IN THE SUPREME COURT OF MISSOURI

No. SC 97175

STATE EX REL. GENERAL CREDIT ACCEPTANCE COMPANY, LLC,
Relator,

v.

THE HONORABLE DAVID L. VINCENT III,
Respondent.

AMICUS CURIAE BRIEF OF MISSOURI BANKERS ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Missouri Bankers Association (the "Association"), founded in 1891, is a not-for-profit statewide trade and professional association that represents the interests of member banks and saving and loan financial institutions in Missouri. The Association's members represent 260 of Missouri's 287 banks and savings and loan associations. These banks and savings associations maintain more than 2,300 locations, employ over 43,000 people, and serve 7.7 million customers in Missouri.[1]

This case presents two issues of great importance to the Association. To operate safely and soundly and to protect the interests of depositors who provide the funds that banks loan, members of the Association must, in most cases, pursue deficiency claims against borrowers and guarantors in connection with delinquent loans. Respondent seeks to undermine the way banks prudently conduct business in Missouri by asking that this Court hold that Mo. Rev. Stat. § 408.553 prohibits lenders from charging and collecting post-default pre-judgment interest. Respondent's interpretation of Section 408.553 is directly contrary to the plain statutory language, which expressly authorizes lenders to charge and collect interest at the rate set forth in the particular loan agreement between default and judgment. Respondent's interpretation will significantly increase costs for all consumer borrowers because the interest expense banks incur in funding loans provided to defaulted borrowers will be factored into the overall costs for consumer lending and shifted

[1] Banks' Economic Impact in Missouri, Am. Bankers Ass'n, https://www.aba.com/EconomicImpact/Default.aspx?xr=t&xp=f&ExcelCache=1440&mode=&AdrBookEmail=&PageSize=20&OrderBy=Issue_ASC&State=f&StateLk=MO&debug=&StateDD= (last visited Oct. 18, 2018).

to all borrowers, making credit more costly and consequently pricing some consumers out of the market. Alternatively, banks and other lenders will tighten underwriting standards to reduce the exposure to lost interest income and consequently deprive some Missouri consumers of access to the market.

Respondent also seeks to apply the "no-notice-no-deficiency" rule, also known as the "absolute bar" rule, to obtain both statutory damages under the UCC *and* elimination of the deficiency owed on the defaulted loans. Respondent does not limit her contention regarding the "absolute bar" rule to a defense against a creditor's affirmative claim for the deficiency, but *additionally* contends that the deficiency cannot be defensively set off against a recovery of damages by the borrower. This Court has not ruled on whether Missouri courts should follow the "absolute bar" rule as opposed to the "rebuttable presumption" rule that is followed by the majority of states. The Association respectfully submits that the Court should address that issue and adopt the "rebuttable presumption" rule, which is the fairest rule and is in accord with the UCC and its policies, as the law in Missouri. To the extent the Court does not adopt the "rebuttable presumption" rule, the Association respectfully submits that it should still hold that a creditor can set off any debt against any statutory damages even if the deficiency is eliminated through the "absolute bar" rule. It would be a pure windfall and a double recovery, contrary to established Missouri law, to allow Respondent (and others) to recover statutory damages for alleged technical violations of notice requirements, walk away from paying the debt on her loan, and proclaim that the debt cannot be set off against her statutory damages. And, in the context of class action suits against lenders, it would lead to the potential for staggering

damages while wiping out the legitimate claims of lenders for the debt due them on loans on which borrowers defaulted and never repaid. This excessive exposure to damages will lead to a further tightening of consumer loan underwriting standards because a single judgment could more than wipe out a bank's earnings over multiple years for its consumer loan portfolio.

The Court's interpretation of Section 408.553 and Article 9 of the UCC (specifically Section 9-625), will have a direct effect not only on Missouri lenders' ability to enforce long-recognized remedies, but also on the delivery, pricing, and underwriting of the hundreds of thousands of consumer loans they make annually.[2]

[2] Amicus counsel is also counsel for Commerce Bank in *Commerce Bank v. Kirkpatrick*, Case No. 18JE-AC00459 (Mo. Cir. Ct. 2018) and *Commerce Bank v. Williamson, et. al.,* 4:18-CV-00513-DGK (W.D. Mo. 2018).

CONSENT OF THE PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), Amicus Curiae certifies that it received verbal consent from counsel for Relator to file this brief. However, on October 22, 2018, Respondent's counsel sent written correspondence to Amicus Curiae refusing to consent to the filing of this brief.

JURISDICTIONAL STATEMENT

The Association adopts and incorporates by reference the Jurisdictional Statement of Facts set forth in Relator's brief filed with the Court.

SUMMARY OF ARGUMENT

Missouri citizens purchase cars, trucks, boats, and other motor vehicles every day, thanks to the availability of consumer installment loans. Chapter 408 of the Missouri Revised Statues and Article 9 of the Missouri Uniform Commercial Code ("UCC") proscribes certain requirements for these loans, including notices that must be sent when a borrower defaults and the bank or financial institution repossesses and sells the collateral. In the last few years, numerous putative class action cases asserting violations of these requirements have sprung up throughout Missouri. *See, e.g.,* n. 3, *infra*. The central premise of these lawsuits is the allegation that the banks and financial institutions failed to "strictly comply" with the statutory notice requirements in Chapter 408 and the UCC, thereby entitling borrowers to statutory damages and elimination of any deficiency under the "absolute bar" rule. The Association submits this brief to address two issues that are present in this case and are of general importance to its members.

The first issue is the proper interpretation of the interest recovery limitation in Mo. Rev. Stat. § 408.553. Respondent asserts in this case—and her counsel has asserted in numerous other putative class actions—that Section 408.553 makes it unlawful for a lender to charge interest after default and before judgment—even if such interest is expressly provided for in the loan documents. This assertion is directly contrary to the plain and unambiguous language of Section 408.553, which states: "Upon default the lender ***shall be entitled to recover*** no more than the ***amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment*** together with interest thereafter at the simple interest equivalent of the rate provided in the contract."

Mo. Rev. Stat. § 408.553 (emphasis added). The sole basis for Respondent's assertion is an out-of-context snippet from a concurring opinion authored by Judge Robert G. Dowd Jr. in *Hollins v. Capital Solutions Investments. I, Inc.*, 477 S.W.3d 19, 28-29 (Mo. App. E.D. 2015). Judge Dowd's concurrence, however, was addressing an entirely *different* type of loan, and has no application to consumer installment loans such as Respondent's.

Despite the clear language of the statute and the inapplicability of Judge Dowd's concurrence, some trial courts (including the circuit court in *Weatherspoon*) have allowed claims based on this argument to survive dispositive motions, and the "interest claim" continues to loom as a threat as the putative class action cases progress forward. The issue has not reached the Missouri Court of Appeals or this Court until now because Respondent's counsel (tellingly) does not appeal when a trial court rejects the argument, and lenders are hesitant to litigate the issue to full resolution due to risk imposed by the UCC statutory damages scheme. *See* Mo. Rev. Stat. § 400.9-625(c)(2) (minimum statutory damages for a *single defect* are the "credit service charge plus ten percent of the principal amount of the obligation"). The Association respectfully requests this Court resolve this issue and remove this warped arrow from borrowers' counsel's class action quiver. Failure to do so will result in less available and more expensive credit for Missouri citizens who need these consumer installment loans.

