Appeal No. SC95707

IN THE SUPREME COURT OF MISSOURI

ROBERT HURST
Plaintiff/Respondent,

v.

NISSAN NORTH AMERICA, INC.,
Defendant/Appellant.

SUBSTITUTE REPLY BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Plaintiff cannot defend the case he *actually* brought: That "premium" in national ads, standing alone, renders NNA liable to a class who either *never* had issues or *already* received new dashboards with 99.75% reliability. Unable to defend his actual case, Plaintiff fills his brief with arguments about *different* cases.

As to misrepresentation, Plaintiff and the Attorney General ("AG") insist that deception can occur without "false" statements via, for example, "deceptive format" or "pressure sales tactics." RespBr.40, AGBr.19, 35. But Plaintiff has not *brought* such claims, and this case leaves them untouched. As to the claims Plaintiff has brought—based on alleged advertising misstatements—Plaintiff has no answer to the national consensus rejecting similar claims relying on vague marketing slogans.

As to loss, Plaintiff insists he presented testimony from "owners … that the value of their FX was diminished." RespBr.72. But Plaintiff omits that these vehicles had *unremedied* bubbling. *Infra* 22. Perhaps Plaintiff could have pursued a class of such owners, but he brought a class in which 99% of members are *not* like that. OpBr.12-13, 71. Plaintiff cannot rely on unrepresentative testimony to hold NNA liable to a class of differently situated owners. Blackletter class-action law, bedrock due-process principles, and basic fairness forbid it.

Unable to prevail on the evidence, Plaintiff says NNA *conceded* otherwise—that all "dashboards … were defective," "marketing materials were consistently misleading," etc. RespBr.1. The Court should not be distracted. These false claims are designed to divert from Plaintiff's lack of evidence. *Infra* 16-17 n.10, 19, 26-27, 31-32.

ARGUMENT

I. Plaintiff identified no actionable misrepresentation.

The Western District reversed because "premium" is a "vague or highly subjective claim[] of product superiority" that did not promise, expressly or impliedly, the FX had no risk of defects. A36-37 (quotation omitted). Plaintiffs and the AG depict that holding as a relic inconsistent with modern consumer protection. They warn that if it stands, it will provide "carte blanche" to deceptive tactics occurring absent "false" statements, such as "deceptive format" and "pressure sales tactics." AGBr.31; RespBr.40. And they urge this Court instead to follow Texas law—apparently the most plaintiff-friendly jurisdiction they could find. AGBr.34-36; RespBr.78.

This argument fails at every step. The Western District limited its holding, which does not touch claims about format, pressure tactics, or other MMPA violations. A36. Plaintiff's case solely alleges affirmative misstatements in mass-market advertising. As to such claims, applying

the Western District's rule is not remotely inconsistent with modern consumer protection—as evident from the fact that *every* state and the federal government applies the same principles to similar statutes. *Infra* 4. That includes *Texas*, whose Supreme Court has approved the "puffery" doctrine and whose courts have held similar representations inactionable. *Infra* 8-9. Plaintiff cannot show the MMPA departs from this consensus.

A. MMPA claims cannot be based on vague slogans.

Plaintiff offers a lengthy history, but he ignores today. The modern puffery doctrine means simply this: False or deceptive advertising claims, like Plaintiff's, cannot be based on marketing slogans that are "'vague or highly subjective claims of product superiority'"—because "consumer[s]" do not "'interpret[]'" such slogans as conveying, expressly or impliedly, "statement[s] of objective fact." A36-37 & n.8 (quoting *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390-91 (8th Cir. 2004)). Every year, cases apply similar rules under consumer-protection laws nationwide. *E.g.*, *Jacobsen Diamond Ctr., LLC v. ADT Sec. Servs., Inc.*, 2016 WL 3766236, at *10 (N.J. App. Div. 2016). Such decisions follow the principles this Court applied in *Carrier*, which rejected claims based on advertising products as "unmatched … for quality, performance and dependability." *Carrier Corp. v. Royale Inv. Co.*, 366 S.W.2d 346, 350

(Mo. 1963). Plaintiff contends that if *Carrier* arose under the MMPA, the result would change.

No jurisdiction agrees. *Every* state and the federal government have similar statutes, yet *none* has held they abrogated similar precedents. OpBr.55-56. NNA's research confirms the puffery doctrine has been expressly recognized in 38 states' consumer-protection laws. *See* Addendum, *infra* 34-38.

Plaintiff identifies nothing in the MMPA compelling this Court to discard *Carrier* and hold "vague and highly subjective claims of product superiority" are actionable. A36-37. Quite the opposite. Plaintiff cites cases holding certain "[c]ommon law … doctrines do not" apply. RespBr.44. But on the question here—what representations are "misrepresentation" or "deception"—this Court held that the MMPA "draws on the common law." *State v. Shaw*, 847 S.W.2d 768, 775 (Mo. banc 1993); *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 600 (Mo. banc 1993). *Shaw* preceded the Attorney General's regulations, but as Plaintiff admits, the regulations explain they incorporate "settled meanings," except certain discrete changes—*e.g.*, eliminating the "actual deception" requirement. RespBr.40; §§60-9.020, 60-9.070.

Plaintiff and the AG claim the regulations abrogated cases like *Carrier*. That is false. Misrepresentation is "an assertion that is not in

accord with the facts." §60-9.070. Plaintiff and the AG rely on the inclusion of "opinion" in the definition of "assertion," but NNA has explained why that does not help Plaintiff. OpBr.59-61. It only codifies settled law that some "opinion" statements *also* convey factual claims—that the opinion is genuinely held, or embedded factual assertions are true. *Id.* Vague slogans like "premium" convey no such claims. *Id.* Indeed, the regulation provides that "opinion" statements are only actionable if they do not "accord with the facts." §60-9.070. This *reaffirms* the principles behind puffery. A30-31.

