IN THE SUPREME COURT OF MISSOURI

ROBERT HURST, ET AL.	)	
	)	
Plaintiffs/Respondents,	)	
	)	
v.	)	**Case No. SC95707**
	)	
NISSAN NORTH AMERICA, INC.,	)	
	)	
Defendant/Appellant.	)	

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
Honorable Jack R. Grate, Jr., Division 17
Circuit Court Case No. 0916-CV38388-02
Court of Appeals, Western District Case No. WD78665

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Statutes and Other Authorities **Page**

INTRODUCTION

Nissan North America, Inc. ("NNA") consistently misrepresented the quality of an admittedly defective vehicle – the Infiniti FX. The 326 consumers identified as the recovering class in the Circuit Court's judgment sustained ascertainable losses because the FX they purchased was worth considerably less than if it had been as represented. This loss applies to all of the consumers in question because all of the FXs in question had a defective dashboard, regardless of whether it was the original defective dashboard or a defective replacement dashboard. Contrary to NNA's assertion, there is no "windfall" involved in this case – each of the consumers in the recovering class has a currently defective vehicle.

Having had both the Circuit Court and the jury determine that it engaged in unlawful practices under the Missouri Merchandising Practices Act ("MMPA"), NNA now seeks to undo the jury's verdict by arguing there was no probative evidence to support Plaintiff's MMPA claim. To the contrary, NNA's own employees and representatives admitted many of the key facts in this case, including the following: (1) that all of the dashboards in question were defective, (2) that the marketing materials were consistently misleading for the entire life cycle of the FX, (3) that the FX's condition was not consistent with the representations in the marketing materials, and (4) that NNA made promises to consumers in its brochures

for the FX.[1] (TR 1224-27, 1131, 1328-31, 1434; PX 97; PX 98; PX 99 PX 100; PX 101; PX 112; PX 279, p. 11; PX 279, pp. 5-7, 27, 38, 49-51; PX 281, pp. 1, 3, 5-15, 17, 21, 28, 31; PX 284, pp. 2-3, 5-7, 12-13, 14, 17). Other evidence, including testimony of NNA's employees, established that the defective nature of the FX diminished the value of the FX. (TR 448-50, 525-27, 539, 591, 599, 605-08, 618-20, 644, 681, 842, 855, 874, 883, 887-88, 897-98; PX 278, pp. 10, 17-18, 25-26; PX 280, pp. 4-6, 8; PX 283, p. 13; PX 285, pp. 1-2, 8, 13).

NNA's Substitute Brief largely ignores this evidence, instead focusing upon evidence that fits its own theory of defense. But the jury rejected NNA's defense. More important, the jury was entitled to rule in favor of the class based upon the substantial body of evidence that was presented in the case.

Apparently recognizing that the record provides ample support for the jury's verdict under existing Missouri law, NNA seeks to radically modify the law pertaining to claims under the MMPA. NNA argues that the puffery doctrine should be applied to MMPA claims, even though the puffery doctrine is closely associated

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[1] References to the Record on Appeal are by document and page number. The following abbreviations are used: Legal File ("LF"), Transcript ("TR"), Plaintiff's Exhibit ("PX"), Respondent's Supplemental Legal File ("RSLF") and Appellant's Appendix ("A").

with fraud actions, and the MMPA is specifically intended to provide protections to consumers that go well beyond a common law fraud claim. In fact, NNA brazenly argues that Missouri courts held fifteen years ago that puffery applies to MMPA actions, even though the Court of Appeals recognized in this case that there is no Missouri case which has so held.

Despite a complete lack of Missouri precedent, NNA argues that representations can only be actionable under the MMPA if they are "susceptible of exact knowledge," "capable of being proved false" or "statements of objective fact." In essence, NNA argues that its statements can be grossly misleading as long as they are not shown to be outright lies. That argument is contrary to the well-recognized policy and purpose of the MMPA.

NNA also devotes a great deal of effort to arguing that the class members are not similarly situated. But those arguments are contrary to the evidence, and many of those arguments have been previously rejected by the Court of Appeals. NNA argues that not all class members saw the same advertisements, but NNA's own employees testified that the advertising was consistently misleading for the entire life cycle of the vehicle. NNA argues that not all FX owners were injured, but NNA's own employees concede that all of the FXs in question have a defective dashboard. No matter how NNA spins the evidence, a full review of the record establishes that the evidence provided ample support for the jury's verdict.

Finally, recognizing that the facts are not on its side, NNA seeks refuge in the law by arguing that the Circuit Court erred in refusing to adopt a number of unsupported legal arguments. NNA argued that only class members should be allowed to testify, despite its own admission that it could not find a single case anywhere in the nation supporting that assertion. NNA argued that vehicle owners should not be allowed to testify to the value of their own vehicles, despite longstanding Missouri law to the contrary. And NNA argued that the verdict director should have included a great deal of factual detail – a suggestion directly contradictory to MAI and Missouri case law regarding instructions. The Circuit Court wisely rejected NNA's unfounded arguments.

In reality, this action is a prime example of the MMPA being properly applied to protect a class of consumers who would be unable to protect themselves individually absent the class action process. The propriety of class certification has previously been addressed by the Court of Appeals and the Circuit Court. The factual determinations were reached as a result of careful consideration by the jury after hearing a week and a half of evidence. The Circuit Court and the jury did their jobs correctly, and this Court should affirm the judgment in all respects.

STATEMENT OF FACTS

Because NNA's Statement of Facts is both incomplete and inaccurate, Plaintiff provides his own Statement of Facts.

I. BACKGROUND.

This action involves dashboard bubbling in the Infiniti FX35 and FX 45 ("FX"). An example of the dashboard bubbling is depicted in the exhibit below:

(PX 259).

NNA undertook two separate countermeasures to address the bubbling issue in the FX dashboard. (PX 279, pp. 5-6, 27). Those countermeasure dashboards are hereafter referred to as Countermeasure 1 and Countermeasure 2. There were three different dashboards used in the FX during production years: the dashboard used in the 2003 model year, the dashboard used in the 2004-2006 model years, and the dashboard used in the 2007-2008 model years (Countermeasure 1 dashboard). (PX 279, p. 5).

NNA's representative, Gary Brand, acknowledged that every FX that left the factory from 2004 to 2006 would have had the same dashboard with the same propensity to bubble when exposed to heat and humidity. (PX 279, p. 6; TR 1225-26). He also acknowledged there was bubbling in the 2003 dashboard. (TR 1224; PX 279, p. 5).[2]

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[2] At trial NNA argued the 2003 dashboard did not suffer from bubbling, but numerous points of evidence refute this argument. For example, Alan Sakimoto, NNA's manager of field quality improvement, acknowledged he sent multiple emails and prepared multiple tables referring to bubbling in 2003. (PX 281, 1, 3, 5-15, 17, 21, 28 31; PX 97; PX 98; PX 99; PX 100; PX 101; PX 112). Nicholas Angelidis testified that the 2003 model had dashboards with a propensity to bubble. (PX 278, p. 11). In the extended

Countermeasure 1 was implemented in October 2006. (TR 1131; PX 279, p. 6). Countermeasure 1 was undertaken in an effort to address the original dashboard's propensity to bubble. (PX 279, pp. 6, 38). The Countermeasure 1 dashboard was used in the production vehicles for 2007-2008. (PX 279, p. 7).

After Countermeasure 1 was implemented for 2007-2008 vehicles, the Countermeasure 1 dashboards also began to bubble. (PX 279, p. 7). The Countermeasure 1 dashboards used in 2007-2008 production vehicles all had the same propensity to bubble. (PX 279, p. 7). When it became apparent that Countermeasure 1 had not addressed the bubbling issue, NNA implemented Countermeasure 2 in July 2009. (TR 1131; PX 279, p. 9, 11, 38). NNA subsequently determined that the Countermeasure 2 dashboard was also bubbling. (PX 279, pp. 49-51).

Approximately 118,000 FXs were sold, of which 53,839 had warranty repairs. (TR 1209). Over 45,000 had dashboards replaced. (TR 1122, 1160).[3] Most of those

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warranty letter NNA acknowledged it was "aware of a cosmetic issue with the dash material on some 2003 to 2008 FX vehicles where the material may start bubbling from heat and humidity." (PX 3).

[3] The actual failure rate is higher because the 45,000 figure only includes dashboards replaced under warranty since 2009. This figure does not include

replacement dashboards were Countermeasure 2 dashboards. (TR 1227). That leaves approximately 65,000 vehicles that have not had any warranty repairs. (TR 1209). Those 65,000 vehicles would have either the original dashboard, or a Countermeasure 1 dashboard. (TR 1210).

Jason Babcock, NNA's expert on chemistry and material science, reviewed the work that NNA had done on the dashboard. (TR 1276). He acknowledged that the Countermeasure 2 dashboard was experiencing bubbling. (TR 1328-31). He agreed that it was failing at a rate 20 times higher than NNA's own standards. (TR 1331). Likewise, Gary Brand acknowledged that the failure rate for Countermeasure 2 dashboards far exceeded NNA's own standards. (TR 1229).

In response to the dashboard bubbling issue, NNA issued a warranty extension for the dashboard. (PX 3). NNA began mailing warranty extension letters on March 4, 2010. (DX 1101, p. 22). However, many people did not receive notice of the warranty extension. (TR 524, 600, 839, 853-54). Furthermore, people who experienced a bubbled dashboard were still denied warranty coverage if they did not meet the precise terms of the extended warranty. (TR 524-25, 643-44, 837-38, 882-84). In addition, some people who had their dashboard replaced subsequently

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FX owners who paid out of pocket or were refused a dashboard replacement under warranty. (TR 1181-83).

experienced bubbling in the replacement dashboard. (TR 849-50).[4] NNA indicated at trial that a customer with a dashboard that has not yet bubbled cannot get a replacement dashboard under the extended warranty. (TR 1259-60). NNA's representative, Gary Brand, did not know how many people had been denied a dashboard replacement because they were out of warranty. (TR 1267).

1,850 FXs were sold in Missouri, approximately 1,300 of which have not had their dashboard replaced. (TR 1220-24). Those vehicles still have an original or Countermeasure 1 dashboard. (TR 1224-25). The others have a Countermeasure 2 dashboard. (TR 1227).

II. FACTS PERTAINING TO MISREPRESENTATIONS.

Class member Susana Oelke learned about the FX from commercials and marketing materials she received at the dealership. (TR 518). Based upon the marketing materials she expected the FX to be a "higher quality" vehicle and did not expect the dashboard to bubble. (TR 519-20). However, after purchase the dashboard bubbled. (TR 520). She did not view the dashboard as being either "premium" or "durable." (TR 530-32).

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[4] The replacement dashboards were Countermeasure 2 dashboards which also had the propensity to bubble. (TR 1227, 1229, 1328-31; PX 279, pp. 49-51).

Class Member Shirley McMillan saw commercials and obtained brochures from an Infiniti dealer prior to purchasing her FX. (TR 588-89, 591-92). The advertising gave her the impression the FX was an "upscale" vehicle. (TR 592). The brochures depicted and discussed the interior of the FX and gave the impression it was an "upscale" vehicle. (TR 593-94). Her experience with the FX's quality was not consistent with the way it was depicted in the marketing materials. (TR 611). If the marketing materials had accurately depicted the FX's quality, she would not have purchased it. (TR 611).

Class member Burt Twibell reviewed a brochure for the FX prior to purchasing it. (TR 875-76, 895). He purchased his FX based upon his impression it was a luxury vehicle. (TR 886). He testified the FX dashboard had not lived up to his expectations regarding a premium, luxury vehicle. (TR 899).

Plaintiff Robert Hurst testified the dashboard in the FX did not meet his expectations of high quality in the vehicle. (PX 283, p. 9). He specifically testified the portion of the FX brochure promising "[p]remium automotive machinery" was not met. (PX 283, pp. 20-21).

Non-class member Ginger Bridger viewed brochures and information on Infiniti's website before purchasing her FX. (TR 430-31). She received her brochures straight from Infiniti. (TR 431, 435-36). Those materials emphasized the FX was a high quality vehicle. (TR 436, 459). She testified those materials

influenced her purchase decision, and she purchased the FX because she viewed it as a "high quality" vehicle with "durability." (TR 436-37, 446). Subsequent to purchase, her dashboard bubbled. (TR 437-40). Based upon the marketing materials she reviewed, she would not have expected dashboard bubbling. (TR 440-41). The bubbling made her vehicle look cheap. (TR 442).

Nathan Lyst is the senior manager for Infiniti marketing communications. (PX 284, p. 1). He testified regarding the marketing campaign for the FX. (PX 284, p. 1). He testified that the marketing for the FX was intended to convey the overall theme that it was a premium vehicle and that it was of a premium nature. (PX 284, pp. 2-3).

Lyst discussed the brochure for the 2003 FX in detail. (PX 284, pp. 3-14). He testified the brochure "in its totality it is meant to convey an overall image for the vehicle." (PX 284, p. 5). He testified the brochure was intended to provide the foundation for an overall image of the FX, and the way the FX looked was important to the overall marketing campaign because NNA was trying to sell a particular "design esthetic." (PX 284, p. 6, 7). Lyst testified NNA was trying to convey the overall image of a "very refined" vehicle. (PX 284, p. 12). The idea of a premium vehicle, including the promise of "premium automotive machinery," was a recurrent theme in the FX marketing. (PX 284, p. 13). He further testified NNA was trying

to convey that the premium features of the FX were a large part of the ownership experience. (PX 284, p. 13).

Lyst also testified regarding brochures for the 2004-2008 FX. (PX 284, pp. 15-17). The overall image of the FX conveyed in the 2003-2008 marketing materials did not change. (PX 284, pp. 6, 17). He testified that "the same message – the same words are being used consistently" and this was true "through the life cycle of the vehicle." (PX 284, p. 17). All of the brochures emphasized views of the dashboard in the FX. (PX 71, pp. 26, 28; PX 72, pp. 32, 35; PX 73, pp. 31, 34; PX 74, pp. 15, 33; PX 75, pp. 15, 34; PX 76, pp. 15, 35). The 2003-2008 brochures, discussed by Lyst, were admitted into evidence. (PX 71, PX 72, PX 73, PX 74, PX 75, PX 76).

Nathan Lyst agreed a dashboard prone to bubbling was not consistent with the promises made in the FX marketing materials. (PX 284, p. 14).

During trial, samples of marketing materials were shown to the jury, with specific aspects pointed out by counsel. (TR 941-44). Those materials included the following representations:

- The FX is a "premium" vehicle and a "leader in style."
- "Since its introduction, the FX has been a leader in style."
- The FX "embodies the Infiniti philosophy of combining design and performance in one luxurious package."
- The FX has "A High Tech Interior Accentuated with Luxurious Comfort."

- The FX encompasses "the comfort and amenities of a luxury car."
- The FX provides a "unique blend of uncompromising style and luxury."
- The FX has "[a]n ergonomically designed, sport-inspired cockpit [that] embraces the driver and elevates the driving experience."

(PX 286 at NNA 121178, 121188, 121232, 121305, 121309, 121426). Another exhibit consisting of 139 pages of marketing materials was also admitted into evidence. (PX 200).

During the instruction conference, NNA's counsel conceded, "[t]here's been a lot of evidence presented from brochures and from press releases, from TV advertisements and various things." (TR 1382).

In closing argument, NNA's counsel admitted the statements NNA makes in its brochures are promises: "What they do promise the public is what's in the brochures." (TR 1434).

III. FACTS PERTAINING TO ASCERTAINABLE LOSS.

Susana Oelke testified the value of her FX had been diminished as a result of the dashboard issue. (TR 525-26). NNA objected to that testimony. (TR 525-26). She explained if she were purchasing a vehicle, the appearance would be a factor in the purchasing decision. (TR 526). She testified that based upon the dashboard appearance problems, the resale value of her vehicle was diminished. (TR 526-27).

Shirley McMillan testified she generally traded her vehicles every two or three years. (TR 591). However, because of the dashboard issue, she was unable to trade her FX. (TR 605). She testified the resale and trade-in value of her FX was diminished by the dashboard issue. (TR 605). She could find no one willing to take the FX on trade-in. (TR 605). There was no objection to this testimony. (TR 605). Mrs. McMillan also testified that when she eventually sold her vehicle the resale value would be diminished as a result of the dashboard problem. (TR 606-08). NNA objected to that testimony. (TR 606-07). She explained she thought the resale value would be diminished because the purchaser would know of the dashboard problem and that would lower the value of the vehicle. (TR 608).