The second issue is the proper approach for determining a lender's ability to recover a deficiency after sale of collateral if the lender does not comply with the notice requirements in Chapter 408 and the UCC. Here, Respondent seeks complete elimination of any deficiency (Weatherspoon's First Amended Petition, A00899-900), which would be

consistent with application of the "absolute bar" or "no-notice-no-deficiency" rule that has been generally followed by the Missouri Court of Appeals. This Court has never addressed the issue, and the Western District has sharply criticized the absolute bar rule in favor of the "rebuttable presumption" rule. Under the rebuttable presumption rule, a commercially unreasonable sale creates a presumption that the value of the collateral sold is equal to the amount of the indebtedness, and thereby shifts the burden of proving the amount that should reasonably have been obtained through a lawful sale of the collateral to the creditor. The Association urges this Court to address this issue and adopt the rebuttable presumption rule because it is the most equitable approach, is aligned with the spirit of the UCC, and accordingly, *has been adopted by the majority of states*. The rebuttable presumption approach is also consistent with the Missouri General Assembly's clear intent to promote a competitive and strong banking industry and to assure that Missouri's community-based banks are competitive and will continue to serve, benefit and promote Missouri's communities.

Regardless of whether this Court adopts the rebuttable presumption rule, it should expressly recognize the longstanding "deficiency offset" precedent that allows a creditor to *set off* the outstanding debt the debtor owes against any damages she could obtain if successful on her claims. This deficiency offset rule is also consistent with Missouri law, which does not permit a double recovery, namely, an award of statutory damages *in addition to* cancellation of the debt. The measure of damages under the UCC is designed to prevent a debtor from having its debt cancelled and then also receiving the windfall of a statutory or other damage award in addition. Missouri lenders are in great peril if they face

extinction of deficiencies owed them by defaulting borrowers *in addition to* the statutory damages of Section 9-625.

ARGUMENT

I. SECTION 408.553 DOES NOT BAR LENDERS FROM CHARGING POST-DEFAULT PRE-JUDGMENT INTEREST IN THE TYPE OF CONSUMER INSTALLMENT LOANS AT ISSUE IN THIS CASE.

The recovery of post-default pre-judgment interest by a lender in Missouri is controlled by Mo. Rev. Stat. § 408.553. Respondent asserts that Section 408.553 makes it unlawful for a lender to charge interest during the time after default and before judgment is entered. Respondent's counsel has taken the same position with regard to Section 408.553 in numerous other putative class actions filed against financial institutions throughout Missouri.[3] Respondent's novel reading of Section 408.553 ignores the

[3] In each of the following class action lawsuits, Respondent's counsel has claimed an interest overcharge in violation of Section 408.553. *Commerce Bank v. Kirkpatrick*, Case No. 18JE-AC00459 (Counterclaim filed March 22, 2018; Jefferson County); *Ally Financial Inc., v. Burrow*, Case No. 16MS-AC00012 (Counterclaim filed February 23, 2017; Maries County); *Focus Bank v. Scott*, Case No. 15MI-CV00193 (Counterclaim filed February 20, 2017; Mississippi County); *Ally Financial Inc., v. Breitweiser*, Case No. 15SL-AC08334-01 (Am. Counterclaim filed January 24, 2017; St. Louis County); *Ally Financial Inc., v. Lackey*, Case No. 16AB-AC00464 (Am. Counterclaim filed January 24, 2017; Franklin County); *Ally Financial Inc., v. Baldridge, et. al.,* Case No. 1616-CV07246 (Am. Counterclaim filed November 14, 2016; Jackson County); *Ally Financial Inc., v. Benitez*, Case No. 1616-CV06878 (Am. Counterclaim filed October 3, 2016; Jackson County); *Ally Financial Inc., v. Keyser*, Case No. 16CA-AC00449-01 (Counterclaim filed September 6, 2016; Cass County); *Lou Budke's Arrow Finance Co. v. Kyles*, Case No. 15 SL-AC29334-01 (Counterclaim filed August 4, 2016; St. Louis County); *Commerce Bank v. Williamson, et. al.,* 4:18-CV-00513-DGK (W.D. Mo. 2018) (Am. Counterclaim filed July 21, 2016; Carroll County (16CR-AC00091)); *Focus Bank v. Pruiett*, Case No. 15PE-AC00152-01 (Am. Counterclaim filed July 12, 2016; Pemiscot County); *Universal Credit Acceptance, Inc. v. Myers*, Case No. 15JE-AC05976 (Am. Counterclaim filed July 10, 2016; Jefferson County); *Ally Financial Inc., v. Marino,* Case No. 16WY-CV00069 (Am. Counterclaim filed June 23, 2016; Wayne County); *United Auto Credit Corp. v. Rucker*,

language of the statute itself, and is instead premised *solely* on a snippet taken out of context from Judge Dowd's concurrence in *Hollins v. Capital Solutions Investments I, Inc.*, 477 S.W.3d 19, 28-29 (Mo. App. E.D. 2015). Intervention by this Court is needed to firmly establish that Respondent's (and her counsel's) interpretation of Section 408.553 is not the law, and to remove any uncertainty facing the trial courts on this point in the many cases pending, *see* n. 3, *supra*, and in cases that will presumably be filed in the future. If Respondent's interpretation were the law (it is not), defaulting borrowers on loans in Missouri would be better off than non-defaulting borrowers, *and,* according to Respondent's view, all defaulting borrowers would have a claim against their lenders.

A. The Plain and Unambiguous Language of Section 408.553 Does *Not* Bar Interest—It Limits a Lender's Post-Default Recovery to Amounts Due Under the Contract at the Time of Judgment (Principal And Interest) Plus Post-Judgment Interest at the Simple Interest Equivalent of the Contractual Interest Rate.

Section 408.553 operates as a recovery limitation on lenders when a borrower defaults. It has a broad reach, applying to "any credit transaction made primarily for personal, family or household purposes." Mo. Rev. Stat. § 408.551.[4] Section 408.553 provides:

Case No. 1522-AC11032 (Am. Counterclaim filed June 3, 2016; City of St. Louis) (case settled); *Anheuser-Busch Employees' Credit Union v. Wells, et. al.,* Case No. 1522-AC09263-01 (Am. Counterclaim filed May 5, 2016; Saint Louis City) (case settled); *Saber Acceptance Co. v. Henderson*, Case No. 15AO-AC02085 (Am. Counterclaim filed February 22, 2016; Jasper County).

[4] Section 408.551 defines "credit transaction" as "any retail installment transaction as defined by [Mo. Rev. Stat. §365.020], or any loan subject to section 408.100 or any second mortgage loan as defined by section 408.231 or any retail time transaction as defined in section 408.250." Mo. Rev. Stat. § 408.551.

> Upon default the lender shall be entitled to recover no more than the amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment together with interest thereafter at the simple interest equivalent of the rate provided in the contract.

Mo. Rev. Stat. § 408.553. The plain meaning of this statutory language[5] is that a lender's recovery upon default by a borrower is comprised of two components: (1) "the amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment," and (2) "interest [on that baseline obligation] thereafter at the simple interest equivalent of the rate provided in the contract." The baseline obligation—i.e., the "amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment"—includes the principal *and interest* due as of the date of judgment as agreed in the contract, which would include interest in the time between default and judgment being entered. Once judgment is entered against the defaulting borrower, post-judgment interest accrues on the amount of the judgment at the "simple interest equivalent of the rate provided in the contract."[6]

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[5] "This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009) (citing *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). "Other rules of statutory interpretation, which are diverse and sometimes conflict, are merely aids that allow this Court to ascertain the legislature's intended result." *Id.* (citing *Edwards v. St. Louis County*, 429 S.W.2d 718, 722 (Mo. banc 1968)).

[6] The term "simple interest" is a financial term of art, which means interest computed solely upon the principal. *See* Interest, Black's Law Dictionary (10th ed. 2014).