Plaintiff and the AG fare no better with the "deception" regulation. They fill pages arguing that "deception" need not be based on "false" statements, pointing to "deceptive format," "pressure sales tactics," or scamming "the elderly" or "vulnerable." RespBr.40-41, 48; AGBr.18-19, 34-35. That is true, but irrelevant: Plaintiff has not *brought* such claims. If Plaintiff *had* brought claims based on pressure tactics, he could prevail without showing any "false" statement, and *Carrier* and puffery would be no defense. This argument thus succeeds only in refuting the overwrought claims that the Western District "undermine[d]" or "gut[ted] protections against deception." RespBr.49; AGBr.15. Deceptive-format, pressure sales, and many other theories will preserve MMPA liability absent "false" statements—when plaintiffs *pursue* such theories.

The only "deception" theory Plaintiff pursued, however, was that the *content* of NNA's *advertisements*—not their "format," or pressure tactics—"tended to create a false impression." A20; §60-9.020. And Plaintiff is plainly wrong that falsity is irrelevant in a *false*-impression case. *Cf.* Webster's Third New Int'l Dictionary 819 (1986) ("false" statement is "not true").

"False impression" cases are not some MMPA innovation that uniquely abrogated settled doctrines like puffery. They have deep roots in Missouri and nationwide—reflecting the longstanding prohibition on statements that, even if literally true, deceptively convey false claims. OpBr.42-43. Such "false impression" cases, however, have always required factual claims, which simply may be implied. *E.g.*, *Clinkenbeard v. Weatherman*, 157 Mo. 105, 114-15 (1900) (citing 1 Joseph Story, *Equity Jurisprudence* §192 (13th ed. 1886)); *Nelson v. Kansas City Pub. Serv. Co.*, 30 S.W.2d 1044, 1047 (Mo. App. 1930) ("deception accomplished by acts or language designed to produce a false impression is equivalent to an actual false statement"); *Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 588 (Mo. App. 2000) (similar). NNA's brief provided examples. OpBr.42-43.

Plaintiff does not dispute NNA's showing that courts in Missouri and nationwide apply puffery to false-impression cases. OpBr.42-43;

Constance, 25 S.W.3d at 587; *Am. Italian*, 371 F.3d at 390-91. That is because vague slogans like "premium" do not create "false impressions" in rational consumers any more than they convey affirmative misrepresentations. While the "tend[] to" prong eliminates the common-law requirement of *actual* deception, *Telco*, 863 S.W.2d at 701, "false impression" cases do not otherwise abrogate principles that have long applied to such claims.

So contra Plaintiff, RespBr.49, NNA agrees that the MMPA condemns some "technically true" statements. OpBr.42-43. But taglines like "premium" are inactionable not because they are "technically true," but because they are too *vague* to expressly or impliedly convey factual representations.

Especially mysterious is what Plaintiff and the AG think they accomplish in arguing the MMPA prohibits acts with the "tendency to mislead." RespBr.41-48; AGBr.15-16. If this is directed at their "technically true" argument, RespBr.49, it is irrelevant for the just-given reason. If they contend the phrase "tendency … to mislead" broadens liability in some *additional* undefined manner, this argument is irrelevant because Plaintiff did not submit it to the jury: "false impression" and "tendency … to mislead" are different branches of deception, and Plaintiff submitted only the former. 15 CSR §60-9.020(1); A20. If the Court

desired, it could reject *all* Plaintiff's (and the AG's) arguments on the basis that they rely on unsubmitted theories. *See Kansas City v. Keene Corp.*, 855 S.W.2d 360, 367 (Mo. banc 1993) (issue "not preserved" where "[n]o effort was made to offer any instruction consistent with the theory").

The AG raises an argument based on regulatory history, but it only refutes Plaintiff's position. He claims that by announcing a "capacity-to-deceive" standard, the regulations necessarily rejected a "reasonable-person standard" (which the Western District supposedly applied), and he urges this Court to embrace Texas law (which uses a "least sophisticated" standard). AGBr.34-36. Plaintiff likewise urges that Texas law is "the equivalent of" the MMPA. RespBr.78.

To begin, the capacity-to-deceive standard is consistent with considering "reasonable" consumers: It does not answer *whose perspective* governs, and under such standards, many states apply both reasonable-consumer tests and puffery.[1] More important, Texas's statute *also* recognizes puffery. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001); *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 461-63 (Tex. App. 1990). Texas courts have readily held representations like

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[1] *E.g.*, *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 395-96 (2004); *Garcia v. Overland Bond & Inv. Co.*, 282 Ill. App. 3d 486, 491 (1996).

"premium" inactionable. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995) ("'superb,' 'super fine,' 'one of the finest'"); *Autohaus*, 794 S.W.2d at 464 ("best engineered car in the world"). A Texas federal court followed this caselaw to dismiss claims *identical* to Plaintiff's, by the same attorneys. Opinion 4-5, *Aaron v. Nissan N. Am., Inc.*, No. 2:10-CV-47-TJW (E.D. Tex. Sept. 22, 2010) (citing *Prudential* and *Autohaus*); *see* Supplemental Appendix. Adopting the AG's argument requires rejecting Plaintiff's position. This case provides no occasion to weigh "reasonable" versus "least-sophisticated" standards—because "premium" is inactionable under *either*.[2]

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[2] If the Court considered this issue, it should borrow the "reasonable consumer" test from the "omissions" definition. Omitted facts are actionable if they would deceive "reasonable consumer[s]." §60-9.010(1)(C). It would be incongruous if a reasonable-consumer standard applied to omissions but not misrepresentations. Omissions also are actionable if sellers "know[]" they would deceive "a particular consumer," *id.*, but Plaintiff cannot rely on NNA's knowledge or "particular" consumers' characteristics in this class action. *Supra* 15, 18. The AG's reliance on this prong, AGBr.36, thus fails.

