, 563 S.W.2d 67, 69 (Mo. banc 1978), except that the Court "reviews de novo, as a question of law, whether a jury was properly instructed." *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003)

Class decertification. Appellate review of class certification issues, including whether a class was properly certified in the first instance and whether a motion to decertify should have been granted, is for abuse of discretion. *Vandyne v. Allied Mortg. Capital Corp.*, 242 S.W.3d 695, 697 (Mo. banc 2008); *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 113 (Mo. App. W.D. 2012).

POINT I

THE TRIAL COURT ERRED IN DENYING NNA'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF FAILED TO ESTABLISH A SUBMISSIBLE CASE THAT NNA MADE AN ACTIONABLE MISREPRESENTATION IN CONNECTION WITH THE FX'S ADVERTISING, IN THAT THE REPRESENTATIONS CITED BY PLAINTIFF—THAT THE FX WAS "LUXURY," "PREMIUM," OR THE LIKE—WERE NOT ACTIONABLE FACTUAL STATEMENTS, MUCH LESS REPRESENTATIONS THAT THE FX COULD NEVER DEVELOP A DEFECT, AS REQUIRED FOR LIABILITY UNDER THE MMPA; INSTEAD, THEY WERE ONLY INACTIONABLE PUFFERY, AND NONE OF THE OTHER PURPORTED MISREPRESENTATIONS INVOKED BY PLAINTIFF COULD ESTABLISH A SUBMISSIBLE CASE BY THE CLASS.

Stripped to its core, Plaintiff's theory of the case—necessarily—is that NNA represented to customers that the FX had no risk of developing a defect. That is the only theory that could permit Plaintiff to recover on behalf of a class including hundreds of owners whose vehicles have never had bubbling problems, and hundreds more who received free warranty repairs. But the only statements by NNA that Plaintiff has ever identified are vague advertising slogans, such as that the FX is "premium,"

"luxury," or similar. *Supra* at 17-19. And for decades, this Court and others nationwide have held that such vague taglines do not make actionable guarantees. They certainly do not promise the FX could never develop a defect. Plaintiff's contrary arguments—which, at bottom, posit that the MMPA renders NNA liable to the class even if NNA never said anything that is objectively or verifiably *false*—are meritless.

A. To establish a submissible case, Plaintiff must identify an actionable misrepresentation by NNA.

To recover under the MMPA, Plaintiff must show NNA made an actionable misrepresentation. *See* R.S. Mo. 407.020.1. Such a representation could have been express, in violation of the prohibition on any "assertion that is not in accord with the facts." 15 CSR § 60-9.070(1). Or it could have been implicit, in violation of the prohibition on representations that, even if not literally false, "tend[] to create a false impression" about the facts. *Id.* § 60-9.020(1). But one way or the other, *some* such representation is essential. So the question is whether any of the advertising taglines Plaintiff invoked at trial—that the FX was "premium," "luxury," and so on—promised the FX could never develop a defect. The answer is no, as the Court of Appeals held. Op. 16, A36. As this section shows, this Court has long held that vague marketing slogans do not convey actionable guarantees. And as the next section

establishes, none of NNA's specific statements about the FX made an actionable promise that permits Plaintiff to recover under the MMPA.

For decades, precedent from Missouri and nationwide has rejected claims—just like Plaintiff's—that vague marketing slogans convey specific guarantees of quality. The caselaw varies in precisely how it describes such inactionable buzzwords. Some cases distinguish actionable "statement[s] of fact" from generally inactionable "expression[s] of opinion." *Clark v. Olson*, 726 S.W.2d 718, 719-20 (Mo. banc 1987). Others observe that, to be actionable, a statement must be "susceptible of exact knowledge," so that a jury or reviewing court can objectively measure its truth or falsity. *Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 587 (Mo. App. W.D. 2000); *see Reis v. Peabody Coal Co.*, 997 S.W.2d 49, 65 (Mo. App. E.D. 1999) (same). Still other cases simply declare such slogans to be "dealer's talk, trade talk, … and sales propaganda … which are not actionable." *Carrier Corp. v. Royale Inv. Co.*, 366 S.W.2d 346, 350 (Mo. 1963). The catchall term that has developed is "puffing" or "puffery." *See, e.g.*, *id.*; *Clark*, 726 S.W.2d at 719-20. All these formulations are just different ways of stating the same commonsense rule: Vague and general marketing slogans do not convey specific promises whose breach yields a cause of action for misrepresentation.

That rule is deeply entrenched in this Court's precedent; indeed, in *Carrier Corp. v. Royale Investment Co.*, this Court applied that rule to advertising brochures very similar to those at issue here. Those brochures proclaimed that an air conditioner was:

> [S]o simple, so compact, so quiet and so completely automatic that it has been called the most remarkable in the world.... This great combination of meticulous attention to detail, deep-seated pride in craftsmanship and modern manufacturing methods results in products unmatched in the industry for quality, performance and dependability.

366 S.W.2d at 349-50 (quotation marks omitted). The *Carrier* plaintiffs, much like Plaintiff here, claimed that the air conditioner fell short of their expectations, which rendered the just-quoted statements actionably false. *Id.* at 348. This Court, however, readily concluded that the brochure was "dealer's talk, trade talk, puffing of a manufacturer's wares, and sales propaganda," and that the just-quoted statements were

"mere statements of opinion, promises, expectations and estimates, which are not actionable." *Id.* at 350.[6]

This rule is not just long established in this Court's precedent, but essential. Otherwise, any consumer who purchased a product billed as "premium" (or "luxury," or "unmatched … quality," *Carrier*, 366 S.W.2d at 349-50, and so on) could walk into court, claim he was unsatisfied, and demand the court give him what he believed he should have received—all without identifying anything the merchant said that was *false* in any objective sense. Every seller would thus become a lifetime guarantor solely through normal advertising, even where, as here, the parties specifically bargained for a more limited warranty. Op. 16-17, A36-37.

This is no hypothetical. Papa John's has faced suit over its catchphrase "Better Ingredients. Better Pizza," as has Sam Adams over its slogan, "Best Beer in America." *Papa John*, 227 F.3d at 491; *In re Boston Beer Co. L.P.*, 198 F.3d 1370 (Fed. Cir. 1999). As the Court of Appeals observed, the *only* thing that prevented Papa John's and Sam

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[6] Although the court found that certain statements in the brochure made specific factual promises, the above-quoted statements did not. *Carrier*, 366 S.W.2d at 350, 354-58.

Adams from incurring limitless liability to every customer who deemed his expectations unmet was the rule applied by this Court in *Carrier* and the Court of Appeals below—that vague advertising taglines do not give rise to misrepresentation liability. Op. 11, A31. For just this reason, this Court has explained that such marketing statements "are common, are permitted, and should be expected." *Clark*, 726 S.W.2d at 720. Indeed, this Court has affirmed that such statements may stretch "even to the point of exaggeration," "so long as … salesmanship remains in the field of 'dealer's talk.'" *Turner v. Cent. Hardware Co.*, 186 S.W.2d 603, 606 (Mo. 1945).

With this rule so established and so essential, it is no surprise courts have readily applied it under the MMPA. The Court of Appeals did so below, of course. Op. 16, A36. And while Plaintiff sought transfer by claiming the Court of Appeals thus "created new law," App. 3, that is untrue: Fifteen years ago, the Eastern District applied the same rule in *Morehouse v. Behlmann Pontiac-GMC Truck Services, Inc.*, 31 S.W.3d 55 (Mo. App. E.D. 2000). The Eastern District held that the representations at issue there were actionable, but expressly recognized that the rule applied by this Court in cases like *Clark* and *Carrier* governs MMPA claims. *Id.* at 59-60. Myriad federal cases have reached the same result. *See Budach v. NIBCO, Inc.*, No. 2:14-CV-04324, 2015 WL 3853298, at *7-

8 (W.D. Mo. June 22, 2015); *Wright v. Bath & Body Works Direct, Inc.*, No. 12–00099–CV–W–DW, 2012 WL 12088132, at *2 (W.D. Mo. Oct. 17, 2012); *Govreau v. Albers*, No. 2:10-cv-04135-NKL, 2010 WL 4817143, at *5 (W.D. Mo. Nov. 22, 2010); *Tockstein v. Spoeneman*, No. 4:07cv00020ERN, 2009 WL 690201, at *4-*5 (E.D. Mo. Mar. 12, 2009).

The same rule, moreover, applies whether the plaintiff claims a literal misrepresentation, or that the statements tended "to create a false impression." 15 CSR § 60-9.020(1); *see* A20. 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. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998). In a famous example, Kraft boasted its cheese slices, unlike competitors', "are made from five ounces of milk," and lauded calcium's nutritional benefits; these literally true factual statements, the court found, impliedly asserted that Kraft contained the *same* calcium as five ounces of milk, and *more* than competitors'—and that implicit factual assertion was *false*. *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992). Such "false impression" cases thus equally require specific "statement[s] of fact," *Clark*, 726 S.W.2d at 719-20, and claims "susceptible of exact knowledge," *Constance*, 25 S.W.3d at 587, 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. *See United Indus.*, 140 F.3d at 1180 (Whether plaintiff raises a "literal fals[ity]" or "false impression" claim, "vague or highly subjective" "representations of … superiority" are "not actionable"); *Am. Italian Pasta*, 371 F.3d at 391 (similar); *Wright*, 2012 WL 12088132, at *2 (same rule as to MMPA deception claim).

B. Plaintiff cannot identify any actionable misrepresentation that the FX could never develop a defect.

Under these principles, Plaintiff did not establish a submissible case. At trial, Plaintiff pointed to statements that the FX was "luxury," "premium," and the like. *Supra* at 17-19. But as the Court of Appeals held, and in accordance with the caselaw described above, none of these statements—nor any of the others Plaintiff has invoked—promised the FX could never develop a defect. Op. 16, A36. Indeed, courts nationwide have considered *exactly* the same words and phrases and rejected arguments that they make actionable guarantees. *Infra* at 47-51.