B. Respondent's Interpretation of Section 408.553 is Incorrect, and—If Allowed to Stand—would Greatly Affect Lenders and Consumers in Missouri.

Respondent argues (as her counsel has argued repeatedly in other cases) that Section 408.553 prohibits lenders from charging post-default pre-judgment interest. This argument is not based on an interpretation of the statutory language. Rather, Respondent relies on Judge Dowd's statement in his concurring opinion in *Hollins* that "[t]his statute [§ 408.553] indicates interest on *these types of loans* does not begin to accrue until the date of a 'final judgment.'" *Hollins*, 477 S.W.3d at 29 (emphasis added). This reliance is misplaced. Judge Dowd's statement was expressly directed at the application of Section 408.553 to the loan at issue in *Hollins*, which *capped* the amount the borrower was contractually required to pay, *inclusive of interest*, at $155. *Hollins*, 477 S.W.3d at 21. The statement has no application to the installment loan in the present case (or those in the numerous other cases where Respondent's counsel has asserted this argument) where the loan documents expressly provide that interest accrues on all unpaid sums until paid in full.

The *Hollins* decision arose from a $100 payday loan. The borrower, Hollins, obtained the loan from Loan Express, and signed a promissory note promising to repay a *total* of $155 in five monthly installments of $31 beginning on January 21, 2007. *Id.* at 21. Hollins paid the first monthly installment of $31 on January 21, 2007, but made no further payments leaving a total of $124 due under the contract at the time of default. *Id.* Loan Express eventually filed a collection lawsuit against Hollins, and when Hollins didn't answer or otherwise respond, the trial court entered a default judgment against Hollins for $912.50 ($124 in principal and interest, a $40 late fee, and $729.90 in additional pre-

judgment interest *not allowed by the loan documents*) with post-judgment interest accruing at 199.71%. *Id.* at 21, 29.

More than two years after entry of the default judgment, Hollins filed a lawsuit against Loan Express alleging claims for violation of the Missouri Merchandising Practices Act and violation of Section 408.553, and asking the trial court to vacate the default judgment under Missouri Supreme Court Rule 74.06(b). *Id.* at 21-22. The trial court eventually certified a class of "all people who, in Missouri, received a consumer installment loan from [Loan Express], and prior to obtaining judgment, charged interest on the amount owed at the time of default," but then granted summary judgment to Loan Express, finding the default judgment could not be set aside. *Id.* Hollins appealed and the Eastern District affirmed, holding that the default judgment could not be vacated because the court that entered it "did not lack subject matter jurisdiction" and there was no basis for the court to set aside the default judgment under Missouri Supreme Court Rule 74.05(d). *See Hollins*, 477 S.W. 3d at 24-26.

Judge Dowd wrote a concurring opinion blasting "predatory lending" (*id.* at 27) in the context of unconscionable "pay day" loans, and stating in dicta that he "believe[s] the trial court's judgment violates the statutory limitation on prejudgment interest" in Section 408.553. *Id.* at 29. Judge Dowd reached this conclusion because the "amount which [Hollins] would have been required to pay upon prepayment of the obligation on the date of final judgment" (*see* Section 408.553) was only $164 ($124 in principal and interest plus a $40 late fee), not the $912.50 set forth in the default judgment. *See Hollins*, 477 S.W.3d at 21, 29. He correctly found that the "$729.90 in interest from the date [Hollins] defaulted

until the date of the default judgment" violated the statutory limitation on interest "on *these types of loans*"[7] in Section 408.553 because such interest was not provided for in the contract and therefore was in excess of "the amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment." *Id*. at 29.

Judge Dowd's concurrence in *Hollins* does not support Respondent's interpretation of Section 408.553 in the present case (or Respondent's counsel's similar position in other similar cases) because—unlike the loan documents in *Hollins* which **capped the total repayment obligation at $155**—the Installment Agreement signed by Respondent specifically allows GCAC to charge and recover interest at a specified rate of interest (29%) per year on all unpaid balances until paid in full. *See Weatherspoon,* Amended Petition, Exhibit C (A00902) (filed May 18, 2018). GCAC's Installment Agreement is not one of the "pay day" loans that was the focus of Judge Dowd's wrathful concurrence in *Hollins*, and GCAC did not violate Section 408.553 by seeking to recover post-default pre-judgment

[7] Significantly, the "these types of loans" referred to by Judge Dowd were *not* the type of loan at issue in the present case. Rather, Judge Dowd's opinion specifically states his reason for writing the concurrence was to express his concern with "**Section 408.500**, which was designed for unsecured loans of five hundred dollars or less." *Hollins*, 477 S.W.2d at 27 (emphasis added). That is exactly the type of loan that was at issue in *Hollins* (total of $155, inclusive of interest). *See id*. at 21. As Judge Dowd noted, "[a]t the time Hollins filed her brief, **she had paid $3,592.35 on a $100 loan**." *Id.* at 28-29 (emphasis added). Judge Dowd refers to Section 408.500 **eleven times** in his concurrence, and Section 408.553 only twice. *See Hollins*, 477 S.W.2d at 27-29. It is clear that his reference to Section 408.553 was only because it is the *mechanism* that *should have applied* to bar typical post-default pre-judgment interest on loans *under* ***Section 408.500*** that have a ***capped*** amount of interest.

interest on all unpaid balances at the rate provided in the Installment Agreement. Nor does any other lender that seeks to recover such interest.[8]

C. Intervention By This Court Is Necessary to Establish the Correct Interpretation of Section 408.553.

A ruling by this Court on the proper interpretation of Section 408.553 is necessary and important to the Association for two primary reasons. First, Respondent's asserted construction of Section 408.553 is contrary to the plain language of that statute, flaunts basic principles of contract law, and would turn lending practices on their head. Indeed, if the law were as Respondent and her counsel contends, all defaulting borrowers on all loans (other than those with capped interest) in Missouri would be better off than non-defaulting borrowers, *and,* according to Respondent's view, all defaulting borrowers would have a claim against their lenders for violating Section 408.553.

Second, Respondent's counsel has filed numerous putative class claims against financial institutions asserting violations of Section 408.553 and other statutes as a result of those lenders charging defaulting borrowers post-default pre-judgment interest that is allowed by their loan documents. *See* n. 3, *supra*. The cost to defend class action lawsuits which include meritless claims under Section 408.553, and the risk associated with the

[8] *See Ally Financial Inc. v. Benitez*, Case No. 1616-CV06878 (Judgment, pp. 5-6, April 21, 2017) (rejecting the same argument raised by Respondent and holding that Ally's notices, which charged contractual interest from default to judgment, fully complied with the plain language of Mo. Rev. Stat. § 408.553); *see also 1st MidAmerica Credit Union*, Case No. 15CN-CV00141 (Order on Motion to Dismiss, p. 2, Sept. 2, 2016) ("The Court finds that Defendant's arguments regarding . . . the additional interest . . . are inconsistent with Missouri law.").

potential exposure in such cases,[9] has caused some of these financial institutions to settle before they can fully litigate the issue. Such meritless class claims invariably have an overall chilling effect on consumer lending by increasing costs and causing underwriting standards to be tightened. This has a negative effect on consumers, businesses, and communities throughout Missouri who rely on the availability of consumer credit all based on an incorrect interpretation of Section 408.553. That is certainly not what the General Assembly had in mind when it passed Section 408.553.