Plaintiff's remaining arguments fail. Plaintiff notes some common-law doctrines do not apply, *e.g.*, reliance, intent, the voluntary-payment doctrine. RespBr.50. This means, Plaintiff says, the MMPA abrogates *any* principle with common-law roots. RespBr.29. But beyond this Court's contrary *holding*, *supra* 4, this is a nonsequitur. When facing similar claims that the MMPA abrogated common-law contract principles, this Court was unequivocal: "There is no conflict between the intention of the legislature in enacting the MMPA and the application of the basic tenets of contract law." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. banc 2013).[3]

Plaintiff contends puffery "is rooted in … caveat emptor," which is "at odds with the MMPA." RespBr.46. This is a red herring. As Plaintiff admits, "caveat emptor" has fallen away in fraud too, yet puffery applies. RespBr.34 (citing *Chesus v. Watts*, 967 S.W.2d 97, 112 (Mo. App. 1998)). That is because, whatever puffery's roots, *today* it is not based on caveat emptor—in Missouri or the other states applying the doctrine.

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[3] *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. banc 2012), is not contrary. *Overbey* held that plaintiffs who "chose to bring a statutory claim under the MMPA" could not avoid MMPA damages caps. *Id.* at 376.

Worse is Plaintiff's claim that puffery is based on "reliance," yet "there is no requirement of reliance under the MMPA." RespBr.47-48. Plaintiff ignores NNA's refutation: Puffery is *not* based on reliance. OpBr.57-58.

Plaintiff retreats to broad assertions about purpose, claiming puffery would "undermine the protections the MMPA is intended to provide." RespBr.49. Incorrect. Consumers remain protected by all the above-noted ways the MMPA "provide[s] protections" "well beyond" "common law fraud." RespBr.3; *supra* 9-10. These doctrines refute claims that applying puffery would render the MMPA "superfluous." RespBr.50; *see* AGBr.19. MMPA liability remains much broader than the common law. None of the 50 states, nor the Federal Trade Commission, has concluded puffery undermines their statutes' identical purposes. *Supra* 4; OpBr.55-56.

While Plaintiff's warnings are hyperbolic, his theory's dangers are real. Plaintiff denies his argument would "eliminate the requirement of establishing [an] actionable" misrepresentation. RespBr.30. But in substance, it does precisely that. Per Plaintiff, it is always for "the jury … to determine whether [a] representation" was actionable. RespBr.29. So long as plaintiffs identify *some* statement, a court cannot grant a motion to dismiss, enter summary judgment, or review submissibility.

This Court should not make Missouri the first state where merchants are subject to liability for vague taglines—turning every advertiser into a lifetime guarantor. A36-37.

B. NNA made no actionable misrepresentations.

Plaintiff defends only one representation: "premium." RespBr.57-59. "Premium," however, is no more actionable than the dozens of representations Plaintiff abandoned. OpBr.18-19, 43-44. Certainly, it does not represent the FX had no risk of defects.[4] Plaintiff denies this is his theory. RespBr.28. But only such a promise could support recovery by owners who received free replacements (119 owners), or never experienced bubbling (almost all others). OpBr.24.[5]

Carrier governs because it is identical in two ways. First, *Carrier* was also about allegedly false *advertising* statements—a "magazine-type brochure." 366 S.W.2d at 349; OpBr.39. Second, it stated that a line of

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[4] This argument does not depend on whether "puffery" applies. Under any standard, NNA's representations were inactionable.

[5] Plaintiff insists his claim is just "NNA marketed the FX as … premium" but it "was definitely not." RespBr.28. This is word play. Plaintiff has never claimed the FX (or its dashboard) failed to live up to NNA's promises in any way *besides* that bubbling issues arose.

refrigerators was "unmatched … for quality, performance and dependability." 366 S.W.3d at 350. That is equivalent to "premium," or "premium [refrigeration] machinery." This Court's holding that those statements were "not actionable," *id.* at 351, controls. It speaks volumes that Plaintiff ignores how closely *Carrier* tracks this case's facts. RespBr.55.

Plaintiff also ignores the false-advertising cases nationwide holding similar words inactionable. OpBr.43-51. The only case Plaintiff claims supports him is *Vigil v. General Nutrition Corp.*, 2015 WL 2338982 (S.D. Cal. 2015), but *Vigil* underscores what Plaintiff lacks. The manufacturer of a sexual-performance supplement claimed its product had "premium ingredients *to provide maximum potency*." *Id.* at *9 (emphasis added). *Vigil* recognized that "premium" is "typical" puffery, but found the italicized phrase promised "some effect on male potency" and was "provably false." *Id.* That is what Plaintiff cannot identify—anything pushing "premium" beyond a vague slogan to a promise, express or implied, that the FX had no risk of defects. That is particularly true when "premium" appeared alongside the warranty, which set forth NNA's

commitment to repair issues inside, not outside, the warranty. OpBr.51.[6]

Plaintiff contends *Clark*, *Carpenter*, and *Morehouse* show Missouri rejects this consensus. Wrong. All share the same pattern. First, none was about advertising: Sellers of *particular* items assured buyers they could rely on sellers' exclusive knowledge, and warranted the items were "reliable" or similar. *Clark v. Olson*, 726 S.W.2d 718, 720 (Mo. banc 1987) ("refer[red] specifically to the physical condition of a particular house" and "intended that plaintiffs rely"); *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 358 (Mo. App. 1993) ("dealer picked this particular car," and referred "specifically to" it); *Morehouse v. Behlmann Pontiac-GMC*

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[6] Lyst did not "agree[]" "promises made in the FX marketing materials" were inconsistent with NNA's vehicles. RespBr.12. Lyst was asked about the image NNA was "trying to convey," and responded—naturally—NNA was not trying to convey bubbling. PX284, 55:24-56:5.

NNA's closing-argument statement that its brochures contained "promises" did not concede *everything* was actionable. RespBr.61. NNA was responding to Plaintiff's claim that deviations from "internal standards" were actionable, T1434:3-4, and noted the brochures *contained* promises—*i.e.*, the warranty.