Gary McMillan likewise testified the dashboard issue harmed the resale value of their FX. (TR 618). He testified when they tried to trade in the FX they could not find anyone interested in owning it. (TR 618). There was no objection to that testimony. (TR 618). He also testified the resale value would be diminished when they eventually sold their FX. (TR 618-19). NNA objected to this testimony. (TR 619). As Mr. McMillan described it: "the first thing they're going to say is this the one that had the bad dash, yeah, I think it will affect it." (TR 620).

Lisa McDowell, Robert Meleleu and Scott Koons (non-class members) all testified it was their opinion the bubbling in their dashboards diminished the value

of their FXs. (TR 644, 842, 855). There was no objection to that testimony. (TR 644, 842, 855).

Burt Twibell testified the bubbling issue diminished the value of his FX. (TR 887). Specifically, he testified the bubbling would make it difficult to resell his FX, stating: "Nobody is going to buy a luxury vehicle for what should be an appropriate value with a defect of that nature." (TR 887-88). He testified if he were to sell his FX, his options would be either pay to fix the dashboard or take a reduced price for the vehicle. (TR 888). There was no objection to any of this testimony. (TR 887-88). In fact, NNA's counsel also questioned Twibell about his opinions regarding the resale value of the FX, and Twibell testified that even if the bubbled dashboard was replaced, the value of the vehicle would be diminished by the vehicle's history of dashboard bubbling. (TR 897-98). This is clear testimony of stigma causing diminished value.

Ginger Bridger testified she had difficulty selling her FX due to the dashboard issue. (TR 448). NNA objected to that testimony. (TR 448-49). Ms. Bridger also testified that the value of her FX had been diminished as a result of the dashboard issue, and she was not able to sell it for a fair price. (TR 450). There were no objections to this testimony. (TR 450).

Robert Hurst was questioned by NNA's counsel regarding the diminished value of his FX. (PX 283, p. 13). He testified he was concerned about the bubbling

issue diminishing the value of his FX because any history of problems in a particular vehicle line dissuades people from wanting to purchase that vehicle line. (PX 283, p. 13). There were no objections to that testimony. (PX 283, p. 13). Again, this is clear testimony of stigma causing diminished value.

NNA employee Nicholas Angelidis testified the dashboard bubbling issue was a "significant cosmetic issue" that impacted "customer satisfaction." (PX 278, p. 10). He testified this issue was "an important consideration" in terms of "impact on the customer and the brand" because the defect made the vehicle look "pretty bad" and was in a very noticeable position in the vehicle. (PX 278, pp. 17-18). Because of those factors, NNA believed the impact on customers was "fairly high," and NNA was concerned the bubbling issue would affect "repurchase decision[s]" across the entire brand. (PX 278, p. 18). In preparing to address customer questions, Mr. Angelidis anticipated the following question: "I already sold my vehicle, but it was worth less because of the bubbling; will you compensate me on the difference?" (PX 278, pp. 25-26). He indicated NNA's answer should be "no." (PX 278, p. 25).

Various owners testified NNA told them it would cost $1,000-$3,000 to replace their dashboard. (TR 539, 599, 644, 681, 883). All but one of those witnesses testified that the replacement cost was $2,000 or more. (TR 539, 599, 644, 681, 883).

David Grooms, a service consultant at an Infiniti dealer, testified the cost for replacing an FX dashboard was the same for model years 2003-2008. (PX 280, pp. 4-6). He testified the cost for replacing a dashboard at his dealership is $1,289.62. (PX 280, p. 8).

James Mitchell, a service manager at an Infiniti dealer, testified the cost of replacing an FX dashboard was the same for model years 2003-2008. (PX 285, pp. 1-2, 13). He testified the warranty cost for replacing a dashboard at his dealership is $1,075.77. (PX 285, p. 8).

In their discovery response, which was read to the jury, NNA indicated the retail cost for a replacement dashboard is $806.42. (TR 874).

During the instruction conference, NNA's counsel conceded "[t]he evidence has been consistent that the claim damage here is diminished value due to bubbling on a dashboard." (TR 1377).

IV. FACTS PERTAINING TO MICHAEL KELSAY.

Plaintiff withdrew his designation of Michael Kelsay as an expert witness prior to trial. (LF 485). Plaintiff also moved to exclude any reference to Mr. Kelsay at trial. (LF 481). In response to Plaintiff's motion regarding Mr. Kelsay, NNA identified 31 lines of testimony from Mr. Kelsay's deposition which it argued it was entitled to present at trial. (LF 583-84).

NNA filed a supplemental brief regarding Mr. Kelsay which argued that Mr. Kelsay's testimony could be used by NNA pursuant to the theory that his testimony constituted an admission of Plaintiff given that he was Plaintiff's former expert. (LF 640-44).

Plaintiff filed a supplemental brief in which Plaintiff explained that NNA could not use Mr. Kelsay's testimony because (1) NNA had not cross-designated Mr. Kelsay as an expert witness, (2) there was nothing in Mr. Kelsay's deposition which sufficiently qualified him as an expert witness, and (3) none of Mr. Kelsay's opinions in his deposition testimony were stated to the necessary degree of certainty. (LF 702-08). Plaintiff also refuted NNA's argument that Mr. Kelsay's testimony constituted an admission against interest, noting that Missouri law did not support that assertion, and that cases from other jurisdictions had rejected that argument. (LF 709-11).

At the pre-trial hearing, the Court recognized that Mr. Kelsay had never been designated by NNA. (TR 34). The Court also recognized there were concerns that Mr. Kelsay's deposition testimony did not establish his qualifications as an expert, and that none of the opinions stated in Mr. Kelsay's deposition were stated to a reasonable degree of certainty. (TR 34).

NNA argued that Mr. Kelsay's deposition testimony was admissible as an admission against interest. (TR 35). However, NNA conceded it had not found any

Missouri cases to support that proposition. (TR 36). With respect to the Court's concern regarding Mr. Kelsay's qualifications, NNA acknowledged that its argument was based solely upon Kelsay's CV and the fact that he had previously testified for Plaintiff's counsel as an expert in other cases. (TR 38). NNA did not identify any portion of the deposition transcript in which Mr. Kelsay's qualifications had been discussed in any way. (TR 38). NNA did not address the Court's concern regarding the fact that none of Mr. Kelsay's opinions had been stated to a reasonable degree of certainty. (TR 34-43).

The Court sustained Plaintiff's motion seeking to bar NNA from presenting the deposition testimony of Mr. Kelsay. (TR 43). The Court based this ruling on the following conclusions: (1) Mr. Kelsay's statements were not admissions of Plaintiff because Mr. Kelsay was not acting as Plaintiff's agent but was instead obligated to offer his own independent opinions, (2) Mr. Kelsay had not been designated by NNA, and (3) Mr. Kelsay did not state any opinions to a reasonable degree of certainty. (TR 43-44).

NNA made an offer of proof regarding the specific portions of Mr. Kelsay's deposition that it would have presented at trial. (TR 1353-56). At no point in the offered testimony is there any discussion of Mr. Kelsay's qualifications as an expert. (TR 1353-56). At no point in the offered testimony does Mr. Kelsay indicate that he is stating any opinion to any degree of certainty. (TR 1353-56). The Court again

stated its conclusion that Mr. Kelsay's testimony did not constitute an admission of Plaintiff, and that NNA had never designated Mr. Kelsay. (TR 1358-59).

V. FACTS PERTAINING TO TESTIMONY OF PERSONS WHO WERE NOT CLASS MEMBERS.

NNA moved to strike Ginger Bridger as a witness because she was not a class member. (TR 423-24). Its stated bases for doing so were that her testimony was not relevant and that admission of the testimony would be prejudicial. (TR 424). NNA acknowledged it was aware of no case which holds that evidence in a class action must come only from class members. (TR 426). The Court reaffirmed its prior order denying NNA's motion to exclude testimony from non-class members, indicating that it was not aware of any case that required exclusion of such testimony and it could not think of any concept that would support exclusion of such testimony. (TR 427).

During trial, NNA's counsel emphasized during cross-examination of Ms. Bridger that she was not a member of the class. (TR 459). Plaintiff's counsel likewise made this point clear to the jury. (TR 461-62).

Lisa Rae McDowell was a non-Missouri resident who testified regarding her experience with her FX. (TR 639). NNA's counsel objected to her testimony on the basis that she was not a class member. (TR 640-43). During cross-examination,

NNA's counsel made it clear to the jury that Ms. McDowell was not a Missouri resident and was not a member of the class. (TR 646). Plaintiff's counsel likewise made this point clear to the jury. (TR 647-48).

Robert Meleleu was a non-Missouri resident who testified regarding his experience with his FX. (TR 830). NNA's counsel objected to his testimony on the basis that he was not a class member. (TR 831-32). Plaintiff's counsel made it clear to the jury that Mr. Meleleu was not a member of the class. (TR 841). NNA's counsel likewise emphasized to the jury that Mr. Meleleu was not a class member and was not a Missouri resident. (TR 842-43).

Scott Koons testified to his experience with his FX. (TR 846-47). NNA's counsel objected to his testimony on the basis that he was not a class member. (TR 847-48). Plaintiff's counsel made it clear to the jury that Mr. Koons was not a class member. (TR 856). NNA's counsel likewise emphasized to the jury that Mr. Koons was not a member of the class. (TR 856).

During closing argument Plaintiff's counsel again made clear to the jury that it had heard testimony from both class members and witnesses who were not members of the class. (TR 1421).

VI. FACTS PERTAINING TO THE VERDICT DIRECTOR.

NNA objected to the first paragraph of the verdict director. (TR 1381). That paragraph stated:

> 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;

(SLF 8).

NNA objected to this language of the verdict director on the following bases: "because it is too vague, broad indefinite with the use of, quote, representations, closed quote, without any specificity as to what representations are in play." (TR 1382). NNA indicated that this objection also applied to the language "tended to create a false impression." (TR 1383). NNA argued that the verdict director should have identified specific statements from specific advertisements. (TR 1382-83).

The Court rejected NNA's objection, and allowed the proffered language, stating as follows:

> I'm going to allow the plaintiffs to give the instruction they choose in paragraphs first and second, because I think that does not create a roving commission. I think when you got it limited by advertising, and you got it limited by causation to directly cause it eliminates the confusion I think that Mr. Cowden referred to, and leaves what I think is properly argument for argument.

(TR 1386-87).

VII. FACTS PERTAINING TO CLASS CERTIFICATION.

In the post-trial proceedings following the claims process, the parties submitted a Joint Submission Regarding Submitted Claims in which they stated: "a total of 598 claims have been submitted. Of those 598 claims, the parties have agreed that 312 claims are established." (LF 800). Pursuant to that agreement, the Court issued its Order finding that those 312 claims had been established. (LF 839). The Court's Order also indicated that there were 36 claims for which additional information was required, and the Court set forth a specific procedure regarding how the parties would go about collecting that additional information. (LF 840). The Court further ruled that one disputed claim – Claim No. 505 – was timely and would be treated as established. (LF 841). In reaching that conclusion, the court noted that other than the issue of timeliness, the parties agreed that the claim was properly

established. (LF 841). In its final judgment, the Court determined that a total of 326 claims were deemed established. (LF 2352).

The claim forms which were submitted to potential class members asked the class members to identify the model year of their vehicle. (LF 905-06).

In the prior appeal in this action involving certification, the Court of Appeals indicated that the class definition would need to be modified with respect to secondary purchasers, stating as follows:

> 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.

Hope v. Nissan N. Am., Inc., 353 S.W.3d 68, 84 (Mo. App. 2011).

Pursuant to the Court of Appeals' direction, Plaintiff modified the class definition in his Second Amended Petition to read as follows:

> 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.

(LF 46, 48-49). NNA objected to this class definition, arguing that it was contrary to the directions of the Court of Appeals in the Hope decision. (LF 202-03). The Circuit Court rejected that argument, allowing the class definition to stand. (LF 440).

NNA then sought permission to pursue an interlocutory appeal from the Circuit Court's order regarding the revised class definition, again arguing that the revised class definition was inconsistent with the direction of the Court of Appeals in Hope. (RSLF 2-24). The Court of Appeals rejected that request, allowing the action to go forward under the existing class definition. (RSLF 25).

VIII. THE COURT OF APPEALS' OPINION.

In its opinion following trial, the Court of Appeals concluded that the record, when viewed in the light most favorable to the verdict, established a significant defect in the FX which resulted in dashboard bubbling. (A 23-24). The Court recognized that Plaintiff presented a wide variety of evidence at trial regarding NNA's misrepresentations concerning the FX. (A 25-29). The Court devoted particular attention to the testimony of Nathan Lyst, noting he testified that the marketing for the FX emphasized it was a "premium" vehicle containing "premium automotive machinery." (A 27). The Court recognized Mr. Lyst's testimony established that NNA's representations regarding the FX were consistent throughout the entire class period. (A 27). The Court also noted Mr. Lyst

had conceded that the FX did not live up to the representations made in the marketing materials. (A 27).

Despite its recognition that Plaintiff had presented a wide variety of evidence to establish NNA's misrepresentations, the Court concluded that Plaintiff's MMPA claim was barred by application of the puffery doctrine. (A 32, 36). The Court acknowledged that it had not found a single Missouri case that applied the puffery doctrine to an MMPA claim. (A 36). Nonetheless, the Court determined that the puffery doctrine applied to the MMPA claim in this case. (A 36). In reaching that conclusion, the Court focused upon cases which distinguish statements of opinion from statements of fact. (A 30-32, 36).

In applying the puffery doctrine to the MMPA claim in this case, the Court of Appeals focused upon the following standards: (1) whether the statement is "susceptible of exact knowledge," (2) whether the statement is "capable of being proved false," and (3) whether the statement is a "statement of objective fact." (A 31-32, 35-36).

ARGUMENT

I. PLAINTIFF ESTABLISHED A SUBMISSIBLE CASE REGARDING NNA'S MISREPRESENTATIONS.

"A judgment notwithstanding the verdict for the defendant is only appropriate if the plaintiff fails to make a submissible case. In reviewing for a submissible case, [the] court must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence." Moran v. Hubbartt, 178 S.W.3d 604, 609 (Mo. App. 2005) (internal citations and punctuation omitted). "JNOV is only appropriate when the evidence and inferences therefrom are so strong that there is no room for reasonable minds to differ." American Family Mut. Ins. v. Coke, 413 S.W.3d 362, 370 (Mo. App. 2013). "When reasonable minds can differ on the questions before the jury . . . JNOV is not appropriate." Steele v. Evenflo Co., Inc., 178 S.W.3d 715, 717 (Mo. App. 2005). "Granting a motion for JNOV is a drastic action and should only be granted when reasonable persons could not differ on the correct disposition of the case." Hammett v. Atcheson, 438 S.W.3d 452, 458 (Mo. App. 2014) (internal punctuation omitted). "An appellate court will not overturn a jury's verdict unless there is a complete absence of probative facts to support it." Porter v. Toys 'R' Us-Delaware, Inc., 152 S.W.3d 310, 316 (Mo. App. 2004).

"The jury is the sole judge of the credibility of the witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that

testimony." Gatley v. Wal-Mart Stores, Inc., 16 S.W.3d 711, 713 (Mo. App. 2000). "It is the general rule in civil cases that the testimony of a single witness, if accepted as true, is usually sufficient to establish a fact for jury consideration." Tennis v. Gen. Motors Corp., 625 S.W.2d 218, 222 (Mo. App. 1981).

In this case, the Circuit Court and the jury both properly determined that NNA engaged in deception and misrepresentation with respect to the sale of the FX. NNA marketed the FX as being a premium automobile that contained "premium automotive machinery." A reasonable consumer would take these representations as indicating that the FX contained premium or high-quality components.[5] However, the dashboard in the FX was definitely not a premium or high-quality component.

On appeal, NNA attempts to recharacterize Plaintiff's case, suggesting Plaintiff is arguing that "he is not required to identify an actionable misrepresentation." (Appellant's Substitute Brief, p. 51). But that is simply not true. Plaintiff has never argued that an actionable misrepresentation is not a component of an action under the MMPA. To the contrary, Plaintiff identified

[5] Merriam-Webster defines the word "premium" as meaning "of exceptional quality." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, MERRIAM WEBSTER 1789 (2002).

misrepresentations at trial, and both the Circuit Court and the jury agreed that those misrepresentations provided a sufficient basis for Plaintiff's MMPA claim.

Plaintiff does assert that the puffery doctrine should not apply to MMPA claims, but that argument in no way seeks to limit the normal elements of an MMPA claim. NNA suggests that Plaintiff's position "would effectively eliminate the MMPA's misrepresentation element." (Appellant's Substitute Brief, p. 54). But that assertion is based upon NNA's own mischaracterization of Plaintiff's position.