II. THIS COURT SHOULD ADDRESS THE ISSUE OF WHETHER A CREDITOR MAY RECOVER A DEFICIENCY AFTER FAILING TO DISPOSE OF COLLATERAL IN COMPLIANCE WITH THE UCC AND ADOPT THE REBUTTABLE PRESUMPTION RULE, AS IT IS FOLLOWED BY THE MAJORITY OF STATES, IS THE MOST EQUITABLE APPROACH, AND IS CONSISTENT WITH THE INTENT OF THE UCC

This Court has never addressed which of the three available rules—i.e., "absolute bar," "rebuttable presumption," or "set-off" (defined below)—should be applied when a creditor fails to dispose of collateral in compliance with the requirements of Chapter 408 and the UCC. The majority of states follow the "rebuttable presumption" rule which was the rule initially adopted by the Missouri Court of Appeals following Missouri's adoption of the UCC. *See Wirth v. Heavey*, 508 S.W.2d 263 (Mo. App. W.D. 1974). Since 1978, however, the Missouri Court of Appeals has adhered to the "absolute bar" rule, but has done so "with hardly more rationale than the rule itself" (*Commercial Credit Equip. Corp. v. Parsons*, 820 S.W.2d 315, 324 (Mo. App. W.D. 1991)), and despite sharp criticism of

[9] For example, Section 408.562 allows a court to award punitive damages and attorneys' fees to the prevailing party for a violation of Section 408.553.

the rule by the Western District. *See id*. The Association urges this Court to address this important unresolved issue and to adopt the "rebuttable presumption" rule as first articulated by the Missouri Court of Appeals in *Wirth*. The "rebuttable presumption" rule is "considered by the majority of courts to be the fairest and has their concurrence," is consistent with the spirit of the UCC, and is the approach adopted by the General Assembly for commercial transactions. *See* Mo. Rev. Stat. § 400.9-626; *Commercial Credit Equip. Corp.*, 820 S.W.2d at 324.

A. Courts Apply One of Three Approaches to Determine Whether a Creditor May Pursue a Claim For Deficiency After Failing to Dispose of Collateral in Compliance with the UCC.

As noted above, the three approaches employed by courts are (1) the "absolute bar" rule, (2) the "rebuttable presumption" rule, and (3) the "set-off" rule. *Commercial Credit Equip. Corp.*, 820 S.W.2d at 324. "The **absolute bar rule** peremptorily denies a deficiency judgment to a creditor who has disposed of the collateral in a commercially unreasonable manner." *Id.* (emphasis added). By contrast, under the **rebuttable presumption rule**, an improper notice/commercially unreasonable sale creates a presumption that the value of the collateral sold is equal to the amount of outstanding indebtedness. *Id.* A creditor can rebut this presumption by showing that the proceeds of the sale would have been insufficient to cover the debt *even if* the creditor had sold the collateral in compliance with Article 9. *Id.* If the creditor successfully rebuts the presumption, it is entitled to its deficiency judgment, limited to the difference between the remaining debt and the value of the collateral if sold in a commercially reasonable sale. *Id.* The third approach, rarely

followed,[10] is the "**set-off rule**," which allows a creditor to collect a deficiency judgment subject to whatever damages are awarded the debtor under Section 9-625. *Id.* The "set-off" rule "has no currency in [Missouri] decisions." *Id.*

The majority of states (i.e., twenty-eight states) follow the rebuttable presumption rule. *See, e.g., May v. Women's Bank, N.A.,* 807 P.2d 1145, 1147 (Colo. 1991); *Connecticut Bank & Tr. Co., N.A. v. Incendy*, 540 A.2d 32, 38-39 (Conn. 1988); *Landmark First Nat'l Bank of Fort Lauderdale v. Gepetto's Tale O' The Whale of Fort Lauderdale, Inc*., 498 So. 2d 920, 922 (Fla. 1986); *Emmons v. Burkett*, 353 S.E.2d 908, 911 (Ga. 1987); *Liberty Bank v. Honolulu Providoring*, Inc., 650 P.2d 576, 583 (Haw. 1982); *Mack Fin. Corp. v. Scott*, 606 P.2d 993, 996 (Idaho 1980); *First Galesburg Natl. Bank & Trust Co. v. Joannides*, 469 N.E.2d 180, 181 (Ill. 1984); *Vanek v. Indiana Nat'l Bank*, 540 N.E.2d 81, 83 (Ind. Ct. App. 1989), *aff'd* 551 N.E.2d 1134 (1990); *Shawmut Bank, N.A. v. Chase*, 609 N.E.2d 479, 483 (Mass. Ct. App. 1993), *aff'd*, 624 N.E.2d 541 (Mass. 1993); *Chemlease Worldwide Inc. v. Brace, Inc*., 338 N.W.2d 428, 437 (Minn. 1983); *McKee v. Mississippi Bank & Trust Co*., 366 So. 2d 234, 237 (Miss. 1979); *Levers v. Rio King Land & Inv. Co*., 560 P.2d 917, 920 (Nev. 1977); *Block v. Diana*, 600 A.2d 520, 524 (N.J. Super. Ct. App. Div. 1992); *First Nat. Bank of Dona Ana Cty. v. Ruttle*, 778 P.2d 434, 436 (N.M. 1989); *Gregory Poole Equip. Co. v. Murray*, 414 S.E.2d 563, 568 (N.C. Ct. App. 1992); *State Bank of Towner v.*

[10] *See, e.g., Lavender v. AmSouth Bank, N.A.,* 539 So. 2d 193, 195 (Ala. 1988) (allowing recovery of deficiency under the set-off approach); *Chapman v. Field*, 602 P.2d 481, 486 (Ariz. 1979) (same); *Cornett v. White Motor Corp*., 209 N.W.2d 341, 344 (Neb. 1973) (same).

Hansen, 302 N.W.2d 760, 767 (N.D. 1981); *Meyers v. Arnold*, 645 P.2d 577, 579 (Or. 1982); *Savoy v. Beneficial Consumer Disc. Co*., 468 A.2d 465, 467-68 (Pa. 1983); *Assocs. Capital Servs. Corp. v. Riccardi*, 408 A.2d 930, 934 (R.I. 1979); *Republic Nat'l Bank v. DLP Indus*., 441 S.E.2d 827, 829 (S.C. 1994); *Wang v. Wang*, 440 N.W.2d 740, 743 (S.D. 1989); *FDIC v. Morgan*, 727 S.W.2d 500, 501 (Tenn. Ct. App. 1986); *Tanenbaum v. Economics Laboratory, Inc*., 628 S.W.2d 769, 772 (Tex. 1982); *Woodward v. Resource Bank*, 436 S.E.2d 613, 617 (Va. 1993); *McChord Credit Union v. Parrish*, 809 P.2d 759, 762 (Wash. Ct. App. 2 1991); *Bank of Chapmanville v. Workman*, 406 S.E.2d 58, 64 (W. Va. 1991); *Ford Motor Co. v. Lyons*, 405 N.W.2d 354, 376 (Wis. 1987). Missouri is currently part of the minority of states (i.e., 11 states)[11] that adhere to the absolute bar rule in the context of consumer transactions.

B. The Missouri Court of Appeals Has Adhered to the Absolute Bar Rule Since 1978 Despite Sharp Criticism of the Rule From the Western District, And "With Hardly More Rationale Than The Rule Itself."

This Court has not yet addressed whether Missouri follows the absolute bar rule or the rebuttable presumption rule. The first Missouri appellate decision addressing the issue after Missouri adopted the UCC followed the rebuttable presumption rule. *See Wirth v Heavey*, 508 S.W.2d 263 (Mo. App. W.D. 1974). In *Wirth*, after finding the private sale of collateral by the secured creditor violated sections 9-501 and 9-507 (now codified as §

[11] *See, e.g.*, *First State Bank of Morrilton v. Hallett*, 722 S.W.2d 555, 556-57 (Ark. 1987); *Camden Nat'l. Bank v. St. Clair*, 309 A.2d 329, 333 (Me. 1973); *Farmers State Bank v. Mobile Homes Unlimited*, 593 P.2d 734, 738 (Mont. 1979); *Wilmington Tr. Co. V. Conner,* 415 A.2d 773, 777 (Del. 1980); *Stockdale, Inc. v. Baker*, 364 N.W.2d 240, 243 (Iowa 1985); *Ford Motor Credit Co. v. Samec*, 227 So. 2d 164, 166 (La. Ct. App. 1969).