Plaintiff has not even attempted to defend his reliance on most of the slogans he invoked at trial. *Supra* at 17-19. No wonder. When Plaintiff must fall back on, for example, statements that the FX was "[d]esigned to attract a glance. That evolves into a stare. And provokes a

desire," PX286 at NNA122872; *see* T944:1-8, that is a telltale sign Plaintiff cannot identify any genuine misrepresentation. In Plaintiff's transfer application, the *only* statements he claimed were actionable were that the FX was "premium" and "luxury." App. 2.[7] Such statements, however, simply are *not* a guarantee that the vehicle has no risk of ever developing a defect. Instead, these statements are of a piece with those this Court deemed inactionable in *Carrier*—that an air conditioner "had been called the most remarkable in the world," was "unmatched in the industry for quality, performance and dependability," and so on. 366 S.W.2d at 349-50. No reasonable consumer could believe that every merchant who advertised products as "premium" or "luxury" was providing a lifetime warranty or promising the products could never develop a problem.

Indeed, not one of the advertising slogans Plaintiff has invoked—in his application, in the Court of Appeals, or in the trial court—conveys an

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[7] Plaintiff's application also asserted that NNA marketed the FX as "high quality," App. 2, but Plaintiff has never identified any such statement in the FX's marketing materials. In any event, the phrase "high quality" is no more actionable than "premium" or "luxury." *Infra* at 49.

actionable misrepresentation that could establish a submissible case here. Those statements fall into three categories:

1. Statements the FX was luxury, premium, or superior. T1407:9, 16 ("premium vehicle"); T1408:5, 18 (same); T1415:16 (same); T336:19-20, T1416:5 ("premium automotive experience"); T336:18-20 ("premium automotive machinery"); T1467:21-24 (NNA's "commitment to offer a superior product representing excellent value"); T1470:5-7 (FX "embodies the Infiniti philosophy of combining design and performance in one luxurious package"); T336:8-9, T1464:19-20 ("Refinement knows no borders in the" FX).
2. Statements the FX was "uncompromising," or that it had "room for everything except compromise." T1415:24-25; *see also* T1471:8-9 ("unique blend of uncompromising style and luxury").
3. Statements of NNA's commitment "to ensuring total satisfaction for [its] customers," T1467:23-25, or—along the same lines—regarding the "total ownership experience," T353:14-15, or "premium automotive experience" associated with the FX, T336:19-20.[8]

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[8] In the Court of Appeals, Plaintiff objected to this summary on the ground that these quotations come from opening and closing arguments. Such arguments, Plaintiff says, "are not the evidence," and "Plaintiff

Not one of these statements conveys an actionable misrepresentation. None is an actionable "statement of fact," *Clark*, 726 S.W.2d at 719-20, and none is "susceptible of exact knowledge," *Constance*, 25 S.W.3d at 587; rather, all are quintessential "dealer's talk, trade talk, … and sales propaganda … which are not actionable." *Carrier*, 366 S.W.2d at 350. To the extent these statements have *any* content, they certainly do not promise that the FX could never develop a defect. Indeed, courts in Missouri and nationwide have *specifically held* each and every one of the statements enumerated above to be inactionable, and rejected claims that such statements provide objective guarantees.

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presented thirteen pages of marketing materials to the jury, and admitted another 139 pages of marketing materials." W.D. Resp. Br. 18-19. Plaintiff, however, has never contended that the additional pages contain any representation materially different from those summarized above. Indeed, in the Court of Appeals, the *only* statements Plaintiff contended were actionable concerned the FX's "premium" nature; he did not defend his reliance on the others. W.D. Resp. Br. 27-29. This summary thus gives Plaintiff more than his due.

Luxury, premium, or high-quality. Statements that a product is "luxury" or "refined" are quintessentially inactionable—as Missouri federal and state courts have determined specifically in the automobile context. For example, in *In re General Motors Corp. Anti-Lock Brake Products Liability Litigation*, 966 F. Supp. 1525 (E.D. Mo. 1997), *aff'd sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999), the plaintiffs claimed that General Motors had misrepresented the quality of its anti-lock braking system, but the court affirmed that statements that a vehicle is "a luxury car and … quality-engineered" were "nothing more than puffing." *Id.* at 1536 (quotation marks omitted); *see Chesus v. Watts*, 967 S.W.2d 97, 112 (Mo. App. W.D. 1998) (citing *General Motors* with approval). Other courts have reached the same conclusion as to similar statements. *See Serbalik v. General Motors Corp.*, 667 N.Y.S.2d 503, 504 (N.Y. App. Div. 1998) (statement that car was "luxurious" not a basis for a misrepresentation claim when engine contained a defect).[9]

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[9] *See also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989) ("luxury" subdivision); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.*, No. 11 C 8332, 2013 WL 566805, at *24 (N.D. Ill. Feb. 13, 2013) (statements that a service resulted in a "refined … culture"

The same is true of the word "premium," the "statement upon which [Plaintiff] principally relies for his claims"—and indeed, the *only* statement he claimed was actionable in the Court of Appeals. Op. 13, A33; *see* W.D. Resp. Br. 27-29. For example, in *Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027 (N.D. Cal. 2014), Apple had advertised its computer's screen as "very premium class," but it turned out to suffer from a defect that caused the screen to dim. *Id.* at 1042. The statement of "premium" quality, the court explained, was "inactionable puffery" that did "not relate to the longevity of the screen's performance, only to [its] general quality" and that did not promise anything "about specific or absolute characteristics [regarding] longevity … that would constitute an actionable statement." *Id.* at 1042-43. Legion other cases hold similar phrases to be inactionable.[10]

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were "devoid of substantive factual material and constitute puffery" (quotation marks omitted)).

[10] *See, e.g.*, *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 670-71 (6th Cir. 2005) ("premium-quality" and "premium-grade tires"); *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 894 (C.D. Cal. 2013) ("premium soda"); *Anderson v. Bungee Int'l Mfg. Corp.*, 44 F. Supp. 2d 534, 541 (S.D.N.Y. 1999) ("Premium Quality" bungee cords);

The same is true of the claim that a product is "high quality" or "superior." In *Serbalik v. General Motors Corp.*, 667 N.Y.S.2d 503 (N.Y. App. Div. 1998), the plaintiff claimed a misrepresentation on the theory that General Motors had advertised his car as "high quality," even though it had an engine defect. *Id.* at 504. The court readily held that this statement was "nothing more than innocent 'puffery.'" *Id.*[11]

Uncompromising. Courts have been equally quick to deem statements that a product is "uncompromising" to be inactionable. So, for example, there is no actionable misrepresentation when a manufacturer boasts that its boat is of "uncompromising quality," but

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Hill's Pet Nutrition, Inc. v. Nutro Prods., Inc., No. CV–04–8413–AHM, 2005 U.S. Dist. LEXIS 45810, at *8-9 (C.D. Cal. Apr. 28, 2005) ("premium ingredients"); *Tietsworth v. Harley–Davidson, Inc.*, 677 N.W.2d 233, 246 (Wis. 2004) ("premium quality" engine).

[11] *See also, e.g.*, *Anderson*, 44 F. Supp. 2d at 544 ("superior quality" bungee cords); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008) ("generalized and vague statements of product superiority" are inactionable puffery), *aff'd*, 322 F. App'x 489 (9th Cir. 2009); *Shaker v. Nature's Path Foods, Inc.*, No. EDCV 13–1138–GW, 2013 WL 6729802, at *5 (C.D. Cal. Dec. 16, 2013) (similar).

the boat develops engine problems. *Mazzuocola v. Thunderbird Prods. Corp.*, No. 90-CV-0405, 1995 WL 311397, at *3 (S.D.N.Y. May 16, 1995). Other decisions agree. *See Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008) ("superb, uncompromising quality"); *Rasmussen*, 27 F. Supp. 3d at 1043 (same).

Satisfaction guaranteed. The vague statement that a seller is committed to work toward "total satisfaction," T1467:23-25, "is a classic example of commercial 'puffery.'" *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 806 (W.D. Wis. 2006). Court after court has so held. *See, e.g.*, *Sova v. Apple Vacations*, 984 F. Supp. 1136, 1143 (S.D. Ohio 1997) (statement that "we will make sure that your satisfaction is guaranteed" is "puffing" and does "not amount to a guarantee that no mishap will ever occur"); *Babb v. Regal Marine Indus., Inc.*, 179 Wash. App. 1036, 1075 (2014) ("commitment to … provide exceptional customer satisfaction"); *Davies v. Gen. Tours, Inc.*, 774 A.2d 1063, 1076 (Conn. App. 2001) ("guarantee of satisfaction"), *overruled on other grounds by Cefaratti v. Aranow*, No. 19443, --- A.3d ----, 2016 WL 3162815 (Conn. June 14, 2016).

Plaintiff noted below that whether a representation is actionable must be "consider[ed] in … context." W.D. Resp. Br. 28; *see Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 358 (Mo. App. E.D. 1993) (whether

statement is actionable can "depend[] upon the circumstances"). But this observation does not help Plaintiff because nothing in the context here renders NNA's advertising slogans actionable. Indeed, the relevant context only underscores that NNA did not guarantee the FX could never develop a defect. The statements on which Plaintiff relies come, almost uniformly, from Infiniti advertising brochures that *also* discussed NNA's four-year, 60,000 mile warranty—often on the same page. *See, e.g.*, PX71 at 40; PX72 at 44; PX73 at 43. *That* promise to make warranty repairs within four years or 60,000 miles was the specific and provably true or false representation NNA made regarding "the quality of the" FX and NNA's commitment to repair or replace defects. A20.