Plaintiff agrees that in order to establish an MMPA claim, a party is required to identify an actionable deception or misrepresentation (or other actionable conduct) under the MMPA. But Plaintiff contends that the question of whether a deception or misrepresentation is actionable should be determined based upon application of the MMPA and the case law interpreting the MMPA – not upon common law doctrines that normally apply to fraud and warranty actions. As Plaintiff explains more fully herein, the puffery doctrine should not be applied to MMPA actions. That does not mean that the requirement of identifying an actionable deception or misrepresentation is eliminated. It simply means that a trial court will not take a case from the jury based upon application of a doctrine that normally applies to fraud claims. Rather, the jury should be allowed to determine whether the representation in issue was likely to create a false impression or had a tendency to mislead consumers. Thus, holding that the puffery doctrine does not

apply to MMPA claims would in no way eliminate the requirement of establishing actionable conduct – it would simply affirm that the determination of whether conduct is actionable should be made under the MMPA and not under common law doctrines that normally apply to fraud and warranty actions.

NNA also repeatedly mischaracterizes Plaintiff's position by suggesting that Plaintiff's theory of the case is that NNA promised consumers the FX would "never develop a defect." (Appellant's Substitute Brief, pp. 36-37, 43-44, 46, 52). That has never been Plaintiff's position. Plaintiff did not argue at trial that the marketing materials promised the FX would never develop a defect. Rather, Plaintiff argued that NNA made representations regarding the quality of the vehicle that were not in accord with the facts, and that tended to create a false impression.

It was NNA that repeatedly suggested to the jury at trial that Plaintiff should not prevail because NNA did not promise consumers that the FX would never develop a defect. The jury rejected that line of argument, recognizing that NNA's representations could be misleading even if the marketing materials did not expressly promise that the vehicle would never develop a defect. Thus, the theory that NNA attempts to attribute to Plaintiff was actually the theory that NNA unsuccessfully attempted to submit to the jury.

The determination of whether the representations in issue were actionable should be made based upon application of the MMPA and the case law interpreting

the MMPA. When those standards are applied in this case, it is apparent that the jury properly found that NNA engaged in unlawful acts under the MMPA.

A. The Puffery Doctrine Does Not Apply And Should Not Be Applied In MMPA Actions.

The key question before this Court is whether the puffery doctrine – a common law doctrine that has historically been applied in fraud and warranty actions – should be extended to MMPA actions. In order to address that question, it is important to consider both the history and parameters of the puffery doctrine, and the policy and purpose of the MMPA. However, before considering those points, it is first necessary to clarify that Missouri courts have never held that the puffery doctrine applies to MMPA actions.

Plaintiff has not located a single Missouri case which holds that the puffery doctrine applies to MMPA actions. Likewise, the Court of Appeals acknowledged in its opinion that it had not located a single Missouri case which held that the puffery doctrine applies to MMPA actions. (A 36). However, NNA repeatedly asserts in its Substitute Brief that the Eastern District of the Court of Appeals decided this matter 16 years ago in Morehouse v. Behlmann Pontiac-GMC Truck Serv., Inc., 31 S.W.3d 55 (Mo. App. 2000). A review of Morehouse does not support NNA's assertion.

In Morehouse, the Court was addressing both an MMPA claim and a common law fraud claim. Id. at 59. The Court engaged in a discussion of the puffery doctrine, but never indicated that this discussion was directed to the MMPA claim. Id. at 59-60. The Court certainly stated no express holding that the puffery doctrine applies to MMPA claims. Id. In fact, to the contrary, the Court held that the representations at issue in Morehouse were actionable. Id. at 60. Thus, the Morehouse decision did not hold that the puffery doctrine applies to MMPA claims.[6]

Although NNA cites a number of Missouri cases that address the puffery doctrine, none of those cases involve MMPA claims. Rather, those cases involve fraud and warranty claims – the two areas in which the puffery doctrine has historically been applied. Thus, the authorities that NNA relies upon are inapposite.

NNA also argues federal courts in Missouri have held that the puffery doctrine applies to MMPA claims. Of course, federal decisions interpreting Missouri law are

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[6] Apparently the Court of Appeals agreed that Morehouse does not hold that the puffery doctrine applies to MMPA claims. The Court of Appeals opinion discusses the Morehouse decision in some detail in footnote 9, so the Court was well aware of the Morehouse decision. (A 36). However, the Court indicated in the body of its opinion that it had not located any case which decided "whether the puffery doctrine applies to MMPA cases." (A 36).

not binding on Missouri courts. Lapponese v. Carts of Colorado, Inc., 422 S.W.3d 396, 404 (Mo. App. 2013). Furthermore, a review of the unpublished federal cases cited by NNA[7] indicates that these cases are not persuasive. In each of the federal cases cited by NNA, the Court simply assumed that the puffery doctrine applies to MMPA claims without citing a single supporting Missouri case, and without engaging in any analysis to support such a conclusion.

Regardless of what the Court of Appeals or the federal courts have had to say on the matter, it is clear that this Court has never addressed the issue of whether the puffery doctrine applies to MMPA claims. For the reasons addressed below, this Court should affirmatively hold that the puffery doctrine does not apply to MMPA claims.

[7] NNA relies upon four unpublished federal decisions: Budach v. NIBCO, Inc., 2015 WL 3853298 (W.D. Mo. 2015); Wright v. Bath & Body Works Direct, Inc., 2012 WL 12088132 (W.D. Mo. 2012); Govreau v. Albers, 2010 WL 4817143 (W.D. Mo. 2010); Tockstein v. Spoeneman, 2009 WL 690201 (E.D. Mo. 2009).

1. The puffery doctrine in Missouri.

Missouri courts have long recognized that the puffery doctrine (sometimes referred to as "dealers talk") is closely associated with the notion of caveat emptor (i.e. "buyer beware"). See, e.g., Monsanto Chem. Works v. Am. Zinc, Lead & Smelting Co., 253 S.W. 1006, 1009 (Mo. 1923) (Recognizing that the notion of dealers talk falls within "the rule of caveat emptor."); Boston v. Alexander, 171 S.W. 582, 584 (Mo. App. 1914) (Indicating it is "[t]he rule of caveat emptor" which prevents liability on the basis of "mere puffing."); Dyer v. Cowden, 154 S.W. 156, 160 (Mo. App. 1913) (Indicating that when a vendor relies on the puffery doctrine, he is "rely[ing] on the principle of caveat emptor."); Stonemets v. Head, 154 S.W. 108, 112 (Mo. 1913) (Indicating that the ideas of puffery or dealers talk fall under "the doctrine of caveat emptor"). However, more recent cases indicate the modern trend is to restrict the application of such rules in order "to condemn the falsehood of the fraud feasor rather than the credulity of the victim." Chesus v. Watts, 967 S.W.2d 97, 112 (Mo. App. 1998); see also Smith v. New Plaza Pontiac Co., 677 S.W.2d 941, 945 (Mo. App. 1984).

Under Missouri law, the puffery doctrine is based on the notion that mere statements of opinion cannot serve as the basis for a claim of fraud or breach of warranty. In that context, Missouri courts have distinguished between statements of fact and statements of opinion. See, e.g., Constance v. B.B.C. Dev. Co., 25 S.W.3d

571, 587 (Mo. App. 2000) ("The general rule is that expressions of opinion cannot constitute fraud."); Carpenter v. Chrysler Corp., 853 S.W.2d 346, 358 (Mo. App. 1993) ("[I]f the representation is a statement of fact, a petition alleging such a misrepresentation may sufficiently state a claim for breach of express warranty or fraudulent misrepresentation."). Numerous other decisions have likewise grounded the notion of puffery in the distinction between statements of opinion and statements of fact. See, e.g., Gen. Elec. Capital Corp. v. Rauch, 970 S.W.2d 348, 353 (Mo. App. 1998); Wofford v. Kennedy's 2nd St. Co., 649 S.W.2d 912, 915 (Mo. App. 1983); Interco Inc. v. Randustrial Corp., 533 S.W.2d 257, 262 (Mo. App. 1976); McAlpine Co. v. Graham, 320 S.W.2d 951, 955 (Mo. App. 1959); Turner v. Cent. Hardware Co., 186 S.W.2d 603, 606 (Mo. 1945).

While the puffery doctrine is recognized in Missouri, the doctrine has, with rare exception, been applied to fraud or warranty claims.[8] See, e.g., Morehouse, 31 S.W.3d at 59 (warranty); Constance, 25 S.W.3d at 587 (fraud); Gen. Elec. Capital

[8] There are a few Missouri cases which have discussed puffery in the context of other types of claims. For example, in Carrier Corp. v. Royale Inv. Co., 366 S.W.2d 346 (Mo. 1963) the Court discussed puffery in the context of a defense to a contract claim. Id. at 348. However, the vast majority of cases that discuss puffery do so in the context of fraud or warranty claims.

Corp., 970 S.W.2d at 353 (warranty); Chesus, 967 S.W.2d at 112 (fraud); Arnold v. Erkmann, 934 S.W.2d 621, 627 (Mo. App. 1996) (fraud); Carpenter, 853 S.W.2d at 358 (fraud and warranty); Clark v. Olson, 726 S.W.2d 718, 720 (Mo. banc 1987) (fraud); Wofford, 649 S.W.2d at 915 (fraud); Guess v. Lorenz, 612 S.W.2d 831, 833 (Mo. App. 1981) (warranty); Interco Inc., 533 S.W.2d at 261 (warranty); McAlpine Co., 320 S.W.2d at 955 (fraud); Turner, 186 S.W.2d at 606 (warranty); Ralston Purina Co. v. Swaithes, 142 S.W.2d 340, 341 (Mo. App. 1940) (warranty).

It is not surprising that application of the puffery doctrine has generally been limited to actions for fraud or breach of warranty because, in both types of action, there is a requirement that the statement in issue be a statement of fact and not a statement of opinion. For example, in Kruse Concepts, Inc. v. Shelter Mut. Ins., 16 S.W.3d 734, 738 (Mo. App. 2000), the Court recognized that "[f]raudulent misrepresentation cannot be based on a mere opinion." Id. at 738. Similarly, the statutes pertaining to warranty claims specifically indicate that "a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." R.S.Mo. § 400.2-313. Because statements of mere opinion cannot serve as the basis for claims of fraud or breach of warranty, it makes sense that the puffery doctrine – a doctrine that focuses on the distinction between statements of fact and statements of opinion – is commonly applied in such actions. However, as explained below, it makes no sense to extend the puffery doctrine to

MMPA claims which make no distinction between statements of fact and statements of opinion.

Missouri courts have also long connected the concept of puffery to a requirement of reliance. See, e.g., Best v. Culhane, 677 S.W.2d 390, 394 (Mo. App. 1984); Conroy Piano Co. v. Pesch, 279 S.W. 226, 228 (Mo. App. 1925); Thaler v. Niedermeyer, 170 S.W. 378, 383 (Mo. App. 1914); Stonemets, 154 S.W. at 114. For example, in Clark v. Olson, 726 S.W.2d 718 (Mo. banc 1987), this Court noted with respect to puffery statements that "[t]hose in the marketplace should recognize and discount such representations when deciding whether to go through with a transaction." Id. at 720. In other words, statements that constitute puffery are normally considered non-actionable because a party cannot establish reliance upon such statements.

The close link between the puffery doctrine and the requirement of reliance is important because reliance is an element of fraud and breach of warranty claims. As the Court of Appeals recognized in Hope v. Nissan N. Am., Inc., 353 S.W.3d 68 (Mo. App. 2011), under a warranty claim a party is required to establish that the purchaser relied upon specific representations in purchasing the goods in question. Id. at 86; see also Venie v. S. Cent. Enterprises, Inc., 401 S.W.2d 495, 499 (Mo. App. 1966) ("[R]eliance upon the affirmation of fact or representation claimed to be a warranty is one of the elements of a cause of action for breach of the warranty.").

Likewise, reliance is a necessary element of a fraud action. See, e.g., Trimble v. Pracna, 167 S.W.3d 706, 712 (Mo. banc 2005) ("Reliance is an essential element of fraud."); McClain v. Papka, 108 S.W.3d 48, 52 (Mo. App. 2003). Once again, it makes sense that the puffery doctrine is applied in the context of fraud and breach of warranty actions because the puffery doctrine serves to enforce a requirement of reliance, and reliance is a necessary element of both fraud and breach of warranty claims. However, it makes no sense to apply the puffery doctrine to MMPA claims because reliance is not an element of an MMPA claim.

2. The MMPA.

In considering the scope and policy of the MMPA, it is important to consider both the pertinent statutory and regulatory language, and the interpretation of the statutes and regulations by Missouri courts.

a. The statutory and regulatory language.

An MMPA action is a "statutorily created cause of action." Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC, 361 S.W.3d 364, 376 (Mo. banc 2012). That statutory cause of action specifically provides that certain acts are unlawful:

> The act, use or employment by any person of any **deception**, fraud, false pretense, false promise, **misrepresentation**, unfair practice or the

> concealment, suppression, or omission of any material fact . . . is declared to be an unlawful practice.

R.S.Mo. § 407.020.1 (emphasis added). The fact that the statute individually identifies "deception, fraud, false pretense, false promise, misrepresentation [and] unfair practice" as categories of unlawful conduct indicates that each of these categories is separate and distinct.

The attorney general has specific statutory authority to promulgate "all rules necessary to the administration and enforcement of the provisions of [the MMPA]." R.S.Mo. § 407.145; see also Chochorowski v. Home Depot U.S.A., 404 S.W.3d 220, 226 (Mo. banc 2013); Huch v. Charter Commc'ns, Inc., 290 S.W.3d 721, 724-25 (Mo. banc 2009). "A rule properly adopted and promulgated by the attorney general has independent power as law." Chochorowski, 404 S.W.3d at 226; Huch, 290 S.W.3d at 725. "Where the legislature provides a statutory definition for a term, it supersedes any commonly accepted or judicially defined meaning of that term." State ex rel. Nixon v. RCT Dev. Ass'n, 290 S.W.3d 756, 760 (Mo. App. 2009).[9]

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[9] On pages 53-54 of its Substitute Brief, NNA suggests that the MMPA should be interpreted as adopting pre-existing common law definitions of the terms "deception" and "misrepresentation." That argument does not apply given that the MMPA is a statutory cause of action, the MMPA specifically gives

As noted above, the MMPA declares both "deception" and "misrepresentation" to be unlawful acts. These terms are defined in the Missouri Code of State Regulations in Title 15, Division 60, Chapter 9. The preliminary statement of purpose that precedes both of these regulatory definitions indicates that the "rule specifies the settled meanings" of these terms. 15 C.S.R. §§ 60-9.020 & 60-9.070.

The regulations define "deception" as including "any method, act, use, practice, advertisement or solicitation that . . . tends to create a false impression." 15 C.S.R. § 60-9.020(1). The regulation specifically provides that a party is not required to prove "actual deception" in order to establish "deception" for purposes of the MMPA. 15 C.S.R. § 60-9.020(2). The regulations further indicate that it is "deception" for a party to "use any format which because of its overall appearance has the tendency or capacity to mislead consumers." 15 C.S.R. § 60-9.030(1). This broad language indicates that "deception" does not necessarily involve false statements, but can include any communication that has any "tendency or capacity

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the attorney general authority to define terms under the MMPA, and the attorney general has defined the terms "deception" and "misrepresentation" for purposes of the MMPA. In short, common law definitions of these terms cannot override the specific regulatory definitions.

to mislead consumers." The focus is on the tendency or capacity to mislead, not upon the actual truth or falseness of specific assertions.

The regulations define "misrepresentation" as "an **assertion** that is not in accord with the facts." 15 C.S.R. § 60-9.070(1) (emphasis added). The regulations define "assertion" as "words, conduct or pictorial depiction, and may convey past or present fact, law, value, **opinion**, intention or other state of mind." 15 C.S.R. § 60-9.010(1)(A) (emphasis added). This definition indicates that "assertions" may include both statements of "fact" and statements of "opinion." This definition also indicates that assertions need not consist of statements at all, and that a party may make an assertion through its conduct or pictorial depictions. This is consistent with the notion that the main focus is on whether the information has a tendency to mislead.

The definitions of other terms under the regulations are also informative. For example, the regulations define "fraud" as including both "falsehood" and "deception." 15 C.S.R. § 60-9.040(1). This indicates that these terms are different for purposes of the MMPA, and that "deception" does not necessarily encompass "falsehood." The regulations also provide that "[a] seller shall not make a representation or statement of fact in an advertisement that is false or has the capacity to mislead prospective purchasers." 15 C.S.R. § 60-7.020(1). This language indicates that a statement need not be "false" in order to have "the capacity to

mislead prospective purchasers." Again, the core consideration is whether the statement can be misleading not whether the statement is false.

b. The purpose and policy of the MMPA.