9-625), the court refused to deny the creditor a deficiency judgment, noting that the UCC itself does not mention the denial of a deficiency as a remedy:

> Such a sanction, however, does not suit the circumstances of this case.… We think the just solution is to indulge in the presumption in the first instances that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to the law.

Id. at 268-69. The *Wirth* Court attributed the adoption of the absolute bar rule in certain jurisdictions in the United States to several decisions from the Georgia Court of Appeals. *See id.* at 268. This is significant, because after *Wirth* was decided, the Georgia Supreme Court adopted the rebuttable presumption rule. *See Emmons v. Burkett*, 353 S.E.2d 908, 910 (Ga. 1987) (Georgia Supreme Court analyzed the absolute bar rule, concluded that it is contrary to the intent of the UCC, and adopted the rebuttable presumption rule for all situations).

A few years after *Wirth*, the Eastern District distinguished it[12] and applied the "absolute bar" rule. *See Gateway Aviation, Inc. v. Cessna Aircraft*, 577 S.W.2d 860, 863 (Mo. App. E.D. 1978). The Eastern District's sole rationale for applying the absolute bar rule was: "Since deficiency judgments after repossession of collateral are in derogation of the common law, any right to a deficiency accrues only after strict compliance with the relevant statutes." *Id.* at 863. Since *Gateway*, the Eastern and Southern Districts appear to

[12] The Eastern District stated that *Wirth* did not, as did the sale in *Gateway*, "involve lack of notice of a private sale." 577 S.W.2d at 862.

have exclusively adhered to the "absolute bar" rule.[13] *See, e.g., Cherry Manor, Inc. v. Am. Health Care, Inc.,* 797 S.W.2d 817, 820 (Mo. App. S.D. 1990); *Chrysler Capital Corp. v. Cotlar*, 762 S.W.2d 859, 861 (Mo. App. E.D. 1989); *States Res. Corp. v. Gregory*, 339 S.W.3d 591, 596 (Mo. App. S.D. 2011); *First Cmty. Credit Union v. Levison,* 395 S.W.3d 571, 582 (Mo. App. E.D. 2013) ("Thus, an improper notice defeats a secured creditor's right to pursue a deficiency judgment. Therefore, if a secured creditor fails to strictly comply with even one element of 9–614(1), the secured creditor's entitlement to pursue a deficiency judgment is destroyed." (internal citation omitted)).[14]

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[13] *See, e.g., States Res. Corp. v. Gregory*, 339 S.W.3d 591, 596 (Mo. App. S.D. 2011); *First Cmty. Credit Union v. Levison,* 395 S.W.3d 571, 582 (Mo. App. E.D. 2013) ("Thus, an improper notice defeats a secured creditor's right to pursue a deficiency judgment. Therefore, if a secured creditor fails to strictly comply with even one element of 9–614(1), the secured creditor's entitlement to pursue a deficiency judgment is destroyed.")

[14] In *Southgate Bank & Tr. Co. v. May*, 696 S.W.2d 515, 517 (Mo. App. W.D. 1985), the Western District held that a bank was estopped from claiming a deficiency against a truck loan guarantor because the bank sold the truck without providing debtor notice while debtor was negotiating for the redemption of the truck. *Id.* at 519-20. This decision drew a strong dissent from Judge Lowenstein who advocated for the rebuttable presumption rule, stating "[t]he Code itself does not mention the denial of a deficiency as a remedy, nor has any Missouri case so held." *Id.* at 524 (quoting *Wirth*, 508 S.W.2d at 268). Judge Lowenstein went on to suggest that, in light of *Wirth*, the court should have applied the rebuttable presumption rule in this case:

> At best, it is most dubious whether the approach taken by May and adopted by the majority is a viable remedy. On the basis of *Wirth*, it appears highly doubtful the reasonable notice requirement of the sale could be used as was done here to set aside a deficiency. *Wirth* suggests rather than denying a deficiency, *the better practice* where there has been creditor misbehavior *would be for the court to examine the evidence as to the amount of the sale, giving a presumption first of the collateral being worth the debt*.

696 S.W.2d at 524 (emphasis added).

The Western District has at times applied the absolute bar rule, but other times sharply criticized the rule and leaned towards the rebuttable presumption rule (but not applied it because the facts of the cases did not require the issue to be reached). *See Boatmen's Bank of Nevada v. Dahmer*, 716 S.W.2d 876, 877 (Mo. App. W.D. 1986) (applying absolute bar rule); *Sedalia Mercantile Bank & Trust Co. v. Loges Farms, Inc*., 740 S.W.2d 188, 195 (Mo. App. W.D. 1987) (same); *Commercial Credit*, 820 S.W.2d at 324 (criticizing the absolute bar rule and advocating that the rebuttable presumption rule); *Victory Hills Ltd. P'ship I v. NationsBank, N.A. (Midwest)*, 28 S.W.3d 322, 332 (Mo. App. W.D. 2000) (discussing *Commercial Credit's* "criticism" of the absolute bar rule).

The Western District's analysis in *Commercial Credit* is particularly relevant here. There, the Western District denounced the absolute bar rule, pointing out that denial of deficiency (1) was not included in the UCC's remedies to a debtor in § 9-507 (now codified as § 9-625), and (2) "the forfeiture by the creditor and the windfall to the debtor from the arbitrary denial of a deficiency judgment, however insignificant the infraction, [does not] subserve the equitable purposes of the Code." *Commercial Credit,* 820 S.W.2d at 324. The court stated a "*strain of Missouri cases*, nevertheless, adheres to the absolute bar rule, *with hardly more rationale than the rule itself.*" *Id.* (citing *Gateway Aviation*, 577 S. W.2d 860, 863 (Mo. App. E.D. 1978)) (emphasis added). With regard to the rebuttable presumption rule, the *Commercial Credit* court observed that it "is considered by the majority of courts to be the fairest," and "is the rationale adopted by this court" in *Wirth*. *Id.* The court ultimately did not apply either rule because it found the sale at issue was not commercially unreasonable. *Id.*

The Western District discussed its criticism of the "absolute bar" rule nine years later when it decided *Victory Hills* (although the validity of the absolute bar rule was unnecessary to the disposition of the appeal because the creditor had not yet sold all of the collateral and had not claimed a deficiency). *See Victory Hills*, 28 S.W.3d at 330-332 (noting that the court had criticized the absolute bar rule in *Commercial Credit* and indicated that the rebuttable presumption rule was the "fairest" rule in dealing with a creditor's failure to provide proper notice). It overlooked that criticism, however, when it recently decided *Missouri Credit Union v. Diaz*, 545 S.W.3d 856 (Mo. App. W.D. Feb. 6, 2018). Without mention of *Commercial Credit* (or *Victory Hills*), the Western District cited *Gateway* for the proposition that the absolute bar rule applied to pre-sale notices under the UCC, and then extrapolated from that to apply the rule to a defective right-to-cure notice (reasoning that because both types of notice serve the same purpose, the absolute bar rule applies to both). *Id.* at 861. The *Diaz* decision is of little analytical value to the present issue, however, because the creditor in *Diaz* focused its efforts at debating whether the absolute bar rule applied to right-to-cure notices, and *never raised the larger issue* of whether the absolute bar rule should apply at all, or whether the rebuttable presumption rule should apply instead (and Respondent's counsel (who was also counsel in *Diaz*) naturally did not bring that issue to the court's attention either). *Missouri Credit Union v. Diaz*, WD 80412, Respondent's Brief, at 7-8 (September 18, 2017). In short, because the absolute bar rule was not controverted in *Diaz*, the Western District had no reason to re-examine its past decisions, such as *Commercial Credit* and *Victory Hills*. Given that the strong statements in *Commercial Credit* were sufficiently inspiring to cause reflection and

comment nine years later in *Victory Hills*, it is a fair inference that the *Diaz* court simply overlooked its prior jurisprudence advocating the rebuttable presumption rule.