C. There is no merit to Plaintiff's unprecedented argument that, because this is an MMPA case, he is not required to identify an actionable misrepresentation.

Plaintiff has no answer to the Court of Appeals' commonsense conclusion that vague advertising taglines like "premium" or "luxury" did not guarantee the FX could never develop a defect. Op. 16, A36. Even so, he sought transfer by characterizing the decision below as making "new law" in applying the "puffery" doctrine to the MMPA "for the first time." App. 3. In so doing, Plaintiff says, the Court of Appeals improperly required him to identify a statement by NNA that is "capable

of being proved false," is "an objective statement of fact," or contains a representation that is "specific, measurable and capable of verification." App. 12. According to Plaintiff, such requirements are "inconsistent with the policy and purpose of the MMPA"—*i.e.*, "to offer protection to consumers that goes well beyond common law fraud." App. 4-5. Instead, Plaintiff urges, the puffery doctrine should apply only "to claims for fraud and breach of warranty." App. 3. These arguments are meritless, and the Court should reject them.

To begin, Plaintiff's fixation on whether the puffery doctrine, in the abstract, applies under the MMPA glosses over the basic failings in his case. Even if Plaintiff were right about the answer to that question (and he is not), a submissible case *still* requires Plaintiff to identify some express or implied representation by NNA that the FX could never develop a defect. *Supra* at 36-38. He cannot do so, as explained above, and that remains true whatever the puffery doctrine's general status under the MMPA. *Supra* at 43-44. Indeed, that is precisely why the Court of Appeals specifically *declined* to reach any broad holding, or "to declare that the puffery doctrine applies in all MMPA cases." Op. 16, A36. This Court can also resolve this case simply by holding that words like "premium" or "luxury" did not promise the FX would remain forever defect-free.

In any event, every step of Plaintiff's argument is wrong. The Court of Appeals made no "new law," App. 3, but followed the path marked by the Eastern District 15 years before and subsequently applied by numerous federal courts. *Supra* at 41-42. As this consensus reflects, nothing about the puffery doctrine—which, as explained above, is just shorthand for the commonsense requirement to identify a reasonably specific and provably false representation, whose falsity can be objectively judged—conflicts with the MMPA's "policy and purpose" or intent to offer protection "beyond common law fraud." App. 4-5. The MMPA furthers this policy by eliminating certain specific requirements applicable to fraud, such as individual "reliance and intent." *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. banc 2007). This policy does not remotely support eliminating the requirement to identify a representation that is genuinely *false*.

Indeed, Plaintiff's argument contradicts the settled principle that when "the legislature enacts a statute referring to terms that have had other judicial or legislative meaning attached to them," like misrepresentation or deception, "the legislature is presumed to have acted with knowledge of that" meaning and to have incorporated it into the statute. *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825-26 (Mo. banc 2014). So here, when courts have long

held vague taglines like "premium" or "luxury" not to convey any actionable misrepresentation or deception, the presumption is the legislature did not intend to abrogate, *sub silentio*, the decades of law set forth in, *inter alia*, this Court's decisions in *Turner* and *Carrier*, which long predated the MMPA's 1967 enactment. 366 S.W.2d at 349-50.

On even cursory inspection, Plaintiff's contrary argument becomes self-refuting. In Plaintiff's view, this case should yield a multi-million dollar judgment against NNA even though he cannot cite any representation by NNA that is "prov[ably] false," cannot identify any untrue "objective statement of fact" that NNA made, and cannot even point to any statement that is *incorrect* in any manner that is "specific, measurable [or] capable of verification." App. 12. To award that multi-million dollar windfall does not serve any "policy and purpose," App. 4, that could be attributed to the MMPA; to the contrary, it would effectively eliminate the MMPA's misrepresentation element—imposing liability even in the absence of any objectively false or misleading statement.

It is no surprise, then, that no case has ever adopted the position Plaintiff urges on this Court, and that every decision to address the issue has rejected Plaintiff's position. In addition to the decision below, as just noted, the Eastern District has applied the puffery doctrine to the MMPA, as have numerous federal decisions. *Supra* at 41-42. Indeed, given that

the puffery doctrine has now been applied to the MMPA for nearly *two decades*, it is impossible to credit the Attorney General's concern that the decision below "will restrict MMPA actions" "beyond what the legislature intended." AG Br. 3, 5. The Attorney General does not, and cannot, claim that the MMPA is presently under-enforced, and the decision below leaves the law exactly where it found it.

Plaintiff's unprecedented argument is inconsistent not just with every case decided under the MMPA, but with every decision under *any* consumer protection statute nationwide. Since 1981, *every* state has had consumer-protection and deceptive-practice legislation akin to the MMPA, all of which pursue the same consumer-protective policies.[12] Yet *not one* has adopted the position Plaintiff urges and held the puffery doctrine inapplicable. *See, e.g.*, *Park Rise Homeowners Ass'n v. Res. Constc. Co.*, 155 P.3d 427, 435 (Colo. App. 2006) (canvassing decisions nationwide and finding "none of them holds that a consumer protection act precludes application of the [puffery] doctrine"). Among others, the

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[12] *See, e.g.*, Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past As Prologue*, 33 Am. U. L. Rev. 849, 862 n.64 (1984) (noting that by 1981, every state had passed a consumer protection statute); *Marshall v. Miller*, 276 S.E.2d 397, 400 (N.C. 1981) (similar).

puffery doctrine has been expressly applied under the consumer-protection laws of Illinois,[13] Kansas,[14] Nebraska,[15] Tennessee,[16] Kentucky,[17] and Colorado, to name a few. Likewise, the puffery doctrine applies under the federal FTC Act. *See, e.g.*, *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 11-12 (1st Cir. 2010). The Illinois and FTC Act decisions are especially significant: This Court has looked to Illinois law in construing the MMPA, *see State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 864 (Mo. banc 2008), and the MMPA is a "little FTC Act," which has naturally led Missouri courts to look to the federal Act in construing the MMPA, *see Schuchmann v. Air Servs. Heating & Air*

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[13] *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 926 (Ill. 2007).

[14] *Baldwin v. Priem's Pride Motel, Inc.*, 580 P.2d 1326, 1329 (Kan. 1978); *Ormsby v. Imhoff & Assocs., P.C.*, No. 14-2039-RDR, 2014 WL 4248264, at *10 (D. Kan. Aug. 27, 2014).

[15] *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1184 n.11, 1186 (D. Neb. 2015).

[16] *Audio Visual Artistry v. Tanzer*, 403 S.W.3d 789, 811-12 (Tenn. Ct. App. 2012).

[17] *Bland v. Abbott Labs., Inc.*, No. 3:11-cv-430-H, 2012 WL 32577, at *3 (W.D. Ky. Jan. 6, 2012).

Conditioning, Inc., 199 S.W.3d 228, 234 & n.8 (Mo. App. S.D. 2006). As this consensus shows, nothing about the puffery doctrine is inconsistent with consumer-protective policies. Indeed, if adopted, Plaintiff's position would turn Missouri into a national outlier—the only state in the union where Papa John's "Better Ingredients. Better Pizza" subjects it to limitless liability.

Plaintiff's additional arguments are likewise meritless.

Plaintiff principally argues the puffery doctrine should not apply because "puffery is based upon the notion of reliance, and reliance is not required under the MMPA." App. 5 (citing *Plubell v. Merck & Co.*, 289 S.W.3d 707, 713 (Mo. App. W.D. 2009)). But the puffery doctrine is not remotely inconsistent with the MMPA, and it is not based on reliance. Reliance is a *causation* requirement. *See, e.g.*, *Losh v. Ozark Border Elec. Co-op.*, 330 S.W.2d 847, 853 (Mo. 1960). When the MMPA eliminated that causation requirement, it freed plaintiffs from the need to "offer individualized proof that the misrepresentation colored the decision to" purchase a product. *Plubell*, 289 S.W.3d at 714; *see id.* (no need under MMPA to show "*individualized* … consumer[] reliance" (emphasis added)). The puffery doctrine, however, is not about causation. It is about what statements are *actionable*—that is, the requirement to show a misrepresentation or deception—regardless of whether those statements

caused a particular purchase. *Supra* at 37-43. The puffery doctrine has nothing to do with the reliance element that the MMPA eliminates.

Plaintiff appears to have misunderstood decisions describing the puffery doctrine as deeming inactionable "vague or highly subjective claims of product superiority" "upon which *no reasonable consumer would rely*." W.D. Resp. Br. 25 (emphasis added) (quoting *Wright*, 2012 WL 12088132, at *2). But the fact that this formulation of the doctrine—which is merely one among many, *see supra* at 38—uses the word "rely" does not mean that the puffery doctrine is based on the common law's reliance requirement. Again, this formulation describes a *class of statements* that are inactionable, and is about the misrepresentation element, not causation. Indeed, Plaintiff's argument again betrays just how unsustainable is his position: He urges this Court to allow recovery based on statements that *no reasonable consumer* would take seriously.

Alternatively, Plaintiff claims the decision below conflicts with the MMPA's treatment of "opinion." According to Plaintiff, the decision below (and the puffery doctrine generally) holds that "expressions of opinion are not actionable"; this holding, Plaintiff says, is inconsistent with MMPA regulations, which render actionable an "assertion that is not in accord with the facts," 15 CSR 60-9.070(1), and define "assertion" to include words that "convey past or present fact, law, value, *opinion*, intention or

other state of mind," 15 CSR 60-9.010(1)(A) (emphasis added). *See* App. 6-7; AG Br. 3-4.