Truck Serv., Inc., 31 S.W.3d 55, 60 (Mo. App. 2000) (similar). Second, the sellers knew their statements were false or made them with reckless disregard for truth (which Missouri treats as knowing falsehoods).[7] *Clark*, 726 S.W.2d at 720; *Carpenter*, 853 S.W.2d at 358; *Morehouse*, 31 S.W.3d at 60.[8]

There is a chasm between general advertisements, as in *Carrier* and here, and statements *particular vehicles* are reliable when sellers, having invited reliance, know the *opposite*. *Cf. Alpine Bank v. Hubbell*, 555 F.3d 1097, 1107 (10th Cir. 2009) ("size of the audience" matters in assessing puffery). That is especially true when Plaintiff brought omissions claims requiring him to show NNA knew of the issue, but "abandoned" them at trial, T956, and told jurors they did not have to consider NNA's knowledge or intent. T1421:20-22.

The AG implies *Andra v. Left Gate Property Holding, Inc.*, 453 S.W.3d 216, 223 (Mo. banc 2015), held that particular representations

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[7] *Hamlin v. Abell*, 25 S.W. 516, 520 (Mo. 1893).

[8] In *Grabinski*, AGBr.28, there were many "misrepresentations as to facts," and the used-car-saleman defendant induced the buyer's reliance with statements he "knew or should have known" were false. *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 569 (8th Cir. 1998).

were actionable. *Andra* does not get within a country mile of that issue: It solely addressed *long-arm jurisdiction*. *Id.* at 234.[9]

Alternatively, Plaintiff says "statements must be considered in context." RespBr.59. True, but context does not help Plaintiff. The context is that "premium automotive machinery" appeared in mass-market advertisements, on the same page as NNA's warranty—warning defects outside the warranty are uncovered. OpBr.51. Plaintiff relies on Lyst's testimony that "a premium vehicle" was a recurrent "theme." RespBr.60. But whether a phrase is actionable does not turn on its *importance* to marketing campaigns. "Best Beer In America" is central for Sam Adams, but inactionable. OpBr.40-41.[10]

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[9] The AG cites *Areaco* and *Schuchmann*, but both concerned specific factual misrepresentations. *Beer Nuts* concerned "unfair-practice" claims not pled here. AGBr.12.

[10] Lyst did not "agree[]" "promises made in the FX marketing materials" were inconsistent with NNA's vehicles. RespBr.12. Lyst was asked about the image NNA was "trying to convey," and responded—naturally—NNA was not trying to convey bubbling. PX284, 55:24-56:5.

NNA's closing-argument statement that its brochures contained "promises" did not concede *everything* was actionable. RespBr.61. NNA

The AG's similar argument fails. He says "deception" depends on "the totality of th[e] experience"—"auditory and visual" stimuli, high-pressure tactics, whether consumers are "vulnerable." AGBr.29-30, 34. True, but Plaintiff has adduced no such context, and cannot do so because transaction-specific facts destroy the commonality class actions require.[11]

Finally, Plaintiff claims very general statements are actionable whenever sellers are "sophisticat[ed]." RespBr.61. This is another argument the puffery doctrine should not apply: Virtually all modern decisions concern claims by consumers against merchants. OpBr.43-51; Addendum. Missouri applies the doctrine to such cases too. *E.g.*, *Wofford v. Kennedy's 2nd St. Co.*, 649 S.W.2d 912, 915 (Mo. App. 1983)

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was responding to Plaintiff's claim that deviations from "internal standards" were actionable, T1434:3-4, and noted that the brochures *contained* promises—*i.e.*, the warranty.

[11] *FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009), does not help the AG. It held advertising a diet as "easy" was actionably false when it involved "daily injections, heavily restricted diets, colonics, organ cleanses, and daily exercise." *Id.* at 766.

(customer and development corporation); *McAlpine Co. v. Graham*, 320 S.W.2d 951, 955 (Mo. App. 1959) (homeowner and builder).

Plaintiff's cases do not create a general "sophisticated parties" rule. *Clark*, *Carpenter*, and *Morehouse* are discussed above. RespBr.62-63. Plaintiff also cites *Champion Funding & Foundry Co. v. Heskett*, 102 S.W. 1050 (Mo. App. 1907). It applied an exception to the usual rule that statements about value are inactionable as "opinion": When vendors have exclusive knowledge about value, "know[] the vendee" is "in no position to ascertain it," and assert "knowing … falsehood[s]," such statements are actionable. *Id.* at 1054. Those cases are inapplicable not just because Plaintiff foreswore proving NNA's knowledge, but because their rationale does not fit. Some statements about value make *specific* claims, even if the law generally deems them "opinion." "Premium" is vague and unverifiable.

C. Plaintiff identified no representation for most of the class.

Plaintiff's brief confirms he did not establish "universal[]" liability. *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 682-83 (Mo. App. 2009). The sole representation he defends as actionable—"premium" in "premium automotive machinery," RespBr.55-60—appeared only in 2003-05. *Compare* PX71, 40, *with* PX74, 44-45. That cannot establish a submissible case for 2006-08 vehicles. Nor for secondary purchasers:

There is no evidence any such class member viewed the 2003-05 brochures. OpBr.19-20.[12]

Plaintiff claims there is "no requirement" for evidence because *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 710 n.2 (Mo. App. 2009), approved a class where "Plaintiffs alleged Merck misrepresented Vioxx throughout the entire class period." RespBr.64. *Plubell*, however, took allegations as true. 289 S.W.3d at 710 n.2. Now, Plaintiff needs *proof* introduced at trial. Lyst's testimony is not such proof. He testified the "general overall message" NNA was "trying to convey" was "consistent[]." PX284, 64:13-65:5. NNA cannot be liable for general themes it was "trying to convey" absent *actual* consistent representations. If any representations were *actually* consistent, Plaintiff would have cited them—but he cannot.