In summary, while the Missouri Court of Appeals have followed the absolute bar rule since 1978, as noted by the Western District in *Commercial Credit*, this "*strain of Missouri cases*" based on *Gateway* "adheres to the absolute bar rule, *with hardly more rationale than the rule itself*." 820 S.W.2d at 324 (citing *Gateway*, 577 S. W.2d at 863) (emphasis added).

C. This Court Should Adopt the Rebuttable Presumption Rule Because it is Considered the Most Equitable Approach by Courts and is Consistent With the UCC.

It is the position of the Association that this Court should adopt the rebuttable presumption rule consistent with *Wirth, Commercial Credit, and Victory Hills,* and reject the absolute bar rule adopted in *Gateway*. The majority of states have long recognized that the absolute bar rule lacks any logical underpinnings and constitutes bad policy. As noted in *Commercial Credit* and *Victory Hills*, the rebuttable presumption rule is applied by most courts and "is considered by the majority of the courts to be the fairest." 820 S.W.2d at 324 (citing *Bank of Chapmanville*, 406 S.E.2d at 64); *First Galesburg Nat'l Bank & Tr. Co*, 469 N.E.2d at 183 ("The rebuttable-presumption rule is more fair and is consistent with the above-stated intendment of article 9."); *United States v. Willis*, 593 F.2d 247, 260 (6th Cir. 1979) (applying Ohio law) ("Ohio courts appear to follow the [absolute bar rule]. While we might well adopt the absolute bar rule applied by the Ohio courts, we, like the district court below, decline to do so out of our belief that the rebuttable presumption rule is the more enlightened and equitable."); *C & J Leasing Corp. v. Beasley Invs., Inc*., No.

08 0074, 2009 WL 777870, at *4 (Iowa Ct. App. Mar. 26, 2009) ("[The] vast majority of courts have now determined that the justifications for the absolute bar rule have worn too thin and the legal analysis giving birth to the rule was wrong in the first place."); *Farmers State Bank of Leeds v. Thompson*, 372 N.W.2d 862 (N.D. 1985); *Wang*, 440 N.W.2d at 740; *Conti Causeway Ford v. Jarossy,* 276 A.2d 402, 405 (N.J. Dist. Ct. 1971); *Riccardi*, 408 A.2d 930 at 934("Applying the foregoing principles to the issue presented, we are firmly convinced that simple considerations of common sense and fair play mandate the adoption of the rebuttable-presumption rule in Rhode Island."); J. White and R. Summers, Uniform Commercial Code § 26-8 (2d ed. 1980)).

The rebuttable presumption rule is also most consistent with the UCC's "spirit of commercial reasonableness:"

> In the situation where reasonable notice of sale has not been given, the spirit of commercial reasonableness requires that the secured party not be arbitrarily deprived of his deficiency but that the burden of proof be shifted to him to prove that the sale resulted in the fair and reasonable value of the security being credited to the debtor's account. When that burden has been borne, the resultant deficiency ought to be collectable by the secured party, especially in view of the rights to damages afforded the debtor by [the UCC].

Conti, 276 A.2d 402, 404-405; *see also Rushton v. Shea*, 423 F.Supp. 468 (D. Del. 1976) ("Integral to the overall scheme of the Code is its system of remedies.… A court's goal should be to interpret the Act in a way that will further its underlying purposes and policies. I have concluded that this goal is best served in the instant case by adopting the approach that permits the creditor to collect a deficiency if he can carry the burden of proof with respect to the value of the collateral."); *Commercial Credit*, 820 S.W.2d at 324 ("[T]he forfeiture by the creditor and the windfall to the debtor from the arbitrary denial of a

deficiency judgment, however significant the infraction, [do not] subserve the equitable purposes of the Code."); *Cornett v. White Motor Company*, 209 N.W.2d 341, 344 (Neb. 1973) (applying the rebuttable presumption rule and stating that "[n]o sound policy requires us to inject a drastic punitive element into a commercial context"); *Clark Leasing Corp. v. White Sands Forest Products, Inc.*, 535 P.2d 1077, 1081-82 (N.M. 1975) ("We consider [the absolute bar rule] repugnant to the spirit of the UCC. The complete denial of a deficiency smacks of the punitive and is directly contrary to Article Nine's underlying theme of commercial reasonableness. If the secured party has reimbursed the debtor for any losses incurred by improper sale, he has approximated the commercially reasonable sale. Thus, he should be allowed to receive the money which would have been due if the sale had been commercially reasonable.") (internal citation omitted).

Indeed, there is no provision in the UCC that explicitly denies recovery of the deficiency when there is defective notice. *See Wirth*, 508 S.W.2d at 268 ("The Code itself does not mention the denial of a deficiency as a remedy…."); *Commercial Credit*, 820 S.W.2d at 315 ("The UCC, however, does not mention the denial of a deficiency judgment among those remedies that § 400.9–507 codifies in favor of the debtor."); *Conti*, 276 A.2d at 404 ("There is, however, no provision of the Uniform Commercial Code which explicitly denies recovery of the deficiency when there is defective notice."); *First Galesburg Nat. Bank & Tr. Co.*, 469 N.E.2d at 182-83 ("Any loss arising from a lack of notice will give rise to a right to recover for the loss. Section 9-507 does not provide that a failure to comply with part 5 bars the creditor from bringing an action to recover any deficiency. No basis for an "absolute-bar" principle is found anywhere in article 9."). Moreover, the drafters of

the UCC (and the General Assembly) explicitly adopted the rebuttable presumption rule in the context of commercial transactions. *See* Mo. Rev. Stat. § 400.9-626(a).[15]

The policy of the UCC is to allow full recompense to an aggrieved party by application of the remedies provided in the UCC and to avoid the assessment of penal damages. The automatic denial of a deficiency judgment for the remaining portion of a debt based in many instances on a single technical discrepancy would be tantamount to a rejection of that policy. *See Cornett*, 209 N.W.2d at 341. The interests of the Association and its members, as well as individuals seeking consumer loans and competitive choices for those services in Missouri, will be served by applying a rebuttable presumption rule in the context of consumer transactions rule. The rebuttable presumption rule preserves the strong deterrent to an improper sale on the part of the creditor, [16] yet avoids an improper windfall for a debtor who is delinquent on a consumer loan.

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[15] *See also* Mo. Rev. Stat. § 400.9-626, cmt. 3 ("Subsection (a) establishes the rebuttable presumption rule for transactions other than consumer transactions. Under paragraph (1), the secured party need not prove compliance with the relevant provisions of this Part as part of its prima facie case. If, however, the debtor or a secondary obligor raises the issue (in accordance with the forum's rules of pleading and practice), then the secured party bears the burden of proving that the collection, enforcement, disposition, or acceptance complied. In the event the secured party is unable to meet this burden, then paragraph (3) explains how to calculate the deficiency. Under this *rebuttable presumption rule*, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. If a deficiency remains, then the secured party is entitled to recover it. The references to "the secured obligation, expenses, and attorney's fees" in paragraphs (3) and (4) embrace the application rules in Sections 9-608(a) and 9-615(a)."). (Emphasis added).