"The MMPA, as first adopted by the legislature in 1967, protects consumers by expanding the common law definition of fraud 'to preserve fundamental honesty, fair play and right dealings in public transactions.'" Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 414 (Mo. banc 2014); see also Shiplet v. Copeland, 450 S.W.3d 433, 441 (Mo. App. 2014). "The act's fundamental purpose is the 'protection of consumers.'" Huch, 290 S.W.3d at 724; see also Watson v. Wells Fargo Home Mortgage, Inc., 438 S.W.3d 404, 409 (Mo. banc 2014). "The MMPA is 'paternalistic legislation designed to protect those that could not otherwise protect themselves.'" Berry v. Volkswagen Grp. of Am., Inc., 397 S.W.3d 425, 433 (Mo. banc 2013). As this Court has recognized, the MMPA "'is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power.'" Huch, 290 S.W.3d at 725, 727.

Consistent with the broad policies of consumer protection underlying the MMPA, Missouri courts have construed the MMPA as covering a wide variety of misleading conduct. In fact, Missouri courts have noted that the phrase "in connection with" in section 407.020 is "unrestricted, all-encompassing and

exceedingly broad," and that "[f]or better or worse, the literal words cover every practice imaginable and every unfairness to whatever degree." Peel v. Credit Acceptance Corp., 408 S.W.3d 191, 208 (Mo. App. 2013) (internal quotation marks omitted); see also Schuchmann v. Air Servs. Heating & Air Conditioning, Inc., 199 S.W.3d 228, 233 (Mo. App. 2006) (citing Ports Petroleum Co., Inc. of Ohio v. Nixon, 37 S.W.3d 237 (Mo. banc 2001)).

"Sec. 407.020 does not define deceptive practices; it simply declares unfair or deceptive practices unlawful. This was done to give broad scope to the meaning of the statute and to prevent evasion because of overly meticulous definitions. This leaves to the court in each particular instance the determination whether fair dealing has been violated." State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d 633, 635 (Mo. App. 1988); see also Jackson v. Hazelrigg Auto. Serv. Ctr., Inc., 417 S.W.3d 886, 894 (Mo. App. 2014); Huch, 290 S.W.3d at 724. "[T]he determination of whether fair dealing has been violated turns on the unique facts and circumstances of each case." Clement v. St. Charles Nissan, Inc., 103 S.W.3d 898, 900 (Mo. App. 2003). "From the MMPA's inception, Missouri courts have emphasized that Chapter 407, and particularly the remedy of restitution contained in section 407.100, should be liberally construed to protect consumers." State ex rel. Nixon v. Cont'l Ventures Inc., 84 S.W.3d 114, 117 (Mo. App. 2002).

Pursuant to the above-referenced policies and standards, in determining whether specific misrepresentations are actionable under the MMPA a court should strive to provide the "consumer protection" and "paternalistic" care that is the very basis of the MMPA. A court should apply the language of the statute broadly so as to achieve these policies.

c. Common law limitations and doctrines do not necessarily apply to MMPA actions.

Given that the MMPA is a statutory cause of action, and given the broad policies of the MMPA that have been repeatedly recognized by Missouri courts, it is not surprising Missouri courts have held on a number of occasions that various common law doctrines do not serve to limit the scope of an MMPA claim.

First, when considering the meaning of specific terms under the MMPA, it is important to look to the regulations that define those terms. This Court has consistently recognized that where a party brings his action "under the MMPA rather than a common law fraud claim . . . [t]he substance of [his] claim . . . must be determined by reference to the MMPA rather than by reference to the common law." Estate of Overbey, 361 S.W.3d at 376; see also Dodson v. Ferrara, 2016 WL 1620102, at *17 (Mo. banc 2016). As noted above, the meanings of specific terms under the MMPA are established by regulations that have the force of law. This

includes the definitions of "deception" and "misrepresentation." Thus, in considering whether "deception" or "misrepresentation" has occurred, for purposes of an MMPA claim, the courts should look to the pertinent regulatory language, and not to common law definitions of those terms.

More broadly, Missouri courts have consistently recognized that various common law defenses do not apply to MMPA claims. As this Court held in Huch: "Because of the act's broad scope and the legislature's clear policy to protect consumers, certain legal principles are not available to defeat claims authorized by the act." Huch, 290 S.W.3d at 725. Based on that principle, this Court held that the voluntary payment doctrine does not apply to MMPA actions. Id. In reaching that conclusion, this Court noted: "'Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection.'" Id. at 727.

Similarly, in Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300 (Mo. App. 2005), the Court held that an arbitration provision should not be applied to an MMPA claim because to do so "would effectively strip consumers of the protections afforded to them under the Merchandising Practices Act and unfairly allow companies like Alltel to insulate themselves from the consumer protection laws of this State." Id. at 314. Other courts have reached similar conclusions with respect

to other defenses. See, e.g., Peel, 408 S.W.3d at 201 (Noting that the defense of mitigation of damages might not be available in an MMPA action, but not reaching the issue.); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 500 (Mo. banc 1992) (Holding that forum selection clauses are not enforceable in MMPA actions.); Pointer v. Edward L. Kuhs Co., 678 S.W.2d 836, 844 (Mo. App. 1984) (Holding that the defense of estoppel is not applicable in MMPA actions.).

3. The puffery doctrine should not be applied in MMPA actions.

When the puffery doctrine is considered in the context of the law and policy of the MMPA, it is apparent that the puffery doctrine is fundamentally inconsistent with the MMPA in numerous respects.

The very foundation of the puffery doctrine is inconsistent with the MMPA in that the puffery doctrine is rooted in the notion of caveat emptor (i.e. "buyer beware"). The notion of caveat emptor is directly at odds with the MMPA – a statutory cause of action that this Court has recognized is "'paternalistic legislation designed to protect those that could not otherwise protect themselves.'" Berry, 397 S.W.3d at 433. As this Court noted in Huch, the MMPA "'is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power.'" Huch, 290 S.W.3d at 727. If the rule of caveat emptor were

allowed to control in MMPA actions, that rule would remove the very protections that the MMPA is intended to provide to consumers.

The puffery doctrine's close association with fraud and breach of warranty claims also supports the conclusion that the doctrine should not be extended to MMPA claims. As previously noted, the puffery doctrine is commonly described under Missouri law as a way of distinguishing between statements of fact and statements of opinion. In the context of fraud and breach of warranty claims this makes sense, because neither type of claim can be premised on statements of opinion. But this distinction does not extend to MMPA claims because statements of opinion are actionable under the MMPA. Indeed, as previously noted, the definition of "misrepresentation" specifically includes statements of opinion. 15 C.S.R. §§ 60-9.010(1)(A), 60-9.070(1). Furthermore, the language used in the statutes and regulations repeatedly indicates that the key consideration in an MMPA claim is not whether the representations are false, but whether the statements have a tendency to mislead consumers. Representations may be misleading, and thus actionable under the MMPA, regardless of whether they are statements of fact or opinion.

The puffery doctrine is also commonly associated with the notion of reliance. Again, in the context of fraud and breach of warranty claims, application of the puffery doctrine makes sense because both types of claims include a requirement of

establishing reliance. However, there is no requirement of reliance under the MMPA. Plubell v. Merck & Co., 289 S.W.3d 707, 713 (Mo. App. 2009); see also Schuchmann, 199 S.W.3d at 233. Thus, it does not make sense to extend the puffery doctrine – a doctrine founded on notions of reliance – to a statutory cause of action that does not include any requirement of reliance.

If the puffery doctrine were applied in MMPA actions to limit such actions solely to statements which are objectively and verifiably false – as proposed by NNA – that limitation would be inconsistent with the pertinent regulations which consistently indicate the key consideration in MMPA actions is whether the representations have a tendency to be misleading, not whether the statements are false. The regulatory definitions have the force of law. Chochorowski, 404 S.W.3d at 226. Furthermore, "[w]here the legislature provides a statutory definition for a term, it supersedes any commonly accepted or judicially defined meaning of that term." RCT Dev. Ass'n, 290 S.W.3d at 760.

This Court has previously recognized that statements may be misleading – thereby constituting deception or misrepresentation – even when the statements are not false:

> The adjective "false" describes not only things that are "not truthful," but also things that are "deceptive," "illusory" or that have a tendency to "mislead." Webster's Third New International Dictionary 819

> (1981). Likewise, the words "deception" and "misrepresentation" are used to refer to misleading acts. "Deception" is defined as "the act of . . . misleading," id. at 585, and "misrepresentation" as a "misleading representation," id. at 1445. The statutory language indicates a legislative intent to prohibit not only advertising that is patently untruthful, but also advertising that is inherently misleading.

Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n, 946 S.W.2d 199, 205-06 (Mo. banc 1997).

Were the puffery doctrine applied to limit MMPA actions solely to statements which are objectively and verifiably false, that would substantially undermine the protections that the MMPA is intended to provide to consumers. "The act's fundamental purpose is the 'protection of consumers.'" Huch, 290 S.W.3d at 724. "From the MMPA's inception, Missouri courts have emphasized that [the MMPA] should be liberally construed to protect consumers." Cont'l Ventures Inc., 84 S.W.3d at 117. If the puffery doctrine were applied in MMPA actions, such application would allow defendants to escape liability by arguing that, although their statements were likely to mislead consumers, those statements were nonetheless technically true. Such a defense would be directly contrary to the notion that the MMPA broadly defines actionable conduct in order "to give broad scope to the meaning of the statute

and to prevent evasion because of overly meticulous definitions." State ex rel. Webster, 756 S.W.2d at 635; see also Huch, 290 S.W.3d at 724.

Finally, if the puffery doctrine were applied to MMPA actions in the same way that it applies to fraud and breach of warranty actions, the MMPA would become largely superfluous. As previously noted, a primary purpose of the MMPA is to provide broader protections to consumers than existed under prior law. The MMPA accomplishes this purpose by defining actionable conduct more broadly than is commonly recognized in fraud and breach of warranty claims. As this Court has noted, the MMPA "protects consumers by expanding the common law definition of fraud 'to preserve fundamental honesty, fair play and right dealings in public transactions.'" Conway, 438 S.W.3d at 414. More specifically, this Court has held that "'[i]t is not necessary in order to establish 'unlawful practice' to prove the elements of common law fraud.'" Huch, 290 S.W.3d at 724. If a plaintiff is required to establish that the representations at issue are statements of fact, and not mere statements of opinion – as is the case in fraud and breach of warranty claims – then the MMPA action becomes largely identical to an action for fraud or breach of warranty.

This last point is particularly pertinent given that this Court has recognized that common law defenses do not apply to MMPA actions when such defenses would undermine the purpose of the MMPA. Huch, 290 S.W.3d at 725. Missouri

courts have consistently applied this principle to reject various defenses in MMPA actions. See, e.g., Peel, 408 S.W.3d at 201 (Noting the defense of mitigation of damages might not be available in an MMPA action, but not reaching the issue.); Huch, 290 S.W.3d at 725 (Holding the voluntary payment doctrine does not apply in MMPA actions); Whitney, 173 S.W.3d at 314 (Holding arbitration provisions are not enforceable in MMPA actions); High Life Sales Co., 823 S.W.2d at 500 (Holding forum selection clauses are not enforceable in MMPA action.); Pointer, 678 S.W.2d at 844 (Holding the defense of estoppel is not applicable in MMPA actions.).

In each of the above cases, the defenses at issue were fairly limited. However, the courts nonetheless rejected these defenses because they could serve to undermine the purpose of the MMPA. As this Court stated: "'Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection.'" Huch, 290 S.W.3d at 727. If this Court were to allow the puffery doctrine to apply in MMPA actions, the effect would be much more devastating to the underlying purpose of the MMPA.

Again, if the puffery doctrine were applied to MMPA actions, such application would essentially undo the additional protections that the MMPA is intended to provide to consumers. If the MMPA were found to provide no greater

protection from misleading representations than is already recognized under fraud and breach of warranty claims, then the MMPA would serve no purpose. In essence, the puffery doctrine would constitute a broad common law defense to MMPA actions that would substantially undermine the entire statutory and regulatory scheme. That cannot be what the legislature intended. Accordingly, this Court should hold that the puffery doctrine does not apply to MMPA actions.

B. Even If The Puffery Doctrine Were Applicable In MMPA Actions, It Would Not Bar The Claims At Issue In This Case.

As explained in the preceding section, this Court should hold that the puffery doctrine does not apply in MMPA actions. However, even if the puffery doctrine did apply in MMPA actions, the puffery doctrine would not apply in this action for at least three separate reasons. First, the specific standards that NNA seeks to apply in this action have not previously been applied in MMPA actions. Second, application of the puffery doctrine to the representations in this case would be inconsistent with prior Missouri case law. Finally, application of the puffery doctrine in this case would be inconsistent with the traditional emphasis that Missouri courts have placed upon the relative sophistication of the parties.

1. The specific standards that NNA seeks to apply in this action have not previously been applied in MMPA actions.

In applying the puffery doctrine to the MMPA claims in this case, the Court of Appeals focused upon the following standards: (1) whether the statement is "susceptible of exact knowledge," (2) whether the statement is "capable of being proved false," and (3) whether the statement is a "statement of objective fact." (A 31-32, 35-36). In its Substitute Brief, NNA continues to assert that these are the standards that should be used when applying the puffery doctrine to an MMPA claim. (Appellant's Substitute Brief, pp. 37-38, 40, 46, 51-54, 60-61). These three standards impose new requirements that have not previously applied to MMPA actions.

Plaintiff has not located any Missouri cases which hold that, in order for a statement to be actionable under the MMPA, it must be "susceptible of exact knowledge," it must be "capable of being proved false," or it must be a "statement of objective fact."

The "susceptible of exact knowledge" language is used in fraud cases to distinguish between statements of fact and statements of opinion. "'The generally recognized distinction between statements of fact and opinion is that whatever is **susceptible of exact knowledge** is a matter of fact, while that not susceptible is

generally regarded as an expression of opinion.'" Constance, 25 S.W.3d at 587; see also Reis v. Peabody Coal Co., 997 S.W.2d 49, 65 (Mo. App. 1999).

The notion of "statements of objective fact" generally arises in the context of defamation. See, e.g., Nazeri v. Missouri Valley Coll., 860 S.W.2d 303, 314 (Mo. banc 1993); Mandel v. O'Connor, 99 S.W.3d 33, 37 (Mo. App. 2003); State ex rel. Diehl v. Kintz, 162 S.W.3d 152, 155 (Mo. App. 2005). This phrasing is also used when distinguishing statements of fact from statements of opinion in the context of fraud claims. Strebler v. Rixman, 616 S.W.2d 876, 878 (Mo. App. 1981).

With respect to the standard of determining whether a statement is "capable of being proved false," no Missouri cases have applied this standard to misrepresentation claims, even in the context of fraud. In fact, it appears that the only other Missouri case that has even referenced this standard is Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc., 354 S.W.3d 234, 241 (Mo. App. 2011), which applied the "capable of being proved false" standard in the context of a defamation claim.

These standards simply have no basis under the MMPA. To the contrary, these standards conflict with the underlying policy and purpose of the MMPA. As previously noted, the language of the implementing statutes and regulations is broadly drafted in order to provide broad protection to consumers. To this end, the regulations speak in terms of representations that tend to mislead consumers. The

regulations do not impose any requirement of establishing representations that are "susceptible of exact knowledge," "capable of being proved false," or "statements of objective fact." If this Court were to adopt the rigid tests proposed by the Court of Appeals and endorsed by NNA, the regulations that define actionable conduct under the MMPA would be rendered a nullity.

In short, not only are these standards foreign to MMPA actions, but these standards appear to have little support even in the specific context of the puffery doctrine. Thus, even if the puffery doctrine were applied to MMPA actions (which it should not), that doctrine would not impose the rigid tests proposed by the Court of Appeals and NNA.

2. Application of the puffery doctrine to the representations in this case would be inconsistent with prior Missouri case law.

In arguing that the language at issue in this case constitutes puffery, NNA relies almost exclusively on federal cases and cases from other jurisdictions. (Appellant's Substitute Brief, pp. 47-50). But a review of Missouri cases illustrates that the language at issue in this case would not constitute puffery (even if the puffery doctrine applied to MMPA claims).

In Clark v. Olson, 726 S.W.2d 718 (Mo. banc 1987), this Court held that a representation that a house was in "good condition" was not puffery. Id. at 719-20.