The remedy is not to "segregate[]" the "subset" affected. RespBr.67. NNA is entitled to judgment, as in any case where the plaintiff has not carried its burden. *Smith*, 289 S.W.3d at 682-83. The class cannot be blue-penciled. *Infra* Point VII.

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[12] This does not concern "reliance," RespBr.66, but the MMPA's requirement of showing misrepresentation "in connection with" a purchase. R.S. Mo. §407.020(1).

II. Plaintiff showed no "ascertainable loss."

Because Plaintiff brought a class action, his burden is to show not that *some* member incurred loss, but to establish a specific theory: that "stigma" "diminishes every vehicle's value, regardless of whether the defect has actually manifested" or was repaired. *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 78 (Mo. App. 2011). Plaintiff procured certification by promising to prove that theory, *id.*, and conceded his case depended on it. L.F.2407. But tellingly, Plaintiff's Point II does not *mention* "stigma." That is because this theory renders irrelevant the testimony on which he relied at trial and features here: that vehicles with *unremedied* bubbling had diminished value. RespBr.72. Such evidence cannot support the theory Plaintiff must prove, and the class includes only *two* such vehicles. OpBr.13, 21. Plaintiff must show *every* vehicle had diminished value, including hundreds that are a decade old without bubbling or received replacement dashboards that cut bubbling to near zero—0.25% in Countermeasure 2. OpBr.13, 21, 24.

Plaintiff does not dispute that he presented no evidence about every vehicle's value. Instead, Plaintiff incorrectly contends the MMPA carries "a presumption of harm," so no evidence is required. RespBr.68. That argument, if true, would eliminate ascertainable loss as an "element." *Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 438-39 (Mo. banc 2013).

Plaintiff's cases establish no such rule. They concern the "irreparable harm" an injunction requires and hold that once a "court finds … a[n MMPA] violation"—*including* ascertainable loss—harm is presumptively irreparable. *Edmonds v. Hough*, 344 S.W.3d 219, 223 (Mo. App. 2011) (quotation marks omitted).[13]

Plaintiff brushes off his lack of "stigma" evidence by asserting it is "common sense" every FX is now "worth less." RespBr.81. Missouri, however, requires "legal and substantial evidence" to support a verdict, *Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 299 (Mo. banc 2007), which must leave no issue to "guesswork, conjecture and speculation," but must "have a tendency to exclude every reasonable conclusion other than the one desired." *Herberholt v. dePaul Cmty. Health Ctr.*, 625 S.W.2d 617, 623 (Mo. banc 1981). Plaintiff's *own expert* rejected the proposition Plaintiff says is "common sense," finding the class was filled with individuals who "have been made whole." T1354:2-14. Plaintiff

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[13] Plaintiff is wrong that he need only show FXs were "worth less" by some undefined amount. RespBr.69-71. The MMPA requires *ascertainable* loss, and evidence that is "vague" and "insufficiently definite or certain" cannot carry this burden. *Walsh v. Al West Chrysler, Inc.*, 211 S.W.3d 673, 675 (Mo. App. 2007).

designated and withdrew *another* expert, who apparently could not support Plaintiff's theory either. OpBr.69 n.19. "Common sense" cannot support claims that Plaintiff's experts have rejected. A 2004 FX is now 12 years old, and if it has received a new dashboard whose chance of bubbling is 0.25% (or never bubbled), OpBr.12,63, there is no reason to think its value will be less.

The reason Plaintiff insists evidence should not be required is that his evidence is inadequate.

Owner testimony. Plaintiff cites testimony of "vehicle owners … that the value of their FX was diminished." RespBr.72. But first, Plaintiff fails to disclose that all but one of the vehicles, which were mostly owned by non-class-members, had *unremedied* bubbling—which occurred in only *two* class vehicles. T447:2-T450:12, T525:8-16, T644:13-15, T842:2-4, T855:11-16, T886:19-T887:23, T897:14-18; PX283, 76:23-77:14. Plaintiff cannot use unrepresentative testimony to establish stigma "regardless of whether [a] defect has actually manifested." *Hope*, 353 S.W.3d at 78.[14]

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[14] Likewise, testimony that bubbling hindered "attempts to sell," RespBr.72, concerned unremedied bubbling. T445:20-22, T604:22-T605:1, T618:15-17.

Bedrock class-action law confirms the point. Class actions are a "procedural" device, *Charles v. Spradling*, 524 S.W.2d 820, 824 (Mo. banc 1975), that do not change substantive law requiring a submissible case for every member (and cannot, without violating due process). OpBr.92-93. Class-action plaintiffs must "make a prima facie showing" for "each member," based on "the same evidence" that "suffice[s]" for each. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 175 (Mo. App. 2006). That means, as the U.S. Supreme Court explained, that if each member "brought an individual action," the evidence adduced on the class's behalf would have been admissible and sufficient "to establish liability … in each" individual case. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046-47 (2016). Otherwise, the class proceeding changes substantive law by altering some members' burdens. *See id.*

Reliable expert testimony might pass this test, *see id.*, but Plaintiff's evidence flunks it. Consider Susanna Angel, a member for whom there is no evidence of bubbling. L.F.846. Could she, without testifying *her* vehicle's value declined, establish an ascertainable loss with testimony by Plaintiff's witnesses, like Burt Twibell and Shirley McMillan, about *their* vehicles? No, for two reasons. First, a lay witness's value testimony is only ever admissible as to his *own* property: Such testimony is allowed because owners are "particularly familiar"

with their property, but is "without probative value" as to *different* property owned by another. *Shelby Cty. R-IV Sch. Dist. v. Herman*, 392 S.W.2d 609, 613 (Mo. 1965); OpBr.72. Second, these witnesses are differently situated: Angel never had bubbling, and if she proffered testimony from Twibell (with unremedied bubbling) or McMillan (who had bubbling and received a replacement dashboard), OpBr.22, 71, 77 n.21, that testimony would have been irrelevant.