[16] Indeed, the lender can still be denied its deficiency when the rebuttable presumption rule is applied. In *Exch. Bank of Missouri v. Gerlt*, the Western District court affirmed the trial court's application of the "rebuttable presumption" rule, but held the bank's evidence of a commercially reasonable sale was insufficient; therefore the value of the

III. REGARDLESS OF WHETHER THE ABSOLUTE BAR RULE OR THE REBUTTABLE PRESUMPTION RULE APPLIES, THE COURT SHOULD HOLD THAT THE "DEFICIENCY OFFSET APPROACH" (ALLOWING A CREDITOR TO OFFSET ANY DEFICIENCY BALANCE FROM A DEBTOR'S RECOVERY) IS THE LAW IN MISSOURI.

Respondent seeks to recover statutory damages pursuant to Mo. Rev. Stat. § 400.9-625 and the complete elimination of the class member debtors' deficiency balances under the "absolute bar" rule. *See Weatherspoon*, First Amended Petition (A00899-900). Allowing Respondent and the class members to recover both statutory damages under the UCC **and** have their deficiency waived would constitute a "double recovery," which is disfavored under Missouri law. Thus, even if this Court is not inclined to adopt the rebuttable presumption rule, the Association submits that the Court should recognize and apply the longstanding precedent that allows a creditor to *set off* the outstanding debt the debtor owes against any damages she could obtain if successful on her claims, i.e., the "**deficiency offset**" approach.

There is no question that if Respondent were to be awarded statutory damages under Section 9-625 it would constitute a "recovery." *See* Mo. Rev. Stat. § 400.9-625, cmt. 4 ("Subsection (c)(2) provides a minimum, statutory, damage ***recovery*** for a debtor and secondary obligor in a consumer-goods transaction.") (Emphasis added). Elimination of Respondent's debt under the absolute bar rule would also constitutes a "recovery." *See*

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collateral was presumed to be the same as the debt, and the bank could not recover. 367 S.W.3d 132, 134 (Mo. App. W.D. 2012). Although the court relied on Section 9-626 (a)(3) (which applies to non-consumer transactions) in determining that the rebuttable presumption should apply, *id.*, the illustration of the burden on the lender is equally applicable in the consumer loan context.

Recovery, Black's Law Dictionary (10th ed. 2014) ("The obtainment of a right to something (esp. damages) by a judgment or decree."); *see* Mo. Rev. Stat. § 400.9-625, cmt. 3 ("The last sentence of subsection (d) eliminates the possibility of ***double recovery*** . . . arising out of a reduction or ***elimination of a deficiency*** . . ."). (Emphasis added). This concept is borne out by settlements in other similar class action cases where Respondent's counsel take full credit for the "elimination of deficiencies" and use those eliminated amounts to increase the base amount of "recovery"—which then serves as the justification for their extraordinarily large fee awards. For example, in the recent settlement submitted by Respondent's counsel for approval in *Anheuser-Busch Employees' Credit Union v. Wells*, Case No. 1522-AC09263-01 (Mo. Cir. Ct. 2018), the $29 million "Deficiency Write-Off" served to create 35% of the $83 million "benefit" to the class, which was used as the basis for Respondent's class counsel fee of $15,250,000 (out of a total $19,750,000 Cash Fund). *See id.*, Exhibit 1 to Jt. Mot. for Prelim. Approval of Class-Action Settlement (April 20, 2018), at ¶¶ 2.13, 2.14, 4.a., 4.m. In their fee application, Respondent's counsel characterized their $15.25 million class counsel fee as only 20% of the total "benefit" to the class. *See id.,* App. for Award of Attorney's Fees (June 16, 2018), at 1.[17] It would be

[17] Similarly, in *Muir v. Alliance Credit Union*, Case No 13SL-CC00008 (Mo. Cir. Ct., St. Louis County, 2013), Respondent's counsel relied on deficiency write-offs of $961,000, which, together with a $400,000 Cash Fund, judgment write-offs, and credit information deletions, resulted in a total class benefit "exceeding $1,640,000." *See id.*, Jt. Mot. for Prelim. Approval of Class Action Settlement (August 4, 2014), at ¶¶ 4.a., 4.m; *id.,* App. for Award of Attorney's Fees (November 7, 2014), at 1. Based on the $1,640,000 figure, counsel pointed out that their fee was "less than ***18 percent*** of the actual benefit conferred upon the Settlement Class Members…." *Id.*, App. for Award of Attorney's Fees, at 1

incongruous if Respondent's counsel were to contend to this Court that elimination of deficiency is not a "recovery." And, when combined with Section 9-625's statutory damages, a deficiency elimination is a "*double* recovery."

Double recoveries are disfavored under Missouri common law. *See State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 37-38 (Mo. banc. 2008) (requiring workers to elect between statutory recovery or recovery under their contract); s*ee also R.J.S. Sec., Inc. v. Command Sec. Servs.*, 101 S.W.3d 1, 17 (Mo. App. W.D. 2003) ("It is true that a party may pursue multiple theories of liability, however, a party may not recover duplicative damages for the same wrong. While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of a double recovery, which is a species of unjust enrichment and is governed by the same principles of preventative justice."); *Chrysler Fin. Co., L.L.C. v. Flynn*, 88 S.W.3d 142, 153 (Mo. App. S.D. 2002) ("Missouri has a rule against double compensation for the same injury."); *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co.*, 958 S.W.2d 727, 733 (Mo. App. S.D. 1998) ("Although Plaintiff is entitled to proceed on various theories of recovery, he cannot receive duplicative damages, instead he must establish a separate injury on each theory.").

(emphasis in original). The settlement was approved by the trial court. *See id.,* Order Finally Approving Class Action Settlement (November 13, 2014), at 4-6.

In both the *Anheuser Busch* and the *Muir* settlements, the elimination of the deficiency amounts was a significant feature justifying the attorneys' fees, and counsel (Respondent's counsel here) recognized (correctly) that *the deficiency elimination was a primary recovery element* for the benefit of the class.

At least two Missouri trial courts have addressed this issue and held that even with application of the absolute bar rule, lenders may offset their deficiency balances against borrower's statutory damages in order to avoid awarding a "double recovery." In *Vantage Credit Union v. Daniel Trimble et al.*, Case No. 1011-CV08076 (Mo. Cir. Ct., St. Charles County, July 18, 2012) the court agreed that the creditor, Vantage, "should be permitted to offset the amount of its deficiency balance against any additional recovery that [borrower] obtains under the Missouri Uniform Commercial Code." Exhibit E at 6. The *Vantage* court's "offset approach" applied the absolute bar rule, but to avoid awarding a double recovery, still allowed the creditor to use the deficiency balance as a defense to reduce the debtor's damages. *Id*. at 11. ("This is the essence of a double recovery, and the Court declines to permit it by allowing [borrower] to recover—without any offset—her deficiency balance and the "minimum" statutory damages provided by section 400.9-625(c)(2).").