This argument is doubly unavailing. First, Plaintiff's quibble is irrelevant to this case: What dooms his reliance on words like "premium" and "luxury" is not that these words are "opinion"—which is only one category of statements, among several, the puffery doctrine deems inactionable. *See, e.g.*, *Turner*, 186 S.W.2d at 606 (doctrine applies to "expressions of opinion, puffing statements *and* dealer's talk" (emphasis added)); *Clark*, 726 S.W.2d at 720 ("Puffing of wares, sales propaganda, *and* ... expressions of opinion are common [and] are permitted" (emphasis added)). The problem is that these "vague [and] highly subjective" words do not promise that the FX will never develop a defect. Op. 16, A36; *supra* at 43-44. So whether or not "premium" and "luxury" are "opinion" or something else, Plaintiff has failed to establish a submissible case.

Second, Plaintiff's argument fails even on its own terms. It is well-established that opinion statements are *generally* inactionable—a rule that, contrary to Plaintiff's suggestion, is not the Court of Appeals' invention but comes from this Court. *See, e.g.*, *Clark*, 726 S.W.2d at 720. And the limited exception, which the MMPA's regulations embody, is irrelevant to either the puffery doctrine or this case. The United States

Supreme Court's decision in *Omnicare, Inc. v. Laborers Dist. Council Constc. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), explains the point. Consistent with this Court's caselaw, *Omnicare* recognizes that "pure … opinion" is generally inactionable even if the opinion "is ultimately found incorrect." *Id.* at 1325, 1327. But the law, including the MMPA, has long recognized that every opinion statement "explicitly affirms one fact: that the speaker actually holds the stated belief," and that some opinions also contain "embedded statements of fact"—*e.g.*, if NNA had represented, "We believe the FX is premium because it can never develop a defect." *Id.* at 1326-27. So when the MMPA's regulations define an "assertion" to include statements of "opinion." 15 CSR 60-9.010(1)(A), they merely reaffirm this longstanding law recognizing that opinion statements occasionally include factual assertions. This rule, however, has nothing to do with the puffery doctrine or with Plaintiff's claims. And it does not mean, as Plaintiff seems to believe, that plaintiffs can sue based on statements with no objective or verifiable content.

If anything, the MMPA's regulations underscore why Plaintiff's theory is wrong. As just noted, they provide that an "assertion," whether of fact or opinion, is actionable *only* if it is "not in accord with the *facts*." 15 CSR 60-9.070(1) (emphasis added). Yet Plaintiff, as explained above, asks this Court to free him of the burden to identify any assertion that

was untrue in any factual, objectively verifiable sense: He claims he should be entitled to recover even though he cannot identify anything NNA said that was "prov[ably] false," was an untrue "objective statement of fact," or was incorrect in any manner that is "specific, measurable and capable of verification." App. 12. That position is irreconcilable with the MMPA's regulations, which demand that NNA's representations be measured objectively against "the facts." 15 CSR 60-9.070(1).

The Court should reject Plaintiff's unprecedented position, consistent with every court nationwide to consider the issue.

D. Plaintiff's other evidence is irrelevant.

None of the other evidence on which Plaintiff might rely salvages his lack of a submissible case. Indeed, in the Court of Appeals, Plaintiff did not dispute the point, *see generally* W.D. Resp. Br. 27-30; nonetheless, for completeness, NNA addresses these arguments in its substitute brief, as it did in its opening Court of Appeals brief.

Plaintiff repeatedly elicited testimony that dashboard bubbling was not consistent with owners' "expectations." *See, e.g.*, T456:21-T457:9, T611:5-14. But NNA can be liable only if it committed an actionable

misrepresentation, not based on what owners may testify that they expected. R.S. Mo. § 407.020.1.[18]

Plaintiff also pointed to pictures in FX brochures depicting unbubbled dashboards. T1465:10-18, T1470:22-25. Accurate depictions of a new FX, however, are not promises that the vehicle will remain forever in that condition. There is no dispute that NNA's advertising materials accurately depicted the dashboard owners received. *See, e.g.*, T437:15-17 (dashboard was "consistent with what had been conveyed by the marketing material"); T609:24-610:4 (similar); *see also* T1464:12 (FX was as represented when buyers "dr[o]ve it off the lot").

Finally, Plaintiff claimed that the March 2010 letter announcing the eight-year extended warranty contained a misrepresentation by stating that the second countermeasure dashboard "address[ed]" the bubbling issue. PX3. But that letter said nothing untrue. It stated that "a new replacement dash has been developed with an updated surface material

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[18] Indeed, even had NNA directly *said* that it did not "expect" any defects in the FX, statements of "expectations … and predictions for the future" are not actionable misrepresentations. *Slone v. Purina Mills, Inc.*, 927 S.W.2d 358, 372 (Mo. App. W.D. 1996); *see also Carrier*, 366 S.W.2d at 350 ("mere statements of … expectations … are not actionable").

that addresses the bubbling issue." PX3. The "Countermeasure 2" dashboard "address[ed]" bubbling by cutting incidence from 20% to 0.25%. T1172:8-12, T1173:9; DX1082. And even if, counterfactually, the March 2010 letter had said something incorrect, that would not salvage Plaintiff's lack of a submissible case. First, that letter is outside the verdict director, which required a misrepresentation in the FX's "advertising." A20. A warranty letter to existing owners is not advertising. Second, under the statute, Plaintiff could *never* establish a misrepresentation "in connection with the [FX's] sale or advertisement," R.S. Mo. § 407.020.1, based on a letter years later announcing NNA's *voluntary* warranty extension to people who had *already purchased* an FX. *See Watson v. Wells Fargo Home Mortg., Inc.*, 438 S.W.3d 404, 408 (Mo. banc 2014) (misrepresentations in "loan modification negotiations" not actionable because "that was not a service the lender agreed to sell or the borrower agreed to buy when the parties agreed to the loan").

E. NNA also is entitled to judgment because Plaintiff failed to establish a submissible case for owners of 2006-08 vehicles and secondary purchasers.

None of NNA's advertising statements were actionable, but even if *some* were actionable, NNA would still be entitled to judgment because Plaintiff failed to show NNA's "universal[]" liability to the class—as was

his burden, as further explained below. *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 682-83 (Mo. App. W.D. 2009); *see infra* at 67-68.

First, NNA would be entitled to judgment because Plaintiff presented no submissible case for 2006-08 FX vehicles. That is because nearly all of the statements relied upon by Plaintiff appear only in FX brochures for the 2003-2005 model years. *See supra* at 19-20 & n.5. NNA did not make these statements "in connection with the … advertisement of," say, a 2008 FX. R.S. Mo. § 407.020.1.

Second, NNA would be entitled to judgment because Plaintiff presented no submissible case as to secondary purchasers: There is no evidence that a *single* secondary purchaser in the class ever received or viewed the FX brochures. There is thus no evidence that NNA ever made any of the representations contained in these brochures "in connection with the [FX's] … advertisement" to secondary purchasers. R.S. Mo. § 407.020.1. The only evidence concerning secondary purchasers was that one non-class member, Ginger Bridger, testified she requested marketing materials from Infiniti's website. T431:17-24, T435:20-T436:6. That is not competent evidence that the class's many secondary purchasers received these brochures in connection with their purchases, which often occurred *years* after the original sales.

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If the Court affirms the trial-court judgment on this record, the consequences will be grave. No longer will merchants be free to engage in the "legitimate commercial speech" embodied in everyday advertisements. *Am. Italian Pasta*, 371 F.3d at 391. No more will sellers be able to craft their own generous, but limited, warranties. *See* Op. at 16-17, A36-37. Instead, any seller that engages in run-of-the-mill advertising will become a lifetime guarantor, no matter that the parties agreed to a more specific and limited warranty. The MMPA does not support or permit that result.

POINT II

THE TRIAL COURT ERRED IN DENYING NNA'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF FAILED TO ESTABLISH A SUBMISSIBLE CASE OF ANY "ASCERTAINABLE LOSS" BY THE CLASS, IN THAT PLAINTIFF INTRODUCED NO COMPETENT EVIDENCE IN SUPPORT OF THE "STIGMA" THEORY THAT HE CONCEDES IS THE ONLY POSSIBLE GROUND FOR IDENTIFYING AN ASCERTAINABLE LOSS; THE VAST MAJORITY OF CLASS MEMBERS EITHER NEVER EXPERIENCED DASHBOARD BUBBLING OR RECEIVED A FREE REPLACEMENT DASHBOARD; AND NONE OF PLAINTIFF'S OTHER

EVIDENCE COULD ESTABLISH AN ASCERTAINABLE LOSS BY THE CLASS, AS WAS HIS BURDEN.

A. It is undisputed that Plaintiff's "stigma" theory is the only ground for sustaining the trial court's judgment.

Plaintiff's "stigma" theory is the only ground on which he can defend the judgment in this case, as he conceded in the trial court:

> Plaintiff's theory of this case is that the entire class has sustained ascertainable loss because the Subject Vehicle is subject to a defect affecting the entire line of vehicles, thereby diminishing the value of each and every vehicle in the line of vehicles. The injury in issue does not arise from the fact that any particular vehicle experienced bubbling.

L.F.2407.

Missouri law and the Court of Appeals' class-certification opinion compelled that concession. An "ascertainable loss" is an essential element of an MMPA claim. *Binkley v. Am. Equity Mortg. Inc.,* 447 S.W.3d 194, 198-99 (Mo. banc. 2014); *see Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 438-39 (Mo. banc 2013). And in an MMPA class action, a plaintiff's burden is to establish, for *every* member, an "ascertainable loss"; otherwise, NNA is entitled to judgment. R.S. Mo. § 407.025.1. That is, as the court recognized in *Smith v. American Family Mutual*

Insurance Co., 289 S.W.3d 675 (Mo. App. W.D. 2009), a class plaintiff must show the defendant's "*universal*[]" liability to the class. *Id.* at 682-83 (emphasis added); *Felix v. Ganley Chevrolet, Inc.*, 49 N.E.3d 1224, 1232 (Ohio 2015) ("Plaintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions."). And here, *only* Plaintiff's "stigma" theory, if proven, could even arguably establish what is required. The vast majority of class members, it is undisputed, either never experienced bubbling or received a new dashboard at no cost. *Hope*, 353 S.W.3d at 80. Accordingly, the only way Plaintiff could present a submissible case was to show that the "purported stigma arising from the … 'bubbling' defect" reduced the value of *all* FX vehicles. *Id.* at 80, 84. As shown below, Plaintiff failed to meet this burden.