Plaintiff claims "courts have recognized … 'representative evidence'" can "establish[] class-wide damages," RespBr.72, but those cases are inapplicable. First, Plaintiff's evidence is *not* representative: No witness testified about the most common situation (dashboards that never bubbled), and just one couple testified about vehicles that received free replacements (119 vehicles). OpBr.72. *Every* other witness had unremedied bubbling, which occurred in only two vehicles. OpBr.13, 21.[15] Even where "representative" evidence is appropriate, courts reject "small, unrepresentative sample[s]," like Plaintiff's. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013).

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[15] Plaintiff falsely claims Hurst testified about value. RespBr.15-16. Hurst *disclaimed* "knowledge of whether the value of [his] vehicle has been diminished." PX283, 29:20-30:22.

Moreover, Plaintiff's cases are based on an idiosyncrasy of the Fair Labor Standards Act ("FLSA"), not a general rule that "representative" (but nonexpert) evidence is permissible. FLSA requires employers "to keep proper records" of employees' time. *Tyson*, 136 S. Ct. at 1047. When employers "violate[]" this duty, the Act sanctions "representative" evidence, whether the suit is individual or class. *Id.* Here, however, the substantive rule is the opposite: One owner's value testimony is "without probative value" as to another's property. *Shelby*, 392 S.W.2d at 613.

Repair cost. Plaintiff contends "evidence regarding cost of repair" can sustain the verdict. RespBr.75. But again, repair costs exist only when there is *something to repair*, and the class members here, except two, had nothing to repair. OpBr.72-73. None of Plaintiff's cases helps him. In *GJP, Inc. v. Ghosh*, 251 S.W.3d 854 (Tex. App. 2008)—which Plaintiff calls "most on point"—there were "structural weaknesses in the engine frames" whose repair was required to "get[] the car back on the road safely." *Id.* at 865, 889.[16] Cases like that, requiring extensive

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[16] Plaintiff's other citations are similar. RespBr.75-76 (citing *Johnson v. Summers*, 608 S.W.2d 574, 575 (Mo. App. 1980) (collision damage); *Riddell v. Bell*, 262 S.W.3d 301, 303 (Mo. App. 2008) (construction damage); *Brown v. Bennett*, 136 S.W.3d 552, 557 (Mo. App. 2004)

immediate repairs, are irrelevant here—where vehicles have no manifested defect, and many have dashboards with 0.25% chances of issues. OpBr.13, 21. Plaintiff asserts "all class members have the same defective dashboard" with "the propensity to bubble," and thus all "have the same need to have that dashboard replaced," RespBr.74, 78, but no amount of jury deference can make this false statement true. Many vehicles have been in service for 12 years without issues, and many have a Countermeasure 2 dashboard that cut incidence to 0.25% (from nearly 20%). OpBr.11-12, 21; T1172:8-12.

Plaintiff incorrectly claims unnamed NNA "employees and representatives admitted" "all of the dashboards in question were defective." RespBr.1. NNA's witness testified there were "very few cases" of Countermeasure 2 bubbling—"60 to 70" out of 45,000. PX279, 66:17-25; DX1082.[17]

(conditions "caused … flooding")). The out-of-jurisdiction cases are the same.

[17] Plaintiff notes NNA's internal standards set more ambitious targets—1/10,000. RespBr.8; T1226:24-1227:11. Those aspirational standards did not render Countermeasure 2 "defective."

Agelidis. Plaintiff mischaracterizes Agelidis as conceding bubbling issues affected the "resale value of the entire brand." RespBr.73, 106. Agelidis stated NNA was concerned about "repurchase decision[s]," which referred to concerns that *existing* owners with bubbling would not buy Infiniti again. PX278, 66:1-9. NNA's anticipation, in a draft Q&A, that some customers might *claim* they had sold vehicles with *unremedied* bubbling for less did not mean NNA believed every FX was stigmatized. RespBr.73. The Q&A was "speculation" about concerns customers "might raise" "whether [NNA thinks] they're valid or not." PX278, 109:1-19.[18]

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[18] Plaintiff concedes the class includes members with no loss. His theory posits that bad publicity reduces all vehicles' value, after "knowledge [becomes] widespread." RespBr.109. Beyond Plaintiff's comprehensive failure of proof, *supra* 20-27, he claims knowledge did not spread until "March 4, 2010." RespBp.109. Yet the class includes members who owned in December 2009 and sold before March.

Some class plaintiffs will succeed in establishing a submissible classwide case, like in *Smith*. Here, Plaintiff failed to do so. NNA is entitled to judgment.[19]

III. Kelsay's admission was admissible.

Plaintiff argues Kelsay's testimony was inadmissible based on requirements applicable when parties offer *their own* experts—suggesting his Ph.D. economist lacked "qualifications." RespBr.84-87. But testimony by an opponent's expert is an "admission by a party opponent," to which a different test applies. *Stanbrough v. Vitek Sols., Inc.*, 445 S.W.3d 90, 102 (Mo. App. 2014). Such admissions "may be admitted … if the statement is material …, relevant …, and … offered by the opposing party." *Id.*

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[19] Plaintiff claims he showed "universal" liability under *Smith* because "every FX has the same 'inferior' dashboard." RespBr.69. As explained, Plaintiff did *not* show that. *Supra* 25-26. Moreover, Plaintiff misreads *Smith*. The *Smith* plaintiffs' burden was to show "universally inferior[ity]" because it was a breach-of-contract action where the contract designated a specific "quality." 289 S.W.3d at 690. Here, the element is "ascertainable loss," which is what Plaintiff must "universally" show.