The Circuit Court of St. Louis County reached a similar result in *Muir v. Alliance Credit Union*, Case No. 13SL-CC00008 (Mo. Cir. Ct., St. Louis County, January 27, 2014). There, the plaintiff debtor, Muir, who was represented by Respondent's counsel, argued that he was not seeking a double recovery because he did not bring two claims upon the same wrong, seeking the same damages. *See id.,* Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and Motion for Summary Judgment, at 21-23 (Nov. 20, 2013). In reply, the defendant, Alliance, pointed out that Muir failed to cite a single case in support of his argument that double recoveries are limited to situations where someone brings two claims upon the same wrong. *See id.,* Alliance Credit Union's Reply in Support

of its Motion to Dismiss and Motion for Summary Judgment, at 36 (Dec. 20, 2013). Alliance also argued that the absolute bar rule only bars deficiency *judgments*, and Alliance was merely seeking an offset. The court rejected Muir's argument that the absolute bar rule prevents deficiency offsets, and to avoid a double recovery for Muir, the court held that Alliance was allowed to offset its deficiency balances against Muir's statutory damages. *See id.*, Order Granting Partial Summary Judgment in Favor of Alliance Credit Union (January 27, 2014).

The trial courts in *Vantage* and *Muir* relied on *Chemical Sales Co. v. Diamond Chemical Co.*, 766 F.2d 364, 366 (8th Cir. 1985) and *In re Boehne*, 82 B.R. 525, 527 (Bankr. W.D. Mo. 1988) in reaching their decisions. Those opinions are pertinent here as well. In *Chemical Sales*, a customer sued its supplier for conversion, alleging the supplier sold the collateral in a commercially unreasonable manner by failing to provide proper notice prior to the sale. *Id.* After applying the absolute bar rule, the Eighth Circuit allowed the creditor to offset its lost deficiency balance against the debtor's potential damages. *Chemical Sales*, 766 F.2d at 369-70 ("[A]ny failure by defendant to give notice of the sale of collateral should preclude any recovery on defendant's counterclaim beyond the value of the collateral. However, defendant is entitled to recover on his counterclaim for the debt secured by the collateral to the extent of plaintiff's recovery on the value of the collateral for its conversion. Therefore, the court erred in precluding any recovery on defendant's counterclaim if defendant failed to give notice of the sale of the collateral.") (internal citations omitted). The Western District of Missouri Bankruptcy Court reached the same result in *In re Boehne*, relying on *Chemical Sales*. *See In re Boehne*, 82 B.R. at 525, 527

(W.D. Bkrptcy 1988). The court recognized the absolute bar rule, but held that the creditor could still seek to offset the deficiency balance against the affirmative recovery sought by the debtor. *See* 82 B.R. at 527 ("[I]f the creditor were owed $100,000.00, repossessed the collateral improperly, sold it for $50,000.00, gave no notice to the debtor, and was subsequently sued for conversion, then the creditor could still assert the $50,000.00 deficiency against any value of the collateral found to be in excess of the sale price. Thus, the [absolute bar rule] has at least one exception.").

Beyond *Vantage*, *Muir*, *Chemical Sales*, and *In re Boehne*, a number of courts, including the Western District of Missouri, have acknowledged that rewarding a double recovery to debtors would not "subserve the equitable purposes" of the UCC. *Commercial Credit*, 820 S.W.2d at 324 ("The UCC, however, does not mention the denial of a deficiency judgment among those remedies that § 9-507 [the precursor to § 9-625] codifies in favor of the debtor. Nor does the forfeiture by the creditor and the windfall to the debtor from the arbitrary denial of a deficiency judgment, however insignificant the infraction, subserve the equitable purposes of the Code."); *Beneficial Fin. Co. v. Young*, 612 P.2d 1357, 1359 (Okla. 1980) ("To hold that noncompliance deprived creditors of their right to a deficiency judgment would not only protect the debtor, but it would also penalize the creditor. ***In light of the fact that the sale of collateral is necessitated by the fault of the debtor***, we hold that the punishment of creditors for noncompliance with the provisions of Part 5 of Article 9 would be unjustified….") (emphasis added) (also noting the UCC "does not explicitly provide for punitive damages for noncompliance"); *Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank & Const. Co.-Alaska, Inc.*, 568 P.2d 1007, 1013

(Alaska 1977) ("[W]e consider [the absolute bar rule] to be repugnant to the spirit of the UCC.").

Scholarly authorities are in accord. 4 White, Summers, & Hillman, Uniform Commercial Code § 34:45 (6th ed.) ("[W]e would argue that "double recoveries" should be denied...."); Barkley Clark & Barbara Clark, The Law of Secured Transactions Under the Uniform Commercial Code, ¶ 4.12[6], p.4-356.4 (3d ed. 2011) ("If the jurisdiction is one that wipes out any deficiency as a sanction for creditor misbehavior, the debtor should be able to go that alternative route, subject to receiving only a single recovery.").

Courts in other jurisdictions have also denied "double recoveries" in similar contexts. For instance, in *Bank of Chapmanville v. Workman*, 406 S.E.2d 58 (W. Va. 1991), the court denied a "double recovery" for the debtor under the rebuttable presumption rule, explaining:

> For instance, if the amount remaining on the loan is $100,000, and the seller sells the consumer goods collateral in a commercially unreasonable manner for $50,000, and does not rebut the presumption that the collateral was worth $100,000, the debtor is not required to pay the claimed $50,000 "deficiency." This $50,000 has, in effect, been awarded to the debtor as his damages. He cannot, however, also seek minimum damages of, say $10,000, because he has received his damages through the operation of the rebuttable presumption rule.

Id. at 65*; see also In re Boehne,* 82 B.R. at 527 (using exact same example as *Chapman*); *Folks v. Tuscaloosa County Credit Union*, 989 So. 2d 531, 538 (Ala. Civ. App. 2007) (applying the set-off approach and indicating a debtor's statutory damages from UCC violations may be set off against the creditor's deficiency); *Savoy*, 468 A.2d at 467-68 ("The former approach, foreclosing a creditor from the possibility of securing any

deficiency judgment, would provide the debtor with a windfall relief from his obligation while extinguishing a creditor's right to recover sums truly owed."); *Coones v. FDIC*, 894 P.2d 613, 616 (Wyo. 1995) ("[The debtor] has received the benefit of not having to pay a deficiency judgment. Further recovery would be tantamount to a double recovery, which is not favored by the courts."); *see also Kruse v. Voyager Ins. Cos.*, 648 N.E.2d 814, 818 (Ohio 1995) (indicating the court would have allowed debtor's statutory damages to be set-off against Fifth Third's deficiencies, rather than subject Fifth Third to a "double penalty for the same behavior," but Fifth Third failed to appeal this issue).

In short, as recognized by the *Vantage* and *Muir* courts, allowing Respondent to eliminate her deficiency and receive statutory damages would undoubtedly constitute an improper "double recovery" that does not "subserve the equitable purposes" of the UCC. Accordingly, even if the Court finds that the absolute bar should apply, to avoid an unfair double recovery and windfall to Respondent, GCAC (and other similarly situated banks and financial institutions) should be entitled to a deficiency, subject to any damages available to Respondent (or similarly situated borrowers) under Section 9-625.

CONCLUSION

For the foregoing reasons, the Missouri Bankers Association urges that this Court to make its preliminary writ permanent and issue an order (a) interpreting Mo. Rev. Stat. § 408.553 as allowing Relator (and other similarly situated lenders) to charge post-default pre-judgment interest in these types of consumer installment loans, (b) adopting the rebuttable presumption rule in determining whether a creditor may recover deficiency after failing to dispose of collateral consistent with the UCC, and (c) expressly recognizing that

Relator is permitted to offset Respondent's debt against damages claimed by Respondent under Chapter 408 or the UCC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b)(1). The foregoing brief contains 13,339 words, exclusive of the cover, the certificate of service, this certificate, and the signature block.

/s/ Edwin G. Harvey

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I electronically filed this Brief of Amicus Curiae with the Clerk of the Court using the electronic-filing system. Pursuant to Rule 103.08, service on registered users will be accomplished by the electronic-filing system.

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