B. Plaintiff failed to present any competent evidence that could prove his stigma theory.

The question for this Court is thus simple: Did Plaintiff present a submissible case that can support his "stigma" theory?

The answer is a resounding "no." No witness testified to the proposition that Plaintiff claimed was his "theory of this case": that the FX line suffered from stigma "diminishing the value of each and every

vehicle in the line of vehicles." L.F.2407. Nor did any documentary evidence support this proposition.

Indeed, Plaintiff did not proffer any witness who would even be *capable* of testifying to his theory—such as an expert witness. Plaintiff's theory concerned the value of *every* 2003-08 FX vehicle in Missouri, which inevitably included hundreds of vehicles outside the personal knowledge or experience of the handful of lay witnesses who testified. *Supra* at 66-67. *Only* expert witnesses may testify "based upon facts that the expert did not personally observe or of which the witness has no personal knowledge," *Eagan v. Duello*, 173 S.W.3d 341, 350 (Mo. App. W.D. 2005), like the value of every 2003-08 FX vehicle. *See also Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1178 (D. Colo. 2006) (lay witnesses may not "draw[] inferences or offer[] opinions on … transactions in which the[y] did not participate," including effects "on the market as a whole").

When Plaintiff failed to present any expert testimony, it was not because he did not recognize the need. Plaintiff understood it well. Plaintiff duly designated an economic expert, Dr. Michael Kelsay—only to withdraw that designation when he affirmed, in a deposition, that "all the people who have had their vehicle repaired with the new dashboard … have been made whole." T1354:2-10. That testimony affirmatively

refutes Plaintiff's stigma theory, but the trial court erroneously barred its introduction. T43:4-6; *see infra* Point III. Regardless, the excluded testimony highlights that Plaintiff lacked the evidence necessary to carry his burden.[19]

By enforcing the law that dictates judgment for NNA, this Court will only be holding Plaintiff to the same burden that other class action plaintiffs have recognized and carried. In *American Family*, policyholders claimed that auto insurers had breached contracts by using "aftermarket" replacement parts because such parts were lower quality. 289 S.W.3d at 681. The class's burden, the court explained, was "to establish that aftermarket parts were *universally* inferior," not just that some were. *Id.* at 682 (emphasis added). The class there recognized that only expert testimony could establish this proposition, and produced experts who specifically testified on that point. *See id.* at 683 (testimony that aftermarket parts "will be of lesser quality in the dimension, dimensional area, and possibly in the structural area" (quotation marks

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[19] Indeed, Plaintiff designated and then withdrew *another* expert on economic damages, Michael Lewis, in his failed attempt to obtain expert testimony. *See* Pl.'s Supp. Designation of Expert Witness (Nov. 27, 2013).

omitted)). Based on this expert testimony, the court held that the class had carried its burden to show that aftermarket parts were "categorically inferior." *Id.*

Indeed, plaintiffs' attorneys nationwide have recognized that similar questions to those at issue here, like the "true market price" of a good, require expert testimony. *Guido v. L'Oreal, USA, Inc.*, No. CV 11–1067 CAS, 2013 WL 3353857, at *16 n.5 (C.D. Cal. July 1, 2013); *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (in class action, questions concerning "decline in … value" "require proof through expert testimony").

Here, by contrast, Plaintiff failed to carry his burden. That dictates judgment for NNA.

C. None of Plaintiff's other evidence can sustain his stigma theory.

The loss-related evidence Plaintiff presented was tailored to influence and inflame the jury, but it was inadequate to establish the so-called "stigma" theory that Plaintiff concedes is the sole possible basis for liability.

First, Plaintiff at trial focused on a handful of atypical owners who experienced bubbling but did not receive free replacements under warranty or goodwill. *Supra* at 21-22. This evidence is plainly irrelevant

to Plaintiff's stigma theory, which posits a loss "[*r*]*egardless*" of bubbling incidence or dashboard replacement. L.F.2407 (emphasis added). And even for this irrelevant purpose, Plaintiff could only find *two* class vehicles with unremedied bubbling. *See* T525:8-16, T538:11-16 (Susana and Chris Oelke); T884:9-18 (Burt Twibell). This testimony could never be competent evidence of loss by 324 differently situated class members (including Mr. Hurst, the named Plaintiff, *see* L.F.851).[20]

Second, the only other value evidence was from Shirley and Gary McMillan, who received a free replacement dashboard but opined that the issue could "affect [their vehicle's] trade-in value" in the future. T607:22-T608:2; *see* T619:17-23. The McMillans could not, and did not, testify to the value of any other vehicle. *Supra* at 22. The trial court admitted this testimony under the rule that "we can each testify to the value of our own personalty." T526:9-10. NNA believes that this decision was error, *see infra* Point V, but the dispositive point is that

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[20] The record shows that at least 119 of these individuals received a free dashboard. L.F.844-857; DX999. And there is no evidence that any others experienced bubbling at all. Indeed, the class includes another 27 people whose 2007 or 2008 FX vehicles were *still under warranty* as of the verdict and who thus could never be similarly situated. *Id.*

regardless of whether this testimony was properly admitted, it could not have established a submissible case on behalf of the class. The McMillans did not purport to testify as to other vehicles, and even if they had, Missouri courts have rejected "the proposition that an owner can testify to the value of" similar items he does not own "when he has not been qualified as an expert." *State ex rel. Missouri Highway & Transp. Comm'n v. Pracht*, 801 S.W.2d 90, 94 (Mo. App. E.D. 1990). This lay opinion cannot establish a submissible case for 326 class members.

Indeed, there was simply no testimony *at all* from an entire *category* of owners comprising the lion's share of the class: Owners whose vehicles never experienced bubbling at all. No owner testified that such vehicles had declined in value. Likewise, there was no testimony that any owner has ever actually *sold* an FX vehicle for a reduced price—which, if any such owner existed, Plaintiff surely would have produced.

Third, when challenged in the trial court, Plaintiff could only assert that he presented "evidence regarding the repair costs associated with [a] defective dashboard," and he contended that "the cost of repair is a proper way of establishing … diminished value." L.F.2409. That is obviously wrong. Repair costs exist only when there is *something to repair*—when an owner experiences bubbling but does not receive a free replacement. The class members here, except for two, had nothing to

repair. Indeed, Plaintiff has conceded that he must establish an "injury [that] *does not* arise from the fact that any particular vehicle experienced bubbling." L.F.2407 (emphasis added). That is the opposite of repair costs arising only if a "particular vehicle experienced bubbling." *Id.*

Finally, it is telling what evidence Plaintiff has *not* presented. If Plaintiff's stigma theory were true, the FX's "marketability and resale value" would have declined as of some particular *date* or period. *Hope*, 353 S.W.3d at 78. But Plaintiff has never identified such a date, or attempted to show when the alleged "stigma" arose and supposedly reduced the FX's value. That is because, if Plaintiff had identified such a date, it would open his theory to scrutiny (and refutation) with evidence showing *no* drop in value occurred as of that date. By refraining from identifying any such date, Plaintiff has sought to shield his baseless "stigma" theory from contradiction.

D. NNA is entitled to judgment because Plaintiff failed to establish a submissible case for secondary purchasers.

Even if Plaintiff had presented a submissible case based on his "stigma" theory, NNA would be entitled to judgment because Plaintiff did not show NNA's "universal[]" liability to the class, as was his burden. *Smith*, 289 S.W.3d at 682-83. If Plaintiff had proven his "stigma" theory, the value of certain used FX vehicles would be lower and secondary

purchasers could have *paid less*. For example, suppose—hypothetically—that Plaintiff's alleged "stigma" existed and reduced the value of FX vehicles by $2,000 as of December 1, 2009. Someone who bought an FX used the next day would, if Petitioner's stigma theory were true, have paid $2,000 less. That purchaser is not injured at all (having bought at a discount), yet because Plaintiff's class sweeps in everyone, even secondary purchasers, who owned an FX as of December 14, 2009, this person will *also* receive $2,000 under the judgment. Given that Plaintiff's own theory *refutes* the claim that such secondary purchasers suffered an ascertainable loss, he plainly did not establish a submissible case as to these secondary purchasers, and NNA is entitled to judgment.

POINT III

THE TRIAL COURT ERRED IN DENYING NNA'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY EXCLUDED THE TESTIMONY OF PLAINTIFF'S EXPERT, DR. MICHAEL KELSAY, IN THAT DR. KELSAY ADMITTED IN HIS DEPOSITION THAT MANY CLASS MEMBERS HAD SUFFERED NO INJURY AND THIS TESTIMONY WAS ADMISSIBLE AS A PARTY ADMISSION.

As noted, the reason Plaintiff could not present expert testimony at trial was that his expert admitted, in a deposition, that "all the people

who have had their vehicle repaired with the new dashboard … have been made whole." T1354:2-14. Had the jury heard that even Plaintiff's hired expert did not believe that the class had suffered an ascertainable loss, there is every reason to believe that their verdict would have been for NNA. NNA is entitled to a new trial.