This Court concluded that this representation constituted a "statement of fact," and that the "representation that this house was in good condition conveys sufficient definite information as to the physical character of the house for that representation to be considered material." Id. at 720.[10]

[10] In its Points Relied On, NNA indicates that its three best cases on the issue of misrepresentation are Clark v. Olson, 726 S.W.2d 718 (Mo. banc 1987), Carrier Corp. v. Royale Inv. Co., 366 S.W.2d 346 (Mo. 1963) and Turner v. Cent. Hardware Co., 186 S.W.2d 603 (Mo. 1945). As noted above, Clark actually supports Plaintiff's position on appeal. As for Carrier Corp. and Turner, a brief review of those cases illustrates that they are far off point. In Carrier Corp., the Court was considering whether a contract had been "vitiated by fraud" as a result of representations that the defendant had relied upon. Carrier Corp., 366 S.W.2d at 348. The current case does not involve contracts or fraud and, as previously noted, there is no requirement of reliance under the MMPA. In Turner, the Court was considering a personal injury claim based upon the assertion that the injured party had relied upon specific representations regarding a ladder. Turner, 186 S.W.2d at 604-06. The current case does not involve any personal injury claims and, once again, there is no issue of reliance in this MMPA action.

In Carpenter v. Chrysler Corp., 853 S.W.2d 346 (Mo. App. 1993), the Court relied upon this Court's analysis from Clark to hold that the representation that a vehicle was "a good car" did not constitute puffery. Id. at 358. In that regard, the Court observed that the representation "conveyed sufficient definite information about the quality of the [car] for that representation to be considered material." Id.

Indeed, even in Morehouse v. Behlmann Pontiac-GMC Truck Serv., Inc., 31 S.W.3d 55, 59 (Mo. App. 2000) – the primary case that NNA relies upon – the Court held that representations that a minivan was "in excellent condition" and "in good condition" did not constitute puffery. Id. at 59-60. Relying upon the analysis in Clark and Carpenter, the Court held that these representations "about the condition of the car conveyed sufficient information to be representations of fact, and not merely statements of opinion." Id. at 60.

The representations at issue in this case are similar to the representations at issue in Clark, Carpenter and Morehouse. For example, NNA's representation that the FX contains "premium automotive machinery" is not qualitatively different from the representation in Clark that the house was in "good condition," or the representations in Carpenter and Morehouse that a vehicle was "a good car" and was "in good condition." If anything, the representation that the FX contains "premium automotive machinery" is even more specific in that it tends to focus the consumer's

attention upon the specific components of the vehicle (i.e. the machinery) rather than referring generally to the entire car as was the case in Carpenter and Morehouse.

Even if one looks to cases from other jurisdictions, those cases do not uniformly hold that assertions regarding the "premium" nature of a product are puffery.

In Vigil v. Gen. Nutrition Corp., 2015 WL 2338982 (S.D. Cal. May 13, 2015), the Court addressed an advertisement for a health supplement which indicated that it was "[f]ormulated with premium ingredients." Id. at *8. The Court held that while the term "premium" in isolation might be considered puffery, it was not mere puffery when considered in the context of the advertisement. Id. The same is true in this case. NNA did not merely represent in a general way that the FX is a "premium" vehicle. NNA represented that the FX incorporates "premium automotive machinery." (PX 71, p. 40; PX 72, p. 44; PX 73, p. 43). Just as the word "premium" was placed outside the scope of puffery doctrine when directly associated with "ingredients" in a health supplement, so too the word "premium" is placed outside the scope of the puffery doctrine when specifically associated with the "machinery" in the FX.

In Viggiano v. Hansen Nat. Corp., 944 F. Supp. 2d 877, 894 (C.D. Cal. 2013) – one of the cases that NNA relies upon – the court held that the term "premium" constituted puffery in advertisements for diet soda, but it specifically based that

finding upon the fact that this term "has no concrete, discernable meaning in the diet soda context." Id. at 894. The same is not true in the context of motor vehicles, in which the concept of a "premium" vehicle, and particularly the concept of "premium automotive machinery" has a definite meaning to consumers. Similarly, in Viggiano the Court emphasized that the term "premium" was not connected with specific aspects of the product: "the label does even not say the beverage contains 'premium flavors' or 'premium ingredients.'" Id. at 895. As noted above, that is not true in this case, because the marketing materials for the FX specifically indicated that the vehicle incorporates "premium automotive machinery."

Other courts have also recognized that in applying the concept of puffery, it is important to consider specific terms in the context of the advertising as a whole. For example, in Williams v. Gerber Products Co., 552 F.3d 934 (9th Cir. 2008) the Court held that while the term "nutritious" might constitute puffery if considered in isolation, the Court would not treat the term as puffery because the term "contributes . . . to the deceptive context of the packaging as a whole." Id. at 939, n.3; see also Arkansas Teacher Ret. Sys. v. Bankrate, Inc., 18 F. Supp. 3d 482, 485 (S.D.N.Y. 2014) (Recognizing that the term "high quality" was not puffery in the context of the statements in question.).

The idea that marketing statements must be considered in context is particularly important in this case, given that the statements in issue were part of an

overall marketing campaign that focused on the premium nature of the vehicle and its interior components (including the dashboard).

Nathan Lyst, senior manager for Infiniti marketing communications, testified that the individual marketing statements concerning the FX were part of an overall marketing campaign which was intended to convey the theme that the FX was a premium vehicle. (PX 284, pp. 1-3). He testified that these statements were intended to "convey an overall image for the vehicle." (PX 284, p. 5). He testified that the way the FX looked was important to the overall marketing campaign, and that NNA was trying to sell a particular "design esthetic." (PX 284, p. 7). And he testified that the idea of a premium vehicle, including the promise of "premium automotive machinery," was a recurrent theme in the marketing materials for the FX. (PX 284, p. 13).

It is also important to note Nathan Lyst testified that the advertising for the FX conveyed the same overall message throughout the entire vehicle life cycle, from 2003 through 2008. (PX 284, pp. 6, 17). As Mr. Lyst put it: "the same message – the same words are being used consistently." (PX 284, p. 17).

In light of the marketing materials, and Nathan Lyst's testimony, it is clear that the term "premium" and similar terms were not merely used as generic terms with no real meaning. To the contrary, these terms were a core component for the

overall marketing campaign for the FX, and these terms made specific representations when considered in context.

Finally, there can be no question that the statements in NNA's marketing materials constituted "promises" to consumers, given that NNA's counsel conceded in closing argument that the statements in its brochures constituted promises: "What they do promise the public is what's in the brochures." (TR 1434).

3. Application of the puffery doctrine in this case would be inconsistent with the traditional emphasis that Missouri courts have placed upon the relative sophistication of the parties.

Missouri courts have generally taken the relative sophistication of the parties into account when applying the puffery doctrine. For example, in Champion Funding & Foundry Co. v. Heskett, 102 S.W. 1050, 1054 (Mo. App. 1907) the court observed: "The freedom the law accords the individual to praise and puff the wares he would sell and to make the best bargain he may **does not obtain where his position with respect to means of knowledge is clearly superior to that of the prospective purchaser**." Id. at 1054 (emphasis added). Similarly, in A. Franck-Philipson & Co. v. Hanna & Young Handle Co., 200 S.W. 718, 722 (Mo. App. 1918), the Court noted:

> There are cases of course where extravagant statements have been held to attain no greater dignity than mere "puffing," but counsel for appellant have cited no case, nor have we found one where the parties were dealing as they were in the case at bar with knowledge of the thing about which an agreement is about to be made all on one side, obviously impossible for the other party to be informed, that such extravagant statements have been permitted to be smothered under the guise of "puffing."

Id. at 722; see also Bragg v. Kirksville Packing Co., 226 S.W. 1012, 1016 (Mo. App. 1920) ("[I]f the purchaser stands on an equal footing with the seller, he has no right to rely on opinions [of the seller]").

These authorities recognize that the puffery doctrine simply does not apply when the seller has much greater knowledge of the product than the purchaser. This emphasis on the relative sophistication of the parties serves to reconcile cases which might otherwise appear to be contradictory. For example, in Guess v. Lorenz, 612 S.W.2d 831 (Mo. App. 1981), the Court held that a statement by the seller that a car was "in good shape" was subject to the puffery doctrine because the seller "was neither a car dealer nor a person who gave any impression of knowledge about cars." Id. at 833. But in Carpenter, the Court distinguished the Guess decision, stating: "Unlike Guess where buyer and seller were on equal footing, the seller here was an

experienced car dealer." Carpenter, 853 S.W.2d at 358. Similarly, in Morehouse, the Court distinguished Guess, stating as follows: "An integral part of [the holding in Guess] was that the buyer and the seller were on equal footing in terms of knowledge of car mechanics and the seller gave no impression of knowledge about cars." Morehouse, 31 S.W.3d at 60. And in Clark, this Court distinguished Guess, noting that the seller in Guess had given the buyer the impression that she had "no knowledge of the intricacies of automotive mechanics." Clark, 726 S.W.2d at 720.

The theme that runs through these cases is that even general statements of quality do not constitute puffery where the statements are made by one with extensive knowledge of the product, and the statements are made to persons who do not have similarly extensive knowledge of the product. In this case, NNA's level of knowledge regarding the actual quality of the FX was far superior to that of the consumers who purchased the vehicle. Thus, pursuant to Missouri law, the misrepresentations regarding the FX would not constitute puffery (even if the puffery doctrine applied to MMPA actions).

C. The Evidence Established A Submissible Case For All Purchasers.

NNA argues that Plaintiff failed to establish "universal" liability for the class. In that regard, NNA cites Smith v. Am. Family Mut. Ins. Co., 289 S.W.3d 675 (Mo. App. 2009). But in Smith, the Court recognized that the plaintiff could establish

"universal" liability by establishing that all of the parts in question were "inferior." Id. at 683. In this action, Plaintiff established that all of the dashboards in question are "inferior" in that they are all subject to the same defect. Despite this fact, NNA argues that there are certain subsets of the class that should not be allowed to recover.

First, NNA argues that purchasers of 2006-08 FXs should not be allowed to recover because the marketing materials for those years varied from the marketing materials in earlier years. This argument is contrary to both the law and the facts.

In Plubell, the class was pursuing claims based on the failure to disclose problems with Vioxx to the class of persons who had purchased it. The Court made clear there was no requirement to make any showing of reliance upon any specific representation. Plubell, 289 S.W.3d at 714. The Court further indicated there was no requirement to identify specific representations made to specific class members:

> Because Plaintiffs alleged Merck misrepresented Vioxx **throughout the entire class period, individualized evidence as to the company's representation at the time of each class member's purchase will not be required**.

Id. (emphasis added). The Court further stated as follows:

> Plaintiffs are thus not required to prove they or their physicians relied on Merck's alleged misrepresentations about Vioxx, and consequently,

> they are not required to offer individualized proof that the misrepresentation colored the decision to take Vioxx.

Id. The Court further indicated individual class members were not required to tie their damages to specific misrepresentations:

> [T]he class members are not individually required to show what they would or would not have done had the product not been misrepresented and the risks known.

Id.

In the prior appellate opinion in this action, the Court of Appeals relied heavily upon Plubell, generally finding that the claims of the class were similar to the claims being pursued in Plubell. Hope, 353 S.W.3d at 82-84. Of particular note, the Court of Appeals stated as follows:

> The Plaintiffs have alleged that Nissan misrepresented its FX Vehicles **throughout the entire class period, rendering unnecessary individualized inquiries into Nissan's representations** to the original purchasers.

Id. at 84 (emphasis added). Thus, the Court of Appeals recognized that Plaintiff is not required to establish which specific misrepresentations were made to specific class members.

NNA's argument also ignores the testimony of Nathan Lyst. As previously noted, Mr. Lyst testified that the advertising for the FX conveyed the same overall message throughout the entire vehicle life cycle, from 2003 through 2008. (PX 284, pp. 6, 17). As Mr. Lyst put it: "the same message – the same words are being used consistently." (PX 284, p. 17). Thus, there can be no question that the advertising was consistent for the entire class period.

In light of Missouri law, as stated in Plubell and Hope, and in light of the fact that NNA's own employee conceded that the advertising was consistent throughout the entire class period, there can be no serious dispute that Plaintiff's evidence was sufficient to establish misrepresentations with respect to the entire class.

NNA also argues that secondary purchasers are not properly included in the class because there is no evidence that they "received" or "viewed" the marketing materials. Once again, this argument constitutes an improper attempt to impose a requirement of reliance. As previously noted, Missouri courts have consistently held that reliance is not an element of an MMPA claim. See, e.g., Plubell, 289 S.W.3d at 714; Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 774 (Mo. banc 2007). More specifically, in a class action under the MMPA, the plaintiff is not required to show that individual class members "relied on [the] alleged misrepresentations," and "the class members are not individually required to show

what they would or would not have done had the product not been misrepresented." Plubell, 289 S.W.3d at 714.

Pursuant to these authorities, Plaintiff was not required to show that any particular class member (secondary purchaser or otherwise) "received" or "viewed" any particular advertisement.

It is also important to note the secondary purchasers at issue all purchased their vehicles from Nissan/Infiniti dealers, as shown on the claim forms. (LF 869-2350). If a particular consumer did not purchaser his/her FX from a Nissan/Infiniti dealer, then he/she was not included within the recovering class. Thus, there is no question that the secondary purchasers dealt directly with NNA or its agents.

Finally, even if NNA were correct that there was some subset of the class that should not be allowed to recover, that would not be a basis for reversing the entire case on the basis of submissibility. Rather, that particular subset could be segregated from the class. That is, if this Court were to conclude that secondary purchasers or purchasers of certain model years should not be allowed to recover, the Circuit Court's order could be revised to exclude those specific class members from recovering. As explained in more detail at pages 110 to 112, a class definition may be refined post-trial to remove class members when it is determined that certain class members should not be allowed to recover.

II. PLAINTIFF ESTABLISHED A SUBMISSIBLE CASE REGARDING ASCERTAINABLE LOSS.

Once an MMPA violation is established, harm is presumed. See, e.g., Edmonds v. Hough, 344 S.W.3d 219, 223 (Mo. App. 2011); Clement, 103 S.W.3d at 900.[11] Accordingly, this Court's analysis should start from a presumption of harm to the class members.

NNA again cites Smith v. Am. Family Mut. Ins. Co., 289 S.W.3d 675 (Mo. App. 2009) for the proposition that Plaintiff's proof of damages must be "universal." However, as previously noted, the Smith Court recognized the plaintiff met this

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[11] NNA has previously suggested that these cases are inapposite because they involve "irreparable harm" in the context of injunctions sought by the attorney general. However, both of these cases were private MMPA actions (i.e. not brought by the attorney general) that did not involve any claim for injunctive relief. Furthermore, in Edmonds the court expressly indicated that the presumption of harm carries over to other types of MMPA cases: "While these authorities form the support for the issuance of an injunction in MPA cases brought by the attorney general, we have previously recognized their utility in illuminating the spirit of the legislation as applicable to private causes of action." Edmonds, 344 S.W.3d at 223.

standard by establishing that all of the parts in question were "inferior." Id. at 683. In this action, the evidence establishes that all of the vehicles in question have an original dashboard, a Countermeasure 1 dashboard, or a Countermeasure 2 dashboard, and all of these dashboards have a propensity to bubble and will bubble if exposed to high heat and humidity. (PX 3; PX 279, p. 5-7, 38, 49-51; TR 1210, 1224-25, 1227, 1229, 1328-31). Thus, pursuant to the analysis in Smith, every FX has the same "inferior" dashboard, and the damage to the class is "universal."

There is also no question that Plaintiff established an ascertainable loss for all class members pursuant to the analysis from Plubell, in which the Court recognized that in an MMPA case a party may establish "an ascertainable loss under the benefit-of-the-bargain rule, which compares the actual value of the item to the value of the item if it had been as represented at the time of the transaction." Plubell, 289 S.W.3d at 715. In Hope, the Court of Appeals recognized that this principle applies in this case, where Plaintiff has established the FX is worth less than represented due to the defective dashboard. Hope, 353 S.W.3d at 83.

A. The Issue Is The Fact Of Damage – Not The Amount Of Damage.

In addressing the issue of ascertainable loss, it is important to remember that the issue in this appeal is the fact of damage, not the amount of damage. NNA has not challenged the **amount** of damages on appeal – it has only challenged the **fact**

of damages (i.e. whether any damage occurred). NNA's Substitute Brief makes no reference to the amount of damages.

When addressing the fact of damage in this case, the issue is whether the vehicles in question were worth any amount less than they would have been had they been as represented. That is, if the jury could properly conclude that the vehicles with the defective dashboard were worth at least $1 less than they would have been if they did not have the defective dashboard, then the fact of damage has been established and the jury properly found that all class members had suffered an ascertainable loss.