V. Lay witnesses improperly speculated concerning value.

The court should have rejected individual owners' valuation speculation. Plaintiff contends NNA waived this argument, RespBr.51, but Mr. Cowden *repeatedly* objected. T448:25-T449:4, T606:20-25, T618:18-T619:12, T641:9-22, T831:17-T832:2, T847:14-T848:7. He objected to "any owner giving an opinion as to value." T526:1-10. The Court, however, held "we can each testify to the value of our own personalty." *Id.* Although Mr. Cowden continued to object, that was gilding the lily—objection was excused as futile. *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 133 (Mo. banc 2007).

Plaintiff's merits defense fails. First, this testimony was irrelevant: Plaintiff's stigma theory required proving diminished value in *every* vehicle, yet individual testimony was "without probative value" for non-testifying members. *Supra* 23-24.

The testimony also lacked foundation. Plaintiff says the *only* time owners may not testify is when they are "not … familiar" with property. RespBr.94. But such testimony is *also* inadmissible when "guesswork." *Cohen v. Bushmeyer*, 251 S.W.3d 345, 350 (Mo. App. 2008) (resided at property for twenty years; lacking "factual basis"); *Hood v. M. F. A. Mut. Ins. Co.*, 379 S.W.2d 806, 812 (Mo. App. 1964) (car plaintiff owned and drove; testimony "speculation").

VI. The verdict director was improper.

Plaintiff focuses on the MAI's *general* MMPA instructions, but he ignores that this is a class action. The MAI does not specify how to instruct a class-action trial. Rule 70.02(b) directs that where, as here, "there is no applicable MAI" or "an MAI must be modified to fairly submit the issues," courts must craft instructions that "follow[] applicable substantive law" and "submit[] the ultimate facts required to sustain a verdict." *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 219 (Mo. banc 2012) (quotation marks omitted).

The director did not follow class-action law: It did not inform jurors they had to find common misrepresentation causing ascertainable loss for *all* members. OpBr.83-84.

VII. Alternatively, decertification is required.

Plaintiff addresses an irrelevant question. He asks whether the evidence "was inadequate" for particular subclasses. RespBr.104-09. Predominance, however, is not about sufficiency. Plaintiff must show he proved his case via "the same evidence" applicable classwide. *Dale*, 204 S.W.3d at 175. Accordingly, the Second Circuit recently required post-trial decertification due to lack of "class-wide evidence" proving each element. *See Mazzei v. Money Store*, --- F.3d ----, 2016 WL 3876518, at *8 (2d Cir. 2016). It did not assess sufficiency for "every class member's"

claim. *Id.* This is basic fairness: Class trials impose liability in one stroke, but if evidence did not apply classwide, jurors may have been persuaded by evidence inapplicable to many members. *Id.*

The Western District originally approved this class because Plaintiff promised to prove two things by "the same evidence"—misrepresentation "throughout the entire class period," and diminished value through "stigma." 353 S.W.3d at 83, 84. Plaintiff did neither.

The only representation Plaintiff defends—"premium" and "premium automotive machinery"—applied to only half the class period and no secondary purchasers. *Supra* 12, 18-19; OpBr.87. Plaintiff again quotes Lyst's testimony that "the same message – the same words are being used consistently." RespBr.104. But again, Plaintiff tellingly cannot point to any representation that was *actually* consistent. And the "message" Lyst referenced was "boldness and exhilaration, brave by design," PX284, 64:23-65:5—which Plaintiff does not claim was actionable.

As to loss, there is no dispute Plaintiff has no *classwide* evidence of stigma—documentary evidence or expert testimony applicable to every vehicle. OpBr.88-89. Plaintiff relies on witnesses' testimony that "the value of their FX was diminished." RespBr.106. But one owner's lay valuation testimony is "without probative value" as to another. *Shelby*,

392 S.W.2d at 613; OpBr.72. This evidence is not classwide: Each owner raises individual questions.

That is especially true given the class's differences: Most never experienced bubbling, more than 100 received free replacements, and two had unremedied bubbling. OpBr.24. Plaintiff's testimony almost exclusively concerned unremedied bubbling, but Plaintiff cannot rely on this rare situation to recover for the class. *Supra* 22-25. Plaintiff vaguely asserts that all FXs have a "propensity to bubble." RespBr.106. But Plaintiff uses "propensity" to hide the undisputed differences. Original 2004-06 dashboards had a particular risk, Countermeasure 1 less, 2003 less (five in Missouri), and Countermeasure 2 virtually zero—0.25%. PX279, 17:13-15, 23:12-24:7; T1107:15-21, T1172:8-12, T1173:9, T1226:10-18. Plaintiff is thus particularly disingenuous in claiming "owners who received replacement dashboards received Countermeasure 2 dashboards," which had "propensity to bubble." RespBr.107-08. The inclusion of secondary purchasers, who are differently situated, compounds the problem. OpBr.93-95.

Plaintiff did not present a trial based on "the same evidence" classwide. *Dale*, 204 S.W.3d at 175. He cobbled together his most sympathy-inducing witnesses—owners with unremedied bubbling—to persuade the jury to impose liability in favor of hundreds of differently

situated owners. This was *worse* than approaches other courts have found violate due process. Courts have rejected a "trial by formula" holding defendants liable "to all class members by extrapolating from a random sample." *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 920 (Cal. 2014); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). But at least those samples were random and representative. NNA received a trial-by-anecdote in which Plaintiff's individualized evidence was unrepresentative, directed at a situation (unremedied bubbling) that was vanishingly rare.

Plaintiff is wrong that these flaws can be remedied by "exclud[ing] … specific individuals." RespBr.110. Where predominance was lacking at trial, the remedy is decertification and vacatur. The Second Circuit so held in *Mazzei*, which decertified a class because part of the class did not prove privity via classwide evidence. 2016 WL 3876518, at *7. For some, privity was undisputed, *id.* at *8, yet the Court decertified *fully*. *Id.* That is simple fairness: The jury may have relied on evidence that would be irrelevant in a narrower class, and post-trial, the eggs cannot be unscrambled—particularly when Plaintiff falsely told the jury that non-testifying members were "situated exactly the same as" those testifying. T1469:6-7.