Dr. Kelsay's testimony was admissible as a party admission. The Missouri rule is that any "admission by a party opponent" is admissible, even if otherwise hearsay. *Stanbrough v. Vitek Sols., Inc.*, 445 S.W.3d 90, 102 (Mo. App. E.D. 2014). And qualifying admissions include not just a party's own statements, but "authorized statements" by others. *Gordon v. Oidtman*, 692 S.W.2d 349, 355 (Mo. App. W.D. 1985); *see Bynote v. Nat'l Super Markets, Inc.*, 891 S.W.2d 117, 124 (Mo. banc 1995). Courts nationwide have recognized that the testimony of a party's expert qualifies under this rule. *See Collins v. Wayne Corp.*, 621 F.2d 777, 781 (5th Cir. 1980) ("The district court erred in not allowing the plaintiffs to offer [the] deposition into evidence as an admission" because the party "had employed [the deponent] as an expert …."), *superseded on other grounds*, *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002); *Bianco v. Hultsteg AB*, No. 05 C 0538, 2009 WL 347002, at *12 (N.D. Ill. Feb. 5, 2009) ("We agree that [the plaintiff's expert's] sworn testimony constitutes admissions by a party opponent … ."). That is because such

hired experts, like Dr. Kelsay, are specifically "authorized by" the party that retained them "to make a statement concerning the subject matter about which he testified." *Long v. Fairbank Farms, Inc.*, No. 1:09–cv–592–GZS, 2011 WL 2516378, at *10 (D. Me. May 31, 2011), *amended*, 2011 WL 2490950 (D. Me. June 22, 2011). If a hired expert makes a damaging admission, the jury should hear that highly probative testimony. NNA is entitled to a new trial based on the improper and prejudicial exclusion of Dr. Kelsay's testimony.

POINT IV

THE TRIAL COURT ERRED IN DENYING NNA'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY PERMITTED TESTIMONY BY NUMEROUS WITNESSES WHO WERE NOT MEMBERS OF THE CLASS, IN THAT THIS TESTIMONY PAINTED A MISLEADING PICTURE OF THE EXPERIENCES OF CLASS MEMBERS AND ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS NONEXISTENT PROBATIVE VALUE.

Lacking evidence to support his theory of alleged "stigma," Plaintiff distracted the jury with testimony—irrelevant to this theory—from owners who had experienced bubbling yet had not received a free replacement dashboard. But even as to this legally irrelevant situation, the simple fact is: Of the 326 class members, Plaintiff could produce only

two vehicles that experienced bubbling without receiving a free new dashboard, or 0.6% of the class. *Supra* at 21-22. That is not much of a story for justifying $650,000 in payments of $2,000 to each and every class member—even aside from the patent legal deficiencies in Plaintiff's case.

When the trial court permitted testimony by non-class members, however, the jury received a different picture based on an obvious fiction. Of the 10 owners who testified, six experienced bubbling without receiving a free replacement dashboard—60%. The incidence of unremedied bubbling in Plaintiff's fictional world was thus a *hundred* times the true rate. And of the witnesses whose testimony built this imaginary world, fully *half* were not class members.[21] Plaintiff

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[21] The FX owners who testified were Ginger Bridger, Susana Oelke, Chris Oelke, Shirley McMillan, Gary McMillan, Lisa Rae McDowell, Robert Meleleu, Scott Koons, Burt Twibell, and Robert Hurst. The six who experienced bubbling and did not receive a free replacement dashboard were Mr. and Ms. Oelke, Ms. McDowell, Mr. Meleleu, Mr. Koons, and Mr. Twibell. T525:10-16, T539:18-22, T644:3-6, T841:13-15, T852:19-T853:5, T884:9-11. Ms. McDowell, Mr. Meleleu, and Mr. Koons were not class members. T646:15-19, T841:18-21, T856:1-5.

compounded the error when he stated in closing that he had not presented more class members only because "[i]t's not practical to bring in every class member," T1420:22-23, but that others in the class "are situated exactly the same," T1469:6-7. Plaintiff could create that misleading impression only because the court permitted testimony by so many non-class members.

This testimony was highly prejudicial because it permitted Plaintiff to present a picture of the class that was the opposite of the truth. NNA was entitled to a new trial. *See Anderson v. Kohler Co.*, 170 S.W.3d 19, 24 (Mo. App. E.D. 2005) (evidence properly excluded when its "prejudicial impact … outweighed its limited probative value").

POINT V

THE TRIAL COURT ERRED IN DENYING NNA'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY PERMITTED TESTIMONY BY INDIVIDUAL OWNERS CONCERNING ALLEGED FUTURE REDUCTIONS IN THE VALUE OF THEIR VEHICLES, IN THAT THESE OWNERS LACKED EXPERTISE TO TESTIFY CONCERNING DIMINISHED VALUE, THEIR TESTIMONY WAS BASED ON GUESSWORK, AND TESTIMONY ON THE VALUE OF INDIVIDUAL VEHICLES WAS IRRELEVANT IN THIS CLASS ACTION.

As noted above, the trial court repeatedly admitted, over NNA's objection, speculation by individual owners that their vehicles' value would be lower when the time came to sell the vehicles in the future. T450:4-8, T526:18-21, T607:22-T608:2, T619:17-23. None was qualified as an expert or had any expertise concerning valuation. Nonetheless, the court admitted the testimony under the rule that "we can each testify to the value of our own personalty." T526:9-10.

That was error. The rule on which the trial court relied recognizes an owner's testimony "loses its probative value" when it lacks proper foundation and is simply "guesswork." *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780, 783 (Mo. App. W.D. 1992); *see Coach House of Ward Parkway, Inc. v. Ward Parkway Shops, Inc.*, 471 S.W.2d 464, 473 (Mo. 1971) (same rule); *Shelby Cty. R-IV Sch. Dist. v. Herman*, 392 S.W.2d 609, 613 (Mo. 1965) (same rule). The testimony here had no foundation, and reflected nothing besides the individual owners' unsupported and speculative assertions. The testimony of Shirley McMillan, who received a free replacement dashboard from NNA, is illustrative:

> When you ultimately go to either sell or trade-in your car do you have an opinion, do you think that the dashboard bubbling problem that you had is going to affect your trade-in value, what you're able

1 to get in resale on your car?

2 A. My opinion is yes.

3 Q. Why do you say that?

4 A. Well for one thing it will be in the car

5 facts if somebody buys my vehicle; not only that I

6 wouldn't lie about it. It's a major thing.

T607:22-T608:6. There is simply nothing, other than guesswork, to support Ms. McMillan's lay opinion that the disclosure of the now-remedied bubbling would eventually affect her vehicle's value when the time came to trade in the vehicle, at some undefined point in the future.

Moreover, such testimony is simply *irrelevant* in a class action like this one. As explained, Plaintiff's burden was to show a universal loss by the class due to stigma. *See supra* at 66-67. Under no circumstances could lay testimony by individual owners about possible reductions in the future value of their individual vehicles establish such a universal, stigma-based loss. Indeed, Missouri courts have rejected "the proposition that an owner can testify to the value of" items of the same *type* as an item he owns, but which are owned by others, when "he has not been qualified as an expert." *See Pracht*, 801 S.W.2d at 94. This testimony's admission was highly prejudicial, in that it distracted the

jury from the absence of any evidence that genuinely supported Plaintiff's stigma theory.[22]

POINT VI

THE TRIAL COURT ERRED IN DENYING NNA'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT DIRECTOR WAS AN IMPERMISSIBLE "ROVING COMMISSION" THAT DID NOT ALLOW THE JURY TO RENDER AN "INFORMED VERDICT," IN THAT THE VERDICT DIRECTOR DID NOT IDENTIFY ANY SPECIFIC MISREPRESENTATION THAT NNA WAS ALLEGED TO HAVE MADE AND DID NOT INSTRUCT THE JURY ON THE NEED TO IDENTIFY A MISREPRESENTATION AND A RESULTING ASCERTAINABLE LOSS FOR ALL CLASS MEMBERS ACROSS EVERY MODEL YEAR.

Plaintiff's verdict director invited the jury to hold NNA liable regardless of the blatant deficiencies in his case. The director was an

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[22] To be clear, this testimony could not establish a submissible case by the class regardless of whether it was admissible in the first instance, as explained in Point II. The question whether testimony provides "legal and substantial" evidence to support a judgment, *Moore*, 332 S.W.3d at 756 (quotation marks omitted), is distinct from whether that testimony was admissible.

impermissible "roving commission," and at minimum NNA is entitled to a new trial. *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 482 (Mo. banc 2005).

The bedrock command is that a verdict director must "allow the jury to render an informed verdict." *Rice v. Bol*, 116 S.W.3d 599, 611 (Mo. App. W.D. 2003); *see Harvey v. Washington*, 95 S.W.3d 93, 98 (Mo. banc 2003). It cannot be a "roving commission" that allows the jury "to roam freely through the evidence and choose any facts which suit[] its fancy or its perception of logic to impose liability." *Scanwell*, 162 S.W.3d at 482 (quotation marks omitted; bracket in original). In particular, this Court has held that an instruction was an impermissible roving commission where it permitted the jury to take "into consideration not only evidence" on which it could properly rely in imposing liability, "but also evidence … that w[as] not actionable." *Scanwell*, 162 S.W.3d at 482.

The Court of Appeals' decision in *American Family* again marks the path for what those principles require in class actions. There, the class recognized that their burden was to show the defendant's liability to the whole class. 289 S.W.3d at 682. So the class properly proposed an instruction that required the jury to find that the defendant had "categorically and universally" breached its contracts. *Id.* at 690. The jury knew exactly what it had to find to impose classwide liability.

Here, at Plaintiff's urging and over NNA's objection, the trial court gave the following instruction:

> Your verdict must be for Class Plaintiffs if you believe:
>
> First, in connection with the advertising of the Infiniti FX vehicle, Defendant Nissan either:
>
> 1. Made representations regarding the Infiniti FX vehicle that were not in accord with the facts regarding the quality of the vehicle; or
>
> 2. Made representations regarding the Infiniti FX vehicle that tended to create a false impression regarding the quality of the vehicle, and
>
> Second, as a direct result of such conduct, Class Plaintiffs sustained damage.

A20.