The distinction between the fact of damage and the amount of damage is important because Missouri courts recognize that the fact of damage may be apparent from the evidence even when the amount of damage is less susceptible to exact proof:

> "In some cases, the evidence weighed in common experience demonstrates that a substantial pecuniary loss has occurred, but at the same time it is apparent that the loss is of a character which defies exact proof. In that situation, it is reasonable to require a lesser degree of certainty as to the amount of loss, leaving a greater degree of discretion to the court or jury."

Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50, 55 (Mo. banc 2005); see also Ranch Hand Foods, Inc. v. Polar Pak Foods, Inc., 690 S.W.2d 437, 444 (Mo. App. 1985). Similarly, in Best Buy Builders, Inc. v. Siegel, 409 S.W.3d 562 (Mo. App. 2013), the Court noted that while damages generally need to be established with reasonable certainty, "'[c]ertainty' means that damages have been suffered and not exact proof of the amount of the damages." Id. at 565.

In this case, there was ample evidence to establish the fact that damages had been suffered (i.e. the FXs were worth some amount less as a result of the defective dashboard). The fact that the amount of damage might be less certain does not mean that the verdict was not supported by sufficient evidence. This is particularly true given that NNA has not challenged the amount of damages.[12]

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[12] If NNA believed that the amount of damages awarded was unreasonable, it could have challenged that issue directly. NNA could also have sought remittitur to address any concerns regarding the amount of damages. But NNA has taken the position throughout the entire post-trial process that it is challenging the **fact** of damages. That is, NNA has stood on the position that the class members (i.e. vehicle owners) suffered no loss whatsoever resulting from the fact that their vehicles are defective.

B. Plaintiff Presented Ample Evidence To Establish The Fact Of Damage.

Plaintiff presented a variety of evidence to establish the fact of damage in this case. First, Plaintiff presented the testimony of multiple vehicle owners regarding their opinion that the value of their FX was diminished as a result of the bubbling defect. (TR450, 525-27, 605-08, 618-20, 644, 842, 855, 887-88, 897-98; PX 283, p. 13). Several of these owners specifically testified that the bubbling defect had directly interfered with their attempts to sell their vehicle and/or to obtain a fair price for their vehicle. (TR 448, 450, 605, 618).[13]

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[13] NNA has suggested that in a class action, class damages may not be established by presenting the testimony of individuals regarding their own damage which arose from the common conduct of the defendant. While Plaintiff has not located any Missouri case that directly addresses this issue, in other types of class actions the courts have recognized that such "representative evidence" is an appropriate method of establishing class-wide damages. For example, in wage and hour class actions, the courts have repeatedly recognized that class-wide damages may be established by presenting representative evidence of damages from individual class members. See, e.g., Reich v. S. New England Telecommunications Corp.,

Plaintiff also presented testimony from NNA employee Nicholas Angelidis, who conceded that the dashboard bubbling issue impacted the entire vehicle brand. (PX 278, p. 17). He conceded NNA had concerns that the dashboard bubbling issue would affect "repurchase decision[s]." (PX 278, p. 18). And he conceded that in preparing to address customer questions, he anticipated the following question: "I already sold my vehicle, but it was worth less because of the bubbling; will you compensate me on the difference?" (PX 278, pp. 25-26). He indicated that NNA's answer to this question should be "no." (PX 278, p. 25).

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121 F.3d 58, 67 (2d Cir. 1997); U.S. Dep't of Labor v. Cole Enterprises, Inc., 62 F.3d 775, 781 (6th Cir. 1995) ("The testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees."); Reich v. Gateway Press, Inc., 13 F.3d 685, 701 (3d Cir. 1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."); Driver v. AppleIllinois, LLC, 2013 WL 5818899, at *6 (N.D. Ill. 2013); Ridgeway v. Wal-Mart Stores Inc, 2014 WL 4477662, at *12 (N.D. Cal. 2014); Benavidez v. Plaza Mexico, Inc., 2014 WL 1133446, at *14 (S.D.N.Y. 2014) ("The non-testifying plaintiffs are entitled to damages based on the representative evidence.").

Plaintiff also presented testimony of FX owners that the cost of replacing the dashboard varied from $1,000 to $3,000. (TR 539, 599, 644, 681, 883). Employees of Infiniti dealers testified that the cost of replacing a dashboard at their dealership ranged from $1,289.62 to $1,075.77. (PX 280, p. 8; PX 285, p. 8). In its discovery responses, NNA indicated the retail cost for a replacement dashboard (not counting installation) was $806.42.

This evidence was more than sufficient to establish the fact of damage in this case. Again, the evidence establishes that all of the vehicles in question had a defective dashboard (i.e. a dashboard with the propensity to bubble). Thus, any evidence which establishes that the presence of this defective dashboard would diminish the value of the vehicle would be sufficient to establish an ascertainable loss to all class members. The types of evidence presented by Plaintiff are more than sufficient to meet this standard.

The testimony of the FX owners served to establish that the value of the FX was diminished as a result of the bubbling defect. This conclusion was bolstered by the testimony of NNA's own employee, Nicholas Angelidis, who acknowledged that NNA also recognized the bubbling issue would negatively impact the marketability of the FX. The jury was entitled to rely upon that evidence to determine that the bubbling defect had diminished the value of the FXs owned by all class members. There is no reason to believe that this conclusion would be different for any

individual class member. If the FX had a defective dashboard – which was true for all class members – then the FX would have a diminished value.

"Substantial evidence is evidence 'which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inference[s] which can be drawn from it.'" Guengerich v. Barker, 423 S.W.3d 331, 341 (Mo. App. 2014). The evidence in this case was sufficient to allow the reasonable inference that a vehicle which had a defective dashboard was worth less than an otherwise identical vehicle that did not have a defective dashboard.

The evidence regarding cost of repair also supports the jury's conclusion regarding damages. Missouri courts have recognized that cost of repair is evidence of damage. Johnson v. Summers, 608 S.W.2d 574, 575 (Mo. App. 1980). More specifically, Missouri courts have recognized that when the damages involve "diminution in value," evidence of "cost of repairs . . . 'is competent evidence to be considered in determining the damage suffered.'" Riddell v. Bell, 262 S.W.3d 301, 304 (Mo. App. 2008). As the Riddell Court observed, when evidence is presented regarding the cost of repair, the opposing party cannot complain that "there was no evidence of diminution of value." Id.

Missouri courts have also recognized that cost of repair is appropriate evidence of damage with respect to benefit-of-the-bargain damages. Brown v. Bennett, 136 S.W.3d 552, 557 (Mo. App. 2004). This is significant because, as

previously noted, the proper measure of damages in an MMPA action is benefit-of-the-bargain damages. Plubell v, 289 S.W.3d at 715; Hope, 353 S.W.3d at 83.

While few Missouri cases have addressed the use of cost-of-repair evidence to establish diminished value or benefit-of-the-bargain damages, a number of cases from other jurisdictions have recognized this connection. See, e.g., DJ Coleman, Inc. v. Nufarm Americas, Inc., 693 F.Supp.2d 1055, 1062 (D.N.D. 2010) (Noting that benefit-of-the-bargain damages are "frequently measured by the cost of repairs."); County of Santa Clara v. Atlantic Richfield Co., 40 Cal.Rptr.3d 313, 336 (Cal. App. 2006) (Describing damages for "lost benefit of a bargain" as including "the cost of repairing a defective product or compensation for its diminished value."); Morrison Homes of Florida, Inc. v. Wade, 598 S.E.2d 358, 360 (Ga. App. 2004) (Noting that "diminution in value may be proven by showing the cost to repair the defects."); Stevens v. F/V Bonnie Doon, 731 F.2d 1433, 1436 (9th Cir. 1984) (Recognizing that "costs of repairs may be used as evidence of the diminution in value."); Carter v. Empire Mut. Ins. Co., 374 N.E.2d 585, 592 (Mass. App. 1978) (Recognizing that "the estimate of the cost of repairs is evidence on the issue of the diminution in market value.").[14]

[14] Numerous other courts have reached similar conclusions. See, e.g., Dannix Painting, LLC v. Sherwin-Williams Co., 732 F.3d 902, 906 (8th Cir. 2013);

In Brewer v. Brothers, 611 N.E.2d 492, 496 (Ohio App. 1992), the court addressed the determination of benefit of the bargain damages in a fraudulent misrepresentation case. Id. at 496. In that regard, the Court noted that "the cost of repair or replacement is a fair representation of damages under the benefit of the bargain rule and is a proper method for measuring damages." Id. The Court noted that this was particularly true in cases involving defective products "[g]iven the practical difficulties of establishing the value of the property with and without the defects." Id. Other courts have reached similar conclusions:

> The proper test for damages was the difference in value between the property had it been as represented and the property as it actually was. This standard is notoriously more difficult to apply than to state. Reasonable costs of repair may therefore sometimes furnish a reasonable approximation of diminished value.

Johnson v. Healy, 405 A.2d 54, 59 (Conn. 1978).

Aprigliano v. American Honda Motor Co., Inc., 979 F.Supp.2d 1331, 1336 (S.D. Fla. 2013); JJW Development, L.L.C. v. Strand Systems Engineering, Inc., 378 S.W.3d 571, 581 (Tex. App. 2012); Terracon Consultants Western, Inc. v. Mandalay Resort Group, 206 P.3d 81, 83 (Nev. 2009).

Perhaps most on point is the decision in GJP, Inc. v. Ghosh, 251 S.W.3d 854 (Tex. App. 2008). In GJP, Inc., the Court addressed benefit-of-the-bargain damages in the context of a claim under the Texas statute which is the equivalent of the MMPA with respect to the sale of a vehicle. Id. at 888. The defendant argued that the plaintiff had failed to establish benefit-of-the-bargain damages because he had not presented direct evidence of the market value of the vehicle as actually sold. Id. The Court held that although the plaintiff had not presented direct evidence of the market value of the vehicle as delivered, plaintiff had presented evidence of the repair costs necessary to bring the vehicle to its represented condition, and this evidence was sufficient to establish benefit of the bargain damages. Id. In that regard, the Court observed that "[c]ost of repairs is evidence of the difference in fair market value as delivered and as represented." Id.

In this case, the cost-of-repair evidence serves to establish benefit-of-the-bargain damages Furthermore, because all class members have the same defective dashboard, all class members have the same need to have that dashboard replaced. Thus, the cost-of-repair evidence serves to establish damages (i.e. ascertainable loss) for all class members. Again, there is no reason to believe this conclusion would vary among class members. Why would any class member desire to keep their defective dashboard rather than having the dashboard replaced?

"Proof of actual damages must rise to the level of substantial evidence, which has been defined as 'that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inference[s] which can be drawn from it.'" AB Realty One, LLC v. Miken Techs., Inc., 466 S.W.3d 722, 733 (Mo. App. 2015). Reasonable minded jurors, drawing all reasonable inferences from the evidence in this case, and from their own experience as consumers, would be entitled to conclude that the value of the FX was diminished as a result of the bubbling issue, and that this diminished value was true for all class members.

C. Expert Testimony Is Not Required To Establish The Diminished Value Of The Vehicles With The Defective Dashboard.

Although NNA argues that Plaintiff did not present any evidence to support the claim of ascertainable loss, the real gist of NNA's argument is that Plaintiff did not present any expert testimony on this issue. But NNA provides no authority establishing that Plaintiff was required to present expert testimony on this issue.

NNA cannot rely upon the Court of Appeals' prior appellate decision in this matter (i.e. Hope) to support the proposition that Plaintiff was required to present expert testimony regarding ascertainable loss, as the Court of Appeals made absolutely no reference to experts in the Hope decision. Hope, 353 S.W.3d 68. Nor can NNA rely upon Missouri case law regarding the use of expert witnesses, because

that case law does not support the conclusion that expert testimony is required in a case of this type.

"To offer an opinion, the expert's knowledge on the subject must be superior to that of the ordinary juror, and the opinion must aid the jury in deciding an issue in the case." Hill v. City of St. Louis, 371 S.W.3d 66, 74 (Mo. App. 2012). "[C]ourts of this state have held that expert witnesses' opinion testimony 'should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.'" Guzman v. Hanson, 988 S.W.2d 550, 554 (Mo. App. 1999); see also Vittengl v. Fox, 967 S.W.2d 269, 279 (Mo. App. 1998); Stucker v. Chitwood, 841 S.W.2d 816, 819 (Mo. App. 1992).

As the Court in Roy v. Missouri Pac. R.R. Co., 43 S.W.3d 351 (Mo. App. 2001) observed:

> Generally, expert testimony is acceptable when the matter at issue is one with which lay jurors are not likely to be conversant, and when the opinion will be valuable to the jury, provided it does not invade the province of the jury. However, if the topic is one of everyday experience, the testimony of an expert witness is properly rejected.

Id. at 365. "[T]he trial court enjoys a great deal of discretion in determining what is common knowledge and what testimony is admissible." Id.

Expert testimony is not generally required on matters of "common sense." State v. Debler, 856 S.W.2d 641, 654 (Mo. banc 1993). "[F]actual issues that are resolved by applying common knowledge do not require expert opinion testimony." Bryant v. Bryan Cave, LLP, 400 S.W.3d 325, 334 (Mo. App. 2013). "Jurors are competent to decide issues of everyday experience without resorting to expert testimony." Jones v. Trittler, 983 S.W.2d 165, 167 (Mo. App. 1998).

In this case, the issue presented to the jury with respect to damage is a simple one: does the defect in the dashboard of the FX diminish the value of the FX? The jury can make this determination by answering a basic question: If two vehicles are the same in all respects, with the exception that one vehicle has a defective dashboard and the other vehicle does not, is the vehicle with the defective dashboard worth any less than the vehicle that does not have a defective dashboard?

The jury does not need any expert testimony to answer this basic question. Indeed, the question almost answers itself. Common sense dictates that if two vehicles are the same in all respects, with the exception of a defective dashboard, then the vehicle with the defective dashboard will be worth less than the vehicle without a defective dashboard.

It is important to keep in mind that the issue here is not the amount of damages, but the fact of damage. If the jury can reasonably conclude that the vehicle with the defective dashboard is worth $1 less than the vehicle without the defective

dashboard, then the jury has a reasonable basis to find that damage has occurred. In the context of this case, the jury was entitled to find an ascertainable loss pursuant to this analysis.

Plaintiff did not need to present expert testimony to establish that a defective vehicle is worth less (by at least some amount) than a vehicle which is identical in all respects other than the defect. That conclusion is a matter of common sense, and the jury was entitled to reach that conclusion by exercising its own common sense in this action.

D. Secondary Purchasers Suffered Damages.

NNA argues secondary purchasers suffered no loss because the diminished value had already occurred by the time they bought their FX. The problem with this argument is it ignores the class definition, which limits the class to persons who owned their vehicle on December 14, 2009. This date is important because the defect did not become a matter of widespread public knowledge until NNA began mailing warranty extension letters to FX owners on March 4, 2010. (DX 1101, p. 22). Because all secondary purchasers had purchased their FX before knowledge of the defect was widespread, all secondary purchasers sustained the same damage as original purchasers.

In addition, if this Court determines that secondary purchasers are differently situated than original purchasers for purposes of this class action, the proper remedy is removing those secondary purchasers from the recovering class. There is no need to annul the jury's verdict. This Court can simply direct the Circuit Court to identify those members of the class who were secondary purchasers, and to modify its order to exclude those secondary purchasers from the recovering class. As explained in more detail at pages 110 to 112, a class definition may be refined post-trial to remove class members when it is determined that certain class members should not be allowed to recover.

III. THE CIRCUIT COURT PROPERLY EXCLUDED THE DEPOSITION TESTIMONY OF MICHAEL KELSAY.

"'The admission or exclusion of evidence rests in the sound discretion of the trial court, and the court's decision will be reversed only if it constitutes an abuse of discretion.'" Frazier v. City of Kansas, 467 S.W.3d 327, 338 (Mo. App. 2015). "'The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" Id.

The Circuit Court properly ruled that NNA was not allowed to present the deposition testimony of Plaintiff's prior expert witness, Michael Kelsay, given that NNA had not designated Mr. Kelsay as an expert witness. (TR 34, 1358-59). In making that ruling, the Circuit Court observed that the exclusion of this evidence was also proper because there was no portion of Mr. Kelsay's deposition testimony which established his qualifications as an expert, and Mr. Kelsay did not state any of the opinions in his deposition to a reasonable degree of certainty. (TR 34, 43-44).

NNA argued at trial that it should be allowed to present the deposition testimony of this expert witness – despite the fact that NNA had not cross-designated Mr. Kelsay as an expert witness – because Mr. Kelsay's statements constituted an admission of Plaintiff. (LF 640-44). However, NNA acknowledged at trial that it

could not find any Missouri cases which supported this argument. (TR 36). The Circuit Court rejected this argument, finding that Mr. Kelsay's statements did not constitute an admission of Plaintiff because experts are obligated to offer their own independent opinions. (TR 43-44, 1359-59).