Plaintiff's cases modified class definitions as a housekeeping matter: The original definition was overbroad, and certain claims "were not addressed at trial." RespBr.111 (citing *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273 (D. Kan. 2012)); *see In re Urethane Antitrust Litig.*, 2013 WL 2097346, at *2 (D. Kan. 2013) (plaintiffs "abandoned" claim pre-trial, and defendant "had clear notice of the temporal scope of plaintiffs' claim"). That is not this case.

CONCLUSION

NNA asks the Court grant the relief sought in NNA's opening brief.[20]

Respectfully submitted,

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ADDENDUM: CONSUMER-PROTECTION DECISIONS

State	Citation

[20] NNA rests on its opening brief as to Points IV, VIII, and IX.

Alabama	Ala. Stat. §8-19-5
Arizona	*Larkey v. Health Net Life Ins. Co.*, 2012 WL 2154185, at *3 (Ariz. Ct. App. 2012)
California	*Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 & n.3 (2003)
Colorado	*Park Rise Homeowners Ass'n, Inc. v. Res. Constr. Co.*, 155 P.3d 427, 435 (Colo. App. 2006), *cert. denied*, 2007 WL 93091 (2007)
Connecticut	*Web Press Servs. Corp. v. New London Motors, Inc.*, 533 A.2d 1211, 1213 (Conn. 1987)
Delaware	*Scott v. Land Lords, Inc.*, 616 A.2d 1214, at *2 (Del. 1992)
D.C.	*Pearson v. Chung*, 961 A.2d 1067, 1076 (D.C. 2008)
Florida	*Perret v. Wyndham Vacation Resorts, Inc.*, 889 F. Supp. 2d 1333, 1342 (S.D. Fla. 2012)
Georgia	*Hill v. Jay Pontiac, Inc.*, 381 S.E.2d 417, 419 (Ga. Ct. App. 1989)
Hawaii	*Bronster v. U.S. Steel Corp.*, 82 Haw. 32, 53 (1996)
Idaho	*Moto Tech, LLC v. KTM N. Am., Inc.*, 2014 WL 4793904, at *8 & n.2 (D. Idaho 2014)
Illinois	*Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 24, 73

	(2007)
Indiana	*Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332 (Ind. 2013)
Kansas	*Baldwin v. Priem's Pride Motel, Inc.*, 224 Kan. 432, 436 (1978)
Kentucky	*Craig & Bishop, Inc. v. Piles*, 2005 WL 3078860, at *5 (Ky. Ct. App. 2005)
Louisiana	*Davis v. Allstate Ins. Co.*, 2009 WL 122761, at *6 (E.D. La. 2009)
Maryland	*McGraw v. Loyola Ford, Inc.*, 723 A.2d 502, 512 (Md. Ct. Spec. App. 1999)
Massachusetts	*Kwaak v. Pfizer, Inc.*, 71 Mass. App. Ct. 293, 301 (2008)
Michigan	*Prose v. Sun and Ski Marina*, 2004 WL 2827197, at *4 (Mich. Ct. App. 2004)
Minnesota	*Sportmart, Inc. v. Hargesheimer*, 1997 WL 406386, at *2 (Minn. Ct. App. 1997)
Nebraska	*Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1184 n.11, 1186 (D. Neb. 2015).
Nevada	*Baroi v. Platinum Condo. Dev., LLC*, 2012 WL 2847919, at *2 (D. Nev. 2012)

New Hampshire	*Animal Hosp. of Nashua, Inc. v. Antech Diagnostics*, 2012 WL 1801742, at *5-6 (D.N.H. 2012)
New Jersey	*Rodio v. Smith*, 587 A.2d 621, 624 (N.J. 1991)
New Mexico	*Grassie v. Roswell Hosp. Corp.*, 258 P.3d 1075, 1095 (N.M. Ct. App. 2010)
New York	*Bader v. Siegel*, 657 N.Y.S.2d 28, 29 (App. Div. 1997)
North Carolina	*Harrington Mfg. Co., Inc., v. Powell Mfg. Co.*, 38 N.C. Ct. App. 393, 400 (1978)
Ohio	*Davis v. Byers Volvo*, 2012-Ohio-882, ¶ 41
Oregon	*Andriesian v. Cosmetic Dermatology, Inc.*, 2015 WL 1638729, at *4 (D. Or. 2015)
Pennsylvania	*Zwiercan v. Gen. Motors Corp.*, 58 Pa. D. & C.4th 251 (Pa. Ct. C.P. 2002)
Tennessee	*Audio Visual Artistry v. Tanzer*, 403 S.W.3d 789, 811 (Tenn. Ct. App. 2012).
Texas	*Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995)
Utah	*Boud v. SDNCO, Inc.*, 54 P.3d 1131, 1136, 1139 (Utah 2002)
Vermont	*Heath v. Palmer*, 2006 VT 125, ¶ 14

Virginia	*Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 713 (2001)
Washington	*Babb v. Regal Marine Indus., Inc.*, 179 Wash. App. 1036, at *3 (2014)
West Virginia	*State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 357 (1996)
Wisconsin	*Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 41

CERTIFICATE OF SERVICE

The foregoing Substitute Reply Brief of Appellant and Supplemental Appendix were served via electronic mail and filed using the Court's electronic filing system, this 22nd day of September, 2016, resulting in electronic notification on counsel of record listed below:

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CERTIFICATE OF COMPLIANCE

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

That this brief complies with the requirements of Missouri Supreme Court Rule 84.06(b) in that the brief contains 7,738 words, excluding the words in the cover, certificate of service, certificate of compliance, signature block, and appendix. The word count was derived from Microsoft Word. CD-ROMs were prepared using Symantec Endpoint Protection anti-virus software and were scanned and certified as virus free. Two true and correct copies of the attached brief and a CD-ROM containing a copy of this brief were sent by U.S. First Class Mail, postage prepaid, this 22nd day of September, 2016, to:

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