In three related ways, this instruction failed to provide the guidance the jury needed to render an informed verdict in a class action case like this one, and instead permitted the jury to base its verdict on "evidence … that w[as] not actionable." *Scanwell*, 162 S.W.3d at 482. First, the verdict director did not identify *any* specific misrepresentation that NNA purportedly made. Second, the director did not instruct the jury on the need to identify a misrepresentation to all class members, across every

model year—in stark contrast to the "categorically and universally" instruction given in *American Family*. 289 S.W.3d at 690. Third, the director did not inform jurors that they had to find damages to *all* class members, that Plaintiff's "stigma" theory was the only basis for doing so, or that the damages for each class member had to result from the specific misrepresentation the juror had identified.

Here instead is what the verdict director invited. Jurors could extract, from anywhere in the record, a single purported misrepresentation (for example, a juror could answer "yes" to the director's question of whether NNA "[m]ade representations regarding the Infiniti FX vehicle that were not in accord with the facts" based only on, say, a purported misrepresentation in the 2007 FX marketing materials). And so long as jurors could identify a shred of loss to anyone in the class (for example, finding the "Class Plaintiffs sustained damage" based on the two owners who experienced bubbling but did not receive a free replacement dashboard), they could hold NNA liable to the entire class, no matter how atypical these experiences or how irrelevant to Plaintiff's "stigma" theory. Plaintiff's defective verdict director thus compounded all of the problems described above: improper reliance on inadmissible "value" testimony from individual owners, presentation of irrelevant anecdotal testimony from non-class members, and so on. Plaintiff

invited jurors to "roam freely through" a hodgepodge of legally insufficient evidence—and when jurors did so, they reached a result the law cannot sustain. *Scanwell*, 162 S.W.3d at 482 (quotation mark omitted).

POINT VII

THE TRIAL COURT ERRED IN CERTIFYING THE CLASS IN THE FIRST INSTANCE, AS THE TRIAL SHOWED, AND THE TRIAL COURT ERRED IN DENYING NNA'S MOTION TO DECERTIFY AFTER TRIAL, BECAUSE THE EVIDENCE AT TRIAL CONFIRMED THAT COMMON ISSUES OF FACT AND LAW DID NOT SUBSTANTIALLY PREDOMINATE OVER INDIVIDUAL ONES, AS RULE 52.08 REQUIRES, IN THAT PLAINTIFF REPEATEDLY PRESENTED EVIDENCE OF ASSERTED MISREPRESENTATIONS AND INJURIES THAT APPLIED TO ONLY A SLIVER OF CLASS MEMBERS AND DID NOT APPLY CLASSWIDE, AND PERMITTING THE JUDGMENT TO STAND VIOLATES NNA'S DUE PROCESS AND JURY TRIAL RIGHTS.

Even where certification has been granted, the order is "conditional and may be altered or amended." Rule 52.08(c)(1); *see Am. Family*, 289 S.W.3d at 688. Rule 52.08 "charges the circuit court with the duty to monitor its class certification order in light of the evidentiary developments." *Am. Family*, 289 S.W.3d at 688-89. A motion to decertify may be brought after trial where the "trial established that the

common issues of fact and law did not predominate over the individual issues." *Id.* at 688. Plaintiff retains the burden. *Ogg*, 382 S.W.3d at 116.

A. Classwide questions did not substantially predominate as to Plaintiff's evidence of misrepresentation and loss.

To carry his burden, Plaintiff must show not just that the litigation "rais[es] common questions," but that the "classwide proceeding [will] generate *common answers* apt to drive the resolution of the litigation." *Smith v. Missouri Highways & Transp. Comm'n*, 372 S.W.3d 90, 94 (Mo. App. S.D. 2012) (emphasis added) (citing *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). In particular, Plaintiff must show that "*common issues substantially predominate over individual ones.*" *Hope*, 353 S.W.3d at 81 (emphasis in original); *see State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 488 (Mo. banc 2003). Predominance is measured by whether "the same evidence … will suffice for each class member." *Hope*, 353 S.W.3d at 81 (quotation marks omitted).

Such predominance is absent here. This case turns on two key issues: Whether NNA made an actionable misrepresentation, and whether the class incurred an ascertainable loss. At trial, the evidence generated common negative answers to these dispositive questions. *Supra* Points I & II. If somehow this Court declines to grant judgment to

NNA, however, the evidence Plaintiff invoked to support liability plainly does *not* consist of "the same evidence … for each class member." *Hope*, 353 S.W.3d at 81 (quotation marks omitted).

As to the MMPA's misrepresentation element, Plaintiff's case turned on the contents of specific advertising materials and evidence about who received them. To be sure, Plaintiff "*alleged* that Nissan misrepresented its FX Vehicles throughout the entire class period, rendering unnecessary individualized inquiries into Nissan's representations"—which is why the Court of Appeals approved certification in the first instance. *Id.* at 84 (emphasis added). But when the time came to *deliver*, Plaintiff did not rely on any representation that was consistent "throughout the entire class period." *Id.* Most obviously, the brochures on which Plaintiff principally relied varied widely between the 2003-05 model years, on the one hand, and the 2006-08 model years, on the other. *See supra* at 19-20 & n.5. Plaintiff's opening and closing invoked only a *single* statement concerning the latter years, from a press release no purchaser would have seen. *Id.* And Plaintiff had *no* evidence that any secondary purchaser in the class received NNA's brochures. *See supra* at 20. This evidence raised individual questions: What model year did a person own? What specific representations did the marketing

materials for that year make? Was the owner an original or secondary purchaser?

In the Court of Appeals, Plaintiff stressed that he had "presented thirteen pages of marketing materials to the jury, and admitted another 139 pages of marketing materials" into evidence. W.D. Resp. Br. 18-19. But while this evidence fails to cure Plaintiff's lack of a submissible case, *see supra* at 45-46 n.8, it just compounds Plaintiff's certification problem. This evidence, for whatever it is worth, consists of a 2005 "press kit," a 2006 press release, and a 2008 "Infiniti News" article, among others—all of which say different things about these different model years. PX286 at NNA00121309; PX286 at NNA00121178; PX200 at NNA00121312. No witness testified he had seen any of these materials, and even if, counterfactually, some actionable misrepresentation lurked somewhere in this grab bag of materials, it would only apply to a sliver of the class. The "same evidence" would not "suffice for each class member," *Hope*, 353 S.W.3d at 81 (quotation marks omitted), and the individual-specific issues would only multiply.

Plaintiff's evidence of ascertainable loss was equally individual. Once again, Plaintiff promised the courts below he would present a case that would render individual differences irrelevant, via a "stigma" theory based on classwide evidence. *Supra* at 14-16. But again, he failed to

deliver. He effectively abandoned his stigma theory—the sole basis on which he convinced the trial court and the Court of Appeals to approve certification. *Hope*, 353 S.W.3d at 84; *see supra* at 67-73. Instead, Plaintiff presented a trial-by-anecdote: two class members who had experienced bubbling without receiving a free replacement, and another pair who asserted that a replacement dashboard might decrease the vehicle's value when they ultimately decided to sell it. *Supra* at 21-22. Contrary to Plaintiff's promises, this evidence depended *entirely* on "whether the defect … manifested," and thus it did not provide the common, "class-wide" evidence required to maintain certification. *Hope*, 353 S.W.3d at 86, 89. Indeed, Plaintiff proffered no value evidence at all that could even arguably apply "class-wide." *Id.* at 89. Plaintiff's failure to support his "stigma" requires judgment for NNA, as explained above, *see supra* Point II, but at minimum, Plaintiff cannot hold NNA liable to the entire class based on individual-specific evidence.

In similar circumstances, the Second Circuit recently affirmed the decertification of a class after trial proved certification was inappropriate. *See Mazzei v. Money Store*, No. 15-2054, --- F.3d ----, 2016 WL 3876518, at *1 (2d Cir. July 15, 2016). The *Mazzei* plaintiff alleged that The Money Store breached its contracts by charging improper late fees in servicing home mortgages, and he brought a class action on behalf of borrowers

whose loans The Money Store either owned or serviced. *Id.* The basic problem was the same as here: The lead plaintiff *alleged* facts that, if proven via classwide evidence, could have yielded a class in which common questions predominated, but when trial came, his *proof* was lacking. In particular, although the *Mazzei* plaintiff claimed he could show privity—essential to any contract action—based on common evidence, at trial he failed to proffer any "class-wide evidence that class members" whose mortgages The Money Store merely serviced but did not own "were in fact in privity with The Money Store." *Id.* at *8. And "given th[is] failure of class-wide evidence … at trial," the Second Circuit held that common questions did not predominate. *Id.* at *7. Likewise here, decertification is required in light of Plaintiff's failure to prove his allegations that NNA made *uniform* representations about the FX "throughout the entire class period," and that FX vehicles incurred a *common* "stigma" not dependent on "whether the defect … manifested." *Hope*, 353 S.W.3d at 84, 86, 89.

Indeed, given the case Plaintiff presented at trial, maintaining certification here violates not just bedrock class-action principles, but the Court of Appeals' initial certification opinion, which Plaintiff has never challenged. The Court of Appeals properly rejected certification of Plaintiff's warranty claims because, under substantive warranty law,

these claims turned on the specific "advertising materials" provided to particular class members, and on "whether the defect in the dashboard actually manifested [and] the class member was damaged as a result." *Hope*, 353 S.W.3d at 86, 89. Given these individual issues, the Court of Appeals explained, "common issues certainly do not *substantially predominate over individual ones*." *Id.* at 89. Plaintiff has never challenged that ruling, which was plainly correct, but he told the Court of Appeals his MMPA case would not suffer from these flaws. *Id.* at 84-85. Yet when trial came, Plaintiff nonetheless presented a MMPA case that raised *exactly* the individual issues that the Court of Appeals held were disqualifying as to the warranty claims: what specific "advertising materials" applied to a particular vehicle, and "whether the defect in the dashboard actually manifested." *Hope*, 353 S.W.3d at 86, 89; *see supra* at 21-22, 67-73.