The Circuit Court did not abuse its discretion in so ruling.

A. The Circuit Court Properly Excluded Mr. Kelsay's Testimony Because He Was Not Designated By NNA As An Expert Witness.

As the Circuit Court recognized, NNA was barred from presenting the testimony of Mr. Kelsay because it had never cross-designated Mr. Kelsay. It is undisputed that NNA never designated Mr. Kelsay as an expert witness. (TR 34).

Missouri courts recognize that a trial court may properly exclude expert testimony where the expert is not properly designated by the party seeking to present that testimony. See, e.g., Scheck Indus. Corp. v. Tarlton Corp., 435 S.W.3d 705, 719 (Mo. App. 2014); Millard Farms, Inc. v. Sprock, 829 S.W.2d 1, 4 (Mo. App. 1991). Accordingly, the Circuit Court did not err in refusing NNA's request to present the deposition testimony of Mr. Kelsay at trial.

B. Mr. Kelsay Was Not Properly Qualified As An Expert.

"The expert witness statute sets out the legal basis for admitting expert testimony." Kivland v. Columbia Orthopaedic Group, LLP, 331 S.W.3d 299, 311 (Mo. banc 2011). Pursuant to that statutory standard, the qualifications of the expert must be established before the expert may offer testimony to the jury. Id. "Failure to satisfy [the statute's] foundation requirements renders proffered expert witness testimony inadmissible." Scott v. Blue Springs Ford Sales, Inc., 215 S.W.3d 145, 173 (Mo. App. 2006) (overruled on other grounds).

The Circuit Court properly held that, even if Mr. Kelsay had been designated as an expert witness, his deposition testimony could not have been presented at trial because his deposition testimony did not establish his qualification as an expert. In its offer of proof, NNA made no mention of Mr. Kelsay's qualifications. (TR 1353-56). Absent some proof of Mr. Kelsay's qualifications, his expert testimony could not properly be presented to the jury – either live or by way of deposition. Thus, the Circuit Court properly excluded Mr. Kelsay's deposition testimony on this basis.

C. None Of Mr. Kelsay's Opinions Were Stated To The Necessary Degree Of Reasonable Certainty.

Expert opinion testimony can only be presented to the jury if the opinions are stated to a reasonable degree of certainty. See, e.g., State v. Bowman, 337 S.W.3d

679, 690-91 (Mo. banc 2011); Watson v. Tenet Healthsystem SL, Inc., 304 S.W.3d 236, 240 (Mo. App. 2009). None of the opinion testimony of Mr. Kelsay that NNA sought to present to the jury was stated to a reasonable degree of certainty. (TR 34, 43-4). Absent some proof that the opinions which NNA sought to present to the jury were stated to the necessary degree of certainty, those opinions could not be presented to the jury – either live or by way of deposition. Thus, the Circuit Court properly excluded Mr. Kelsay's deposition testimony on this basis.

D. Mr. Kelsay's Deposition Testimony Did Not Constitute The Admission Of A Party.

NNA argues that Mr. Kelsay's deposition testimony should have been admitted as an admission of Plaintiff. That argument fails in several respects.

First, as NNA acknowledged at trial, there are no Missouri cases which support the proposition that statements of an expert constitute admissions of the party that initially retained that expert. (TR 36). In its Substitute Brief, NNA now cites Gordon v. Oidtman, 692 S.W.2d 349 (Mo. App. 1985) and Bynote v. Nat'l Super Markets, Inc., 891 S.W.2d 117 (Mo. 1995) for the proposition that admissions of a party include "authorized statements." However, there is nothing in Gordon or Bynote which indicates that statements of an expert constitute "authorized statements," or which indicates that statements of an expert are admissible as a party

admission. Indeed, the discussion of party admissions in those cases does not even involve experts. Gordon, 692 S.W.2d at 353-56; Bynote, 891 S.W.2d at 123-24.

Another problem with NNA's argument is that the rule regarding admissions of a party opponent only provides an exception to the hearsay rule. Stanbrough v. Vitek Sols., Inc., 445 S.W.3d 90, 102 (Mo. App. 2014); Viacom Outdoor, Inc. v. Taouil, 254 S.W.3d 234, 237 (Mo. App. 2008). Thus, even if that rule applied, it would only serve to get around a hearsay objection. Application of this rule would not serve to make the evidence independently admissible. If the evidence is inadmissible for reasons other than the hearsay rule, then the fact that a hearsay exception applies would not be determinative of admissibility. As noted above, the Circuit Court properly excluded Mr. Kelsay's testimony for three reasons other than hearsay. Thus, the fact that an exception to the hearsay rule might apply does indicate that the Circuit Court's ruling was an abuse of discretion.

The other problem with NNA's argument is that it is inconsistent with Missouri law. Missouri courts have consistently held that even where a party does properly call the opposing party's prior expert witness (i.e. when the expert was properly designated and when his qualifications and opinions are properly stated), the party may not make reference to the fact that the expert was previously employed by the opposing party. See, e.g., Smith v. Homestead Distributing Co., 629 S.W.2d 454, 457 (Mo. App. 1981); State ex rel. State Highway Commission v. Moulder, 547

S.W.2d 882, 884 (Mo. App. 1977); State ex rel. State Highway Commission v. Kalivas, 484 S.W.2d 292, 295 (Mo. 1972). If Missouri courts will not even allow a party to refer to the fact that a witness was previously the other party's expert, then it is clear that Missouri courts do not consider the testimony of such a witness to be an admission of the party that previously retained him.

Lacking Missouri authority to support its argument, NNA relies upon cases from other jurisdictions to argue that an expert's testimony is an admission of a party. However, at best, the case law in other jurisdictions cuts both ways on this issue.

For example, in Kirk v. Raymark Industries, Inc., 61 F.3d 147 (3rd Cir. 1995), the Court concluded that it is not reasonable to treat statements of an expert as admissions of a party, stating as follows:

> In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony. Since an expert witness

> is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent.

Id. at 164 (internal citations omitted); see also In re Hidden Lake Ltd. Partnership, 247 B.R. 722, 724 (Bkrtcy. S.D. Ohio 2000) (making similar observations). Other courts have reached the same conclusion in circumstances where the expert was subsequently withdrawn. See, e.g., Liftee v. Boyer, 117 P.3d 821, 829-30 (Haw. App. 2004) (Holding that the deposition of an expert witness could not be admitted as the admission of a party where the expert was withdrawn prior to trial.).

In short, Missouri courts do not treat statements of experts as admissions of an opposing party. Furthermore, regardless of whether NNA could establish an exception to the hearsay rule, the fact remains that Mr. Kelsay's deposition testimony was properly excluded because (1) Mr. Kelsay was not designated by NNA, (2) Mr. Kelsay's deposition did not establish his qualifications, and (3) none of the opinions that NNA sought to present were stated to a reasonable degree of certainty. Accordingly, the Circuit Court did not abuse its discretion in excluding Mr. Kelsay's deposition testimony.

IV. THE CIRCUIT COURT PROPERLY ALLOWED OWNER-WITNESS TESTIMONY.

"'The admission or exclusion of evidence rests in the sound discretion of the trial court, and the court's decision will be reversed only if it constitutes an abuse of discretion.'" Frazier, 467 S.W.3d at 338.

NNA argues that in the trial of a class action, testimony of witnesses who are not class members should be excluded. Although it raised this issue at several points during trial, NNA conceded that it could not find a single case anywhere that supported this argument. (TR 426). The Circuit Court likewise indicated that it could not find a single case supporting this argument, and that it could not think of any concept that would support the exclusion of such testimony. (TR 427).

"'Evidence is logically relevant if it tends to prove or disprove a fact in issue or corroborate other evidence.'" China Worldbest Group Co., Ltd. v. Empire Bank, 373 S.W.3d 9, 13 (Mo. App. 2012); see also Walley v. La Plata Volunteer Fire Dept., 368 S.W.3d 224, 233-34 (Mo. App. 2012). The source from which evidence was obtained has no bearing upon whether the evidence is relevant.

The testimony of the witnesses in question was relevant in that it addressed multiple relevant issues including the nature of the defect and the impact of the defect. Thus, the evidence was properly admitted, regardless of the fact that the witnesses were not class members.

Apparently recognizing that this evidence was indeed relevant, NNA primarily argues that the admission of this evidence was prejudicial because the jury might have been misled into believing that these witnesses were class members. First of all, it is difficult to see how this would be pertinent, because evidence is relevant regardless of whether it comes from a class member or not. However, there was no risk of prejudice arising from confusion because, for every one of these witnesses, the parties made it clear during their testimony that the witnesses were not class members. (TR 459, 461-62, 646-48, 841-43, 856). Furthermore, during closing argument Plaintiff's counsel again made it clear to the jury that it had heard testimony from both class members and witnesses who were not class members. (TR 1421). Thus, no prejudice could have resulted from the presentation of these witnesses.

V. THE CIRCUIT COURT PROPERLY ALLOWED WITNESSES TO TESTIFY REGARDING THE VALUE OF THEIR OWN VEHICLE.

NNA argues it was error for the Circuit Court to allow FX owners to testify regarding the value of their own vehicles. No prejudice can have resulted from the admission of such evidence because there were numerous instances in which witnesses testified regarding the value of their own vehicle and NNA made no objections. (TR 450, 605, 618, 644, 842, 855, 887-88). In fact, in one instance, NNA questioned a witness about this very issue. (TR 897-98).

"There is no prejudice to a defendant when allegedly improper evidence was merely cumulative to other evidence admitted without objection establishing the same facts." State v. Nichols, 200 S.W.3d 115, 120 (Mo. App. 2006); see also Saint Louis Univ. v. Geary, 321 S.W.3d 282, 292 (Mo. banc 2009) ("'A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence.'"). Accordingly, even if it were error to admit the testimony which was the subject of NNA's objections (which it was not), that error resulted in no prejudice because the testimony was cumulative of other testimony to which NNA did not object. Furthermore, the Circuit Court did not err in admitting this evidence.

Missouri courts have consistently recognized that a property owner is qualified to testify to the value of his own property. See, e.g., Atkinson v. Corson,

289 S.W.3d 269, 279 (Mo. App. 2009); R & J Rhodes, LLC v. Finney, 231 S.W.3d 183, 190 (Mo. App. 2007). This rule is based on the assumption that an owner is familiar with his own property. See, e.g., Cohen v. Bushmeyer, 251 S.W.3d 345, 349 (Mo. App. 2008); Rigali v. Kensington Place Homeowners' Ass'n, 103 S.W.3d 839, 846 (Mo. App. 2003).

It is only when there is evidence indicating the owner may not be sufficiently familiar with his own property that this rule is placed in question. As the court in H & B Masonry Co., Inc. v. Davis, 32 S.W.3d 120 (Mo. App. 2000) observed: "Although we recognize that an owner of real estate may testify regarding his opinion of its value because an owner is presumed to be familiar with the property and its uses, this presumption is overcome and evidence of his opinion of the value of the property should be rejected where the record shows that the owner does not have specialized knowledge regarding the real estate." Id. at 124.

Although NNA made objections to such testimony on the basis of foundation, NNA did not once present any evidence suggesting that any of the FX owners were unfamiliar with their own vehicle. Thus, the presumption of a proper foundation applied. Id.

In support of its argument, NNA relies upon three cases. However, each of those cases involved extenuating circumstances which placed in question the normal

presumption that an owner is entitled to testify regarding the value of his or her own property.

In Carmel Energy, Inc. v. Fritter, 827 S.W.2d 780 (Mo. App. 1992), the owner of real property testified to his opinion regarding the value of his property, and indicated his opinion was based upon a contract that his father had entered into approximately 30 years earlier. Id. at 783. The Court held that because the owner's estimate regarding value was based upon the contract from 30 years prior, and because there was no evidence regarding that prior contract, the owner's testimony was not a proper basis for determining value. Id.

In Coach House of Ward Parkway, Inc. v. Ward Parkway Shops, Inc., 471 S.W.2d 464 (Mo. 1971), a contract action by a lessee against its lessor, the owner of the lessee company attempted to offer testimony that "he, as an owner, would be entitled to 50% of another owner's sales" pursuant to a provision of the contract. Id. at 473-74. The Court rejected that argument, stating: "While it is generally true that an owner is allowed to testify as to the reasonable value of his property, it is obvious that ownership does not in itself qualify one to express opinions on matters not falling within his experience." Id. at 473.

In Shelby Cty. R-IV Sch. Dist. v. Herman, 392 S.W.2d 609 (Mo. 1965), a farmer attempted to testify to his opinion regarding the value of his farm. Id. at 613. However, in the course of offering that testimony, the farmer acknowledged that he

was using a questionable method of determining value, and that he was relying upon highly suspect facts. Id. at 613-14. Based on those facts, the Court concluded that this testimony was properly struck, stating: "While ordinarily the owner of real property is held competent to testify as to its reasonable market value, and his estimate is received notwithstanding that he has not qualified as an expert, upon the assumption that he is particularly familiar with it and knows of the uses to which it is particularly adaptable, his opinion is without probative value where it is shown to have been based upon improper elements or an improper foundation." Id. at 613 (internal citations omitted).

In each of the above cases, there was evidence in the record which placed in question the ability of the witness to accurately testify regarding the value of his or her own property. That additional evidence overcame the normal presumption of a sufficient foundation, and provided a basis for the trial court to exclude or strike the evidence. The same cannot be said in this case.

In the present case, the owners of the FX vehicles testified to the value of their vehicles. They also testified to having personal experience with the bubbling they experienced in their vehicles. Given these facts, the normal assumption that an owner of property is qualified to testify regarding the value of that property applies. Unlike the facts in Carmel, Coach House and Shelby Cty., in this case there was no contrary evidence to overcome this presumption. Indeed, each of the owners

testified about their personal experience with their own vehicle, thereby establishing additional foundation for their testimony regarding value, even though such foundation was not strictly required under Missouri law.

Again, "an owner is presumed to be familiar with the property and its uses" and this presumption is overcome only when "the record shows that the owner does not have specialized knowledge regarding the real estate." H & B Masonry Co., Inc., 32 S.W.3d at 124. In this case, NNA presented no evidence to establish that any of the vehicle owners were not familiar with their own vehicle. Thus, there was no basis to exclude this testimony on the basis of lack of foundation.

In short, there was nothing improper about the Circuit Court allowing owners of FX vehicles to offer their opinion regarding the value of their own vehicles.

VI. THERE WAS NO ERROR IN GIVING THE VERDICT DIRECTOR.

NNA's argument that "the verdict director did not identify any specific misrepresentation" is contrary to MAI.

MAI 39.01, the verdict director for MMPA actions, provides that the paragraph concerning the actionable conduct should identify the "method" or "act" at issue. In that regard, the pertinent paragraph in the MAI instruction reads as follows:

> **Third, in connection with the ["sale", "lease", "advertisement"][4] of (*here identify merchandise*) defendant (*here insert the alleged method, act or practice declared unlawful by §407.020, RSMo, such as "misrepresented the (here repeat the identification from Paragraph First)" or "concealed a material fact"),*[5]**

MAI 39.01. This language indicates the description of the actionable conduct should be fairly general, identifying the type of actionable conduct at issue rather than the specific statements at issue. The two examples given in this language – that the defendant "misrepresented the [product]" and that the defendant "concealed a material fact" – are both general in nature and do not address the specific content of specific representations.

Consistent with MAI, Plaintiff presented, and the Circuit Court approved, a verdict director that described the type of actionable conduct at issue. Specifically, the pertinent portion of the verdict director reads as follows:

> 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 . . .

These descriptions of the actionable conduct are taken directly from the statutory and regulatory language.

While NNA objected on the basis that the verdict director should have identified specific statements that were alleged to be misrepresentations, the Circuit Court rejected NNA's objection, stating as follows:

> I'm going to allow the plaintiffs to give the instruction they choose in paragraphs first and second, because I think that does not create a roving commission. I think when you got it limited by advertising, and you got it limited by causation to directly cause it eliminates the

confusion I think that Mr. Cowden referred to, and leaves what I think is properly argument for argument.

(TR 1386-87).

The MMPA provides that actionable conduct includes "deception" and "misrepresentation." R.S.Mo. § 407.020.1. The regulations used to implement the MMPA define "deception" as including "any method, act, use, practice, advertisement or solicitation that . . . tends to create a false impression." 15 C.S.R. § 60-9.020(1). The regulations define "misrepresentation" as "an assertion that is not in accord with the facts." 15 C.S.R. § 60-9.070(1). The verdict director reflects this regulatory language.

It is not improper to describe the actionable conduct in an MMPA action in the very language the statutes and regulations use to describe actionable conduct under the MMPA. To the contrary, the language of MAI 39.01 suggests this is an entirely appropriate method of crafting the instruction.

As noted above, the suggested language in MAI 39.01 includes a description of the actionable conduct as "concealed a material fact." This phrase essentially tracks the language of the statute, which indicates that actionable conduct includes "concealment, suppression, or omission of any material fact." R.S.Mo. § 407.020.1. Thus, MAI 39.01 suggests it is appropriate to reflect the statutory language directly in the instruction. If anything, Plaintiff was slightly more specific than the examples

from MAI 39.01 in that Plaintiff actually used the regulatory language that gives body to the statutory language.

NNA is essentially arguing that the Circuit Court erred by not requiring Plaintiffs to include a significant amount of evidentiary detail in their verdict director. But Missouri law is contrary to that argument. "[O]ne of the purposes of the enactment of the Missouri Approved Instructions was to remove the necessity of setting forth detailed evidentiary facts in the instructions. Instead, a proper instruction submits only the ultimate facts, not evidentiary details, 'to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over another.'" Duren v. Union Pac. R. Co., 980 S.W.2d 77, 79 (Mo. App. 1998). "MAI contemplates that the jury will be properly advised by the argument of counsel concerning details." Bayne v. Jenkins, 593 S.W.2d 519, 531 (Mo. banc 1980). Thus, the Circuit Court did not err in refusing to require extensive evidentiary detail in the verdict director.

NNA also argues the verdict director was improper because it did not instruct the jurors they had to identify a misrepresentation and injury to all class members. This is merely a reiteration of Defendant's prior argument that Plaintiff was required to establish which class members relied upon which misrepresentations. As previously explained, Missouri law, including the law of this case, does not require the plaintiff to establish that specific class members viewed specific

misrepresentations. Thus, there was nothing improper about the language of the verdict director. To the contrary, any additional language of the type suggested by NNA would deviate from MAI.

VII. THE CIRCUIT COURT DID NOT ERR IN CERTIFYING THE CLASS BECAUSE THE COURT PROPERLY CONCLUDED THAT COMMON ISSUES OF FACT AND LAW PREDOMINATED OVER INDIVIDUAL ISSUES.

"Whether an action should proceed pursuant to Rule 52.08 as a class action rests within the sound discretion of the circuit court. An abuse of discretion occurs if the circuit court's decision 'is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration.'" State ex rel. McKeage v. Cordonnier, 357 S.W.3d 597, 599 (Mo. banc 2012).

NNA argues the class should be decertified because, in light of the evidence at trial, the class includes members who should not be allowed to recover. This argument is nothing more than a repackaging of NNA's arguments from Points I and II of its Substitute Brief. NNA argues in Point I that there was not sufficient evidence to support the jury's finding of misrepresentations, and NNA argues in Point II that there was not sufficient evidence to support the jury's finding of ascertainable loss. In this Point, NNA simply reiterates its argument that the evidence did not support the jury's determinations regarding misrepresentations and ascertainable loss. NNA's arguments should be rejected for the same reasons previously identified in Plaintiffs' Response to Points I and II.

To the extent that NNA does make any argument in this Point that is not wholly duplicative of Points I and II, NNA's argument is not supported by the record.

A. The Evidence Supports Predominance With Respect To Misrepresentation And Ascertainable Loss.

NNA argues that various subsets of class members should not recover because the evidence presented at trial was inadequate. NNA's arguments ignore much evidence.

1. Misrepresentation.

NNA argues that "Plaintiff's case turned on the contents of specific advertising materials and evidence about who received them." (Appellant's Substitute Brief, p. 87). To the contrary, Plaintiff established misrepresentations by presenting samples of the marketing materials for the FX, and presenting testimony from Nathan Lyst, the senior manager for marketing communications, that the advertising for the FX conveyed the same overall message throughout the entire vehicle life cycle, from 2003 through 2008. (PX 284, pp. 6, 17). As Lyst put it: "the same message – the same words are being used consistently." (PX 284, p. 17). Given Lyst's testimony that the advertising was consistent for the entire class period,

it was sufficient to present samples of the advertising to the jury. Plaintiff was not required to show which class members saw which advertisements.

In addition to being contrary to the record, NNA's argument is contrary to Missouri law, including the law in this case, because members of an MMPA class action are not required to present evidence regarding which class members viewed which specific advertisements when the advertising is consistent throughout the class period. Plubell, 289 S.W.3d at 714; Hope, 353 S.W.3d at 82-84.

NNA's argument is also contrary to Missouri law which holds that reliance is not an element of an MMPA claim. Plubell, Inc., 289 S.W.3d at 714 (Mo. App. 2009); Hess, 220 S.W.3d at 774. NNA's argument improperly attempts to impose a reliance requirement by requiring evidence that specific class members relied upon specific advertisements.

2. Ascertainable loss.

NNA argues that Plaintiff's case "depended entirely" on whether bubbling had manifested in particular vehicles. Once again, NNA mischaracterizes both the law and the record.

NNA's argument is contrary to the Court of Appeals' decision in Hope, which recognized that the class in this case properly included owners who had not experienced bubbling because the damage is the diminished value of the vehicle

which is present regardless of whether bubbling has manifested. Hope, 353 S.W.3d at 72-73, 81. As the Court recognized, the loss occurs regardless of the manifestation of bubbling in any particular vehicle because "the existence of the defect places a stigma upon the Subject Vehicle that reduces [its] marketability and resale value." Id. at 73.

The evidence established that all of the vehicles in question have dashboards with the propensity to bubble. (PX 3; PX 279, p. 5-7, 38, 49-51; TR 1210, 1224-25, 1227, 1229, 1328-31). The evidence also included testimony of FX owners that the value of their FX was diminished as a result of the bubbling defect, testimony that the bubbling defect directly interfered with efforts to sell the vehicle, and testimony of NNA employees that the bubbling defect impacted the resale value of the entire brand. (TR 448, 450, 525-27, 605-08, 618-20, 644, 842, 855, 887-88, 897-98; PX 278 pp. 17-18, 25-26; PX 283, p. 13). Thus, the evidence established the stigma associated with the FX, and the stigma associated with the defect that reduced the value of the FX.

Based on this evidence, the jury was entitled to conclude that all FX owners had a dashboard with the propensity to bubble, and that all owners experienced damage as a result of that propensity, regardless of whether bubbling had yet occurred in any specific vehicle. Accordingly, the issue of whether any particular

class member experienced bubbling in his or her own dashboard does not alter the Circuit Court's finding of predominance.

NNA argues Plaintiff "abandoned his stigma theory" at trial, but as noted above that is simply not true. Plaintiff successfully presented his stigma theory at trial by presenting evidence that all of the vehicles in question had the same defective dashboard, and that all of the vehicles had a diminished value as a result of the defective dashboard. That is the very essence of Plaintiff's stigma theory. In fact, that is almost exactly how the Court of Appeals previously described Plaintiff's stigma theory: "At its essence, it is a claim that every FX owner has been damaged economically because each paid for the vehicle as though there were no latent defect to which the vehicle is subject, when in fact there is a taint that applies to the vehicle due to the possibility of dashboard bubbling." Hope, 353 S.W.3d at 72.

3. Owners who received a replacement dashboard.

On page 93 of its Substitute Brief, NNA briefly suggests that the class improperly included owners who "received a free replacement dashboard." The implication is that such owners should not be included in the class because they are not injured. That argument is contrary to the record.

The evidence established that owners who received replacement dashboards received Countermeasure 2 dashboards, and those replacement dashboards had a

propensity to bubble. (TR 849-50, 1227, 1229, 1328-31; PX 279, pp. 49-51). Thus, regardless of whether owners received a replacement dashboard, they still were damaged because they simply received another defective dashboard. Accordingly, owners who received a replacement dashboard were properly included within the class.

B. Secondary Purchasers Are Properly Included.

NNA argues that secondary purchasers are improperly included in the class definition. However, the class definition is based upon the Court of Appeals' direction in Hope:

> 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.

Hope, 353 S.W.3d at 84. Pursuant to that direction, Plaintiff modified the class definition so that it was limited to persons who purchased an FX "through the distribution system of Nissan North America, Inc." (LF 46, 48-49). NNA objected to this class definition, arguing it was contrary to the Court of Appeals' direction in Hope. (LF 202-03). The Circuit Court rejected that argument, allowing the class definition to stand. (LF 440). When NNA sought an interlocutory appeal on that very issue, the Court of Appeals rejected that request. (RSLF, pp. 2-25).

Despite this record, NNA continues to argue the class should only include persons who purchased a new vehicle from NNA. In support of that argument, NNA points to portions of the Hope opinion which refer to "original purchasers." However, the reference to "original purchasers" occurs earlier in the same paragraph quoted above. Thus, when the Court of Appeals used the phrase "original purchasers," it was only intending to exclude "owners who did not purchase their vehicles through Nissan's distribution system." Hope, 353 S.W.3d at 84. Such owners are excluded under the current class definition.

NNA also argues that secondary purchasers should not be included in the class because there is no evidence they sustained any damage. As previously explained, the problem with this argument is that it ignores the class definition, which limits the class to those persons who owned their vehicle on December 14, 2009. This is before NNA began mailing warranty extension letters to FX owners on March 4, 2010 – before knowledge of the defect was widespread. (DX 1101, p. 22). Because secondary purchasers in the class purchased their FX before the defect became widely known, thereby diminishing the value of the vehicle for resale purposes, all of the secondary purchasers in the class sustained the same damage as those who purchased new vehicles.

C. Decertification Is Not Warranted.

For the above reasons, NNA has not shown that the Circuit Court abused its discretion in certifying this class action, or in refusing to decertify post-trial. Based upon this record, it cannot be said that the Circuit Court's action was "clearly against the logic of the circumstance, [] arbitrary and unreasonable, [or] indicates a lack of careful consideration.'" State ex rel. McKeage, 357 S.W.3d at 599.

Furthermore, even if NNA were correct that some subset of the class should not recover, the remedy would be to modify the recovering class to exclude those specific individuals. While Missouri courts have not directly addressed this issue, federal decisions have addressed this question.

In In re Urethane Antitrust Litig., 2013 WL 2097346 (D. Kan. 2013), a price fixing class action was tried to a jury. Id. at *1. After trial and judgment, the defendant argued the class improperly included "2004 purchases." Id. at *2. The Court held this complaint was not a basis for reversing the verdict or decertifying the entire class. Id. In that regard, the Court stated: "As plaintiffs note, however, any problems from the inclusion of such members within the class are obviated by modification of the class to exclude those members. Dow opposes such a modification, but at this stage, such modification is far superior to decertification." Id. Pursuant to this analysis, the Court modified the class post-trial to take into account the complaint regarding 2004 purchases. Id.

In Garcia v. Tyson Foods, Inc., 890 F. Supp. 2d 1273 (D. Kan. 2012), the plaintiffs sought to amend the class, post-trial, seeking to remove almost 2000 class members whose claims were not addressed at trial. Id. at 1296-97. The defendant objected that it would be unfair to modify the class post-trial when the case had been tried based upon the existing class definition. Id. at 1297. The Court rejected that argument, noting that a court has "broad discretion" to modify a class, and this discretion "extends after a trial on the merits." Id. The Court further noted that no prejudice resulted from such a modification where the modification narrows the class, rather than adding new class members who were not included at the time of trial. Id. Based upon these factors, the Court allowed the post-trial modification of the class. Id. at 1298.

A number of other cases have reached similar conclusions. See, e.g., Bates v. United Parcel Serv., Inc., 511 F.3d 974, 983 (9th Cir. 2007); Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 877-78 (11th Cir. 1986). While Missouri courts have not directly addressed this issue, federal cases are persuasive on class certification issues. Craft v. Philip Morris Companies, Inc., 190 S.W.3d 368, 376 (Mo. App. 2005).

It is also important to consider the facts regarding the class in this case. The entire recovering class consists of 326 persons who have been specifically identified. (LF 2352). These persons submitted claim forms that provide detailed information.

(LF 905-06). If this Court concludes that some of these 326 persons should not recover, that issue can be easily addressed by modifying the recovering class. For example, if this Court decided that persons who purchased a specific model year should not be included, those persons can be identified and the judgment can be modified to exclude those persons from the class.

In short, even if the recovering class included some persons who should not be allowed to recover, the appropriate remedy would be modification of the recovering class, not decertification at this late stage in the proceedings.

VIII. CERTIFICATION WAS APPROPRIATE BECAUSE UNINJURED INDIVIDUALS DID NOT DOMINATE THE CLASS.

NNA's argument in this Point is similar to that in Point VII, in that NNA argues once again that the class included persons (1) who never experienced dashboard bubbling, or (2) who received a free replacement dashboard. Neither of these arguments is well-founded.

A. Owners Who Did Not Experience Bubbling.

NNA's argument regarding FX owners who did not experience bubbling in their dashboard is contrary to the Court of Appeals' prior decision in Hope, which recognized that the class properly included owners who had not experienced bubbling because the damage at issue is the diminished value of the vehicle which is present regardless of whether bubbling has manifested. Hope, 353 S.W.3d at 72-73, 81. This argument is also contrary to the evidence presented at trial.

As previously noted, the evidence established that all of the vehicles in question have an original dashboard, a Countermeasure 1 dashboard, or a Countermeasure 2 dashboard, and that each of these dashboards had the propensity to bubble. (PX 3; PX 279, p. 5-7, 38, 49-51; TR 1210, 1224-25, 1227, 1229, 1328-31). The evidence also included testimony of multiple vehicle owners regarding their opinion that the value of their FX was diminished as a result of the bubbling

defect, testimony that the bubbling defect had directly interfered with efforts to sell the vehicle, and testimony of NNA employees that the bubbling defect impacted the resale value of the entire brand. (TR 448, 450, 525-27, 605-08, 618-20, 644, 842, 855, 887-88, 897-98; PX 278 pp. 17-18, 25-26; PX 283, p. 13).

Based on this evidence, the jury was entitled to conclude that all owners of the FX had a dashboard with the propensity to bubble, and that all owners experienced damage as a result of that propensity, regardless of whether bubbling had occurred in any specific vehicle. Accordingly, the class properly included these members.

B. Owners Who Received A New Dashboard.

As noted above, all of the FX owners in the class experienced damage because they all had a defective dashboard that diminished the value of their vehicle. The fact that some owners may have received replacement dashboards does not alter that conclusion.

The evidence established that those owners who received replacement dashboards received Countermeasure 2 dashboards. (TR 1227). The evidence also established that Countermeasure 2 dashboards had a propensity to bubble. (TR 849-50, 1227, 1229, 1328-31; PX 279, pp. 49-51). Thus, regardless of whether owners received a new dashboard, they still were damaged because they had simply received

a new defective dashboard in place of an original defective dashboard. Accordingly, the class properly included these members.

C. Decertification Is Not Warranted.

For the above reasons, this Court should not find that the Circuit Court abused its discretion in certifying this class action, or in refusing to decertify this class action post-trial. Based upon this record, it cannot be said that the Circuit Court's action was "clearly against the logic of the circumstance, [] arbitrary and unreasonable, [or] indicates a lack of careful consideration.'" State ex rel. McKeage, 357 S.W.3d at 599.

Furthermore, even if NNA were correct that some subset of the class should not be included within the recovering class, the remedy under those circumstances would be to modify the recovering class to exclude those specific individuals. In re Urethane Antitrust Litig., 2013 WL 2097346 at *1-2; Garcia, 890 F. Supp. 2d at 1296-98; Bates, 511 F.3d at 983; Kilgo, 789 F.2d at 877-78. Thus, decertification would not be proper.

IX. THE CIRCUIT COURT DID NOT ERR IN AWARDING ATTORNEYS' FEES BECAUSE THE CLASS PREVAILED.

NNA's argument on this Point is based solely upon the assertion that the class should not have prevailed in the underlying action. NNA does not otherwise challenge the determination or amount of attorneys' fees. For the reasons previously explained in this Substitute Brief, the class properly prevailed at trial. Accordingly, the Circuit Court's award of attorneys' fees should stand.

CONCLUSION

For the reasons stated herein, this Court should affirm the Circuit Court's judgment and certification order in all respects. In the alternative, if this Court determines that the recovering class includes some persons who should not be included within the class, this Court should remand this action to the Circuit Court with directions to remove those members from the recovering class, but to otherwise allow recovery by the remaining class members pursuant to the jury's verdict in this action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Substitute Brief conforms to the type-volume limitations set forth in MO. R. CIV. P. 84.06(b) in that the Substitute Brief contains 27,837 words, excluding the cover, certificate of service, certificate of compliance and signature block, as counted using Microsoft Word.

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