Plaintiff's trial-by-anecdote turned the beneficial purpose of the class action device on its head. Class actions serve their purpose when they efficiently generate common answers to common questions. *Smith*, 372 S.W.3d at 94; *see Clark*, 106 S.W.3d at 489 (similar). If a defendant is liable to the class, it is because it would have been liable to each and every member, and a properly constructed class action resolves that question in one blow. *See id.* Here, however, the opposite occurred.

Plaintiff's evidence was not just categorically inadequate, but it applied to only a sliver of the class. So the effect of the trial court's judgment is that NNA is liable to the entire class, even though there was simply *no* evidence (however inadequate) as to many class members and NNA could never have been held liable to them. *Supra* at 21-22, 67-73. The predominance requirement prevents such results. *Cf. Am. Family*, 289 S.W.3d at 689 (decertification properly denied where the predominant issue alleged by the class "continued to be the predominant common issue throughout the trial").

If the trial court's judgment stands, it will violate the Missouri and federal constitutions. A "defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'" (citation omitted)). That is because the proceeding must be "reasonably calculated to reflect the results that would be obtained if th[e individual] claims were actually tried." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997). If the proceeding engenders "confusion or prejudice," it violates due process and the jury-trial right protected by

the federal and Missouri constitutions. *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996); *see* American Law Institute, *Principles of the Law: Aggregate Litigation*, § 2.07(d) cmt. j (2009); U.S. Const. amends. VII, XIV; Mo. Const., art. I, §§ 10, 22(a).

It is not hard to predict the result of a trial involving, say, a 2007 FX vehicle that never experienced bubbling or that received a free replacement dashboard: There was not even an arguable misrepresentation or arguable injury. NNA is today liable to the entire class because the trial masked—was calculated to mask—the absence of evidence. This is not a method "reasonably calculated" to reflect the results of individual trials, and due process and the jury-trial right forbid it. *Chevron*, 109 F.3d at 1020.

B. Decertification should have been granted as to secondary purchasers.

Decertification also should have been granted as to secondary purchasers. As the Court of Appeals foresaw, the evidence for such purchasers is not "the same" as for original owners. *Hope*, 353 S.W.3d at 89; *see id.* at 84 ("Because some owners presumably are secondary owners who did not purchase their vehicles through Nissan's distribution system, the class definition would require adjustment so as not to

include such owners."); *id.* at 86 (similar). There is no evidence that any secondary purchaser in the class ever received the advertising brochures on which Plaintiff relied, *supra* at 20, and thus there is no evidence—much less *classwide* evidence—that NNA made representations to these purchasers "in connection with" these transactions, R.S. Mo. 407.020.1. At minimum, that question raises individual issues. Moreover, as explained above, Plaintiff's "stigma" theory is inconsistent with the claim that secondary purchasers suffered a loss: were that theory true, the value of some used FX vehicles would be lower and secondary purchasers could have *paid less*. *Supra* at 73-74.

Indeed, including secondary purchasers in the class exposes NNA to a real risk of having to pay twice for the same vehicle. Consider again the hypothetical transaction described above: A hypothetical stigma-driven reduction in value as of December 1, 2009, and a sale the next day that, because of the hypothesized stigma, was for $2,000 less than it otherwise would have been. *Supra* at 73-74. The buyer would recover $2,000 under the judgment here because he owned the vehicle on the class cut-off date of December 14, 2009 (even though he was uninjured and paid a price that reflected the alleged stigma). Yet the seller is *not* a class member (having sold before the magic date), and thus may bring his *own* suit, complaining that the alleged misrepresentation caused him

to receive $2,000 less on the sale. That possibility only underscores that secondary purchasers do not belong in this case.

POINT VIII

THE TRIAL COURT ERRED IN CERTIFYING THE CLASS IN THE FIRST INSTANCE, AS THE TRIAL SHOWED, AND THE TRIAL COURT ERRED IN DENYING NNA'S MOTION TO DECERTIFY AFTER TRIAL, BECAUSE UNINJURED INDIVIDUALS IMPERMISSIBLY DOMINATED THE CLASS, IN THAT THE VAST MAJORITY OF CLASS MEMBERS EITHER NEVER EXPERIENCED DASHBOARD BUBBLING OR RECEIVED A FREE REPLACEMENT DASHBOARD.

Decertification is also required because uninjured members dominate the class. Under Rule 52.08, a class "that encompasses more than a relatively small number of uninjured putative members is … improper." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. banc 2008). If a class includes such uninjured members, it "is impermissibly overbroad." *Id.*; *see also Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("[F]or a class to be certified, each member must … show an injury in fact …."); *Felix*, 49 N.E.3d at 1232 ("Plaintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions."). Here, Plaintiff's stigma theory is the sole

asserted injury for the vast majority of the class. Plaintiff's failure to prove that theory means the class is full of uninjured members.[23]

Moreover, the class's inclusion of so many uninjured individuals violates NNA's constitutional rights for the reason just given: NNA would prevail in individual trials brought by the uninjured members, but the trial masked the absence of injury to hold NNA liable to the whole class. *Carrera*, 727 F.3d at 307.

The class's inclusion of so many uninjured members—including the sole named Plaintiff, who received a free replacement dashboard, L.F.851—also violates the due process rights of the absent class members. The "Due Process Clause … requires that the named plaintiff at all times adequately represent the interests of the absent class

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[23] Indeed, myriad class members could not *possibly* have been injured: The class includes not just hundreds of individuals who never experienced bubbling or who received a free dashboard to remedy any bubbling, but also owners of model year 2007 and 2008 vehicles (which were still under warranty at verdict), and owners of model year 2003 vehicles (even though Plaintiff premised his defect claim on analysis of the Mitsui dashboard, which was first used in 2004, T717:3-5; T781:21-T782:4).

members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Uninjured persons cannot adequately represent absent class members who may arguably be injured, and a class's domination by such persons violates due process.

POINT IX

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES BECAUSE THE MMPA AUTHORIZES ATTORNEY'S FEES ONLY FOR A "PREVAILING PARTY," IN THAT THE TRIAL COURT SHOULD HAVE GRANTED NNA'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL, AND TO DECERTIFY THE CLASS, AND IF THIS COURT REVERSES THE TRIAL COURT'S JUDGMENT, THE CLASS WILL NO LONGER BE A PREVAILING PARTY.

The MMPA authorizes attorney's fees only to "the prevailing party." R.S. Mo. § 407.025.1. As NNA has explained, this Court should reverse the trial court's judgment. If it does so, the class will no longer be a prevailing party and attorney's fees will no longer be authorized.

CONCLUSION

Plaintiff did not establish a submissible case as to either the existence of an actionable misrepresentation or a resulting ascertainable loss by the class—both essential elements of an MMPA claim. NNA therefore respectfully requests that this Court reverse the trial court's judgment and direct that judgment be entered for NNA in accordance with its post-trial motions, as the Court of Appeals did. In the alternative, NNA respectfully requests that this Court order a new trial or the decertification of the class.

Respectfully submitted,

/s/ John W. Cowden
John W. Cowden MO #21447
David M. Eisenberg MO #54767
Baker Sterchi Cowden & Rice, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, MO 64108-2504
Phone: (816) 471-2121
Fax: (816) 472-0288

Peter J. Brennan (*pro hac vice*)
Zachary C. Schauf (*pro hac vice*)
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654
Phone: (312) 222-9350
Fax: (312) 527-0484

ATTORNEYS FOR APPELLANT
NISSAN NORTH AMERICA, INC.

CERTIFICATE OF SERVICE

The foregoing Appellant's Brief and Appendix were served via electronic mail and filed using the Court's electronic filing system, this 11th day of August, 2016, resulting in electronic notification on counsel of record listed below:

Kevin D. Stanley
Humphrey, Farrington & McClain, P.C.
221 West Lexington, Suite 400
Independence, MO 64050
kds@hfmlegal.com

L. Benjamin Mook
Davis George Mook, LLC
1600 Genessee, Suite 328
Kansas City, MO 64102
ben@dgmlawyers.com

Michael W. Blanton
Blanton Law Firm
6949 Highway 73, Suite B
Evergreen, CO 80439
mblanton@mblantonlaw.com

Attorneys for PLAINTIFF/APPELLEE

/s/ John W. Cowden
Attorney for Defendant/Appellant
Nissan North America, Inc.

CERTIFICATE OF COMPLIANCE

I, John W. Cowden, hereby certify as follows:

That this brief complies with the requirements of Missouri Supreme Court Rule 84.06(b) and that the brief contains 22,592 words, excluding the words in the cover, certificate of service, certificate of compliance, signature block, and appendix. The word count was derived from Microsoft Word. CD-ROMs were prepared using Symantec Endpoint Protection anti-virus software and were scanned and certified as virus free. Two true and correct copies of the attached brief and a CD-ROM containing a copy of this brief were sent by U.S. First Class Mail, postage prepaid, this 11 day of August, 2016, to:

Kevin D. Stanley
Humphrey, Farrington & McClain, P.C.
221 West Lexington, Suite 400
Independence, MO 64050
kds@hfmlegal.com

L. Benjamin Mook
Davis George Mook, LLC
1600 Genessee, Suite 328
Kansas City, MO 64102
ben@dgmlawyers.com

Michael W. Blanton
Blanton Law Firm
6949 Highway 73, Suite B
Evergreen, CO 80439
mblanton@mblantonlaw.com

Attorneys for PLAINTIFF/APPELLEE

/s/ John W. Cowden
John W. Cowden MO #21447
David M. Eisenberg MO #54767
Baker Sterchi Cowden & Rice, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, MO 64108-2504
Phone: (816) 471-2121
Fax: (816) 472-0288