Appeal No. SC97175

IN THE SUPREME COURT OF MISSOURI

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

v.

THE HONORABLE DAVID L. VINCENT III,
Respondent.

Petition for Writ of Prohibition Against
The Circuit Court of St. Louis County
The Honorable David Lee Vincent, III
Case No. 14SL-CC01561

AMICUS CURIAE BRIEF BY NATIONAL CONSUMER LAW CENTER

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INTEREST OF AMICUS CURIAE

The National Consumer Law Center ("NCLC"), is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal aid attorneys, private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. This Court, in a Merchandising Practices Act case, has described NCLC as a "national expert" in consumer law, citing to its treatise on Unfair and Deceptive Acts and Practices (6th ed. 2004). *See Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 n. 13 (Mo. banc 2007).

NCLC has a strong interest in the present case. The arguments presented by Relator and the Missouri Bankers Association ("MBA") run counter to the fundamental and beneficial purposes of consumer class actions—allowing consumers, often uninformed of their rights and unsophisticated in their dealings with financial entities, to band together and vindicate small claims that would otherwise go unaddressed and undeterred.

If prohibition were granted on the bases asserted by Relator and the MBA, Missouri consumers would have even fewer protections and the resultant harm

would be widely felt, allowing predatory compound interest tactics and encouraging deceptive repossessions to proliferate.[1]

[1] Amicus counsel David Angle is also counsel for Wayne Rivers in *Midwest Acceptance Corp. v. Wayne D. Rivers,* 1722-AC10854-01 (Mo. Cir. 2018).

CONSENT OF THE PARTIES

Under Missouri Supreme Court Rule 84.05(f)(2), NCLC certifies it received verbal consent from Respondent's counsel to file this brief. On December 14, 2018, undersigned sent written correspondence to counsel for Relator but has not, as of this date, received a response. NCLC has not obtained consent of Relator.

JURISDICTIONAL STATEMENT

NCLC incorporates Relator's Jurisdictional Statement.

ARGUMENT

I. The only issue properly before the Court is the propriety of class certification.

Relator and the MBA raise three issues in this case. First, Relator argues several class members should be excluded from the class because of previous collection judgments. As argued in Section II of this brief, this argument is erroneous. Since the collection judgments were obtained in the associate circuit division where counterclaims are not compulsory, the judgments do not have *res judicata* effect.

Second, Relator argues it should be allowed to compound interest charges against defaulting consumers. The MBA endorses Relator's position on this issue and raises a third issue: an argument that this Court should disregard the core consumer protections contained in Article 9 of the Uniform Commercial Code ("UCC"). As detailed below, these arguments are contrary to statutes and long-standing case law. They would endorse policies that would further disadvantage consumers in transactions where they are often taken advantage of.

However, there is an even more fundamental error in the arguments raised by Relator and the MBA regarding post-default interest and the consumer protections in UCC Article 9: they are not properly before this Court. Seeking prohibition on merits-based arguments unrelated to class certification issues is inappropriate. *Elsea v. U.S. Engineering Company*, 463 S.W.3d 409, 416 (Mo. App. 2015); *Amgen v. Connecticut Retirement Plans and Trust*, 133 S. Ct. 1184, 1194–95 (2013) (Rule 52.08 "grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to

the extent—that they are relevant to determining whether the Rule [52.08] prerequisites for class certification are satisfied.").

Further, the MBA's amicus brief is improper because it seeks an advisory opinion. Whether a court should certify a class is substantially independent from the merits; class certification is a procedural matter, not a substantive one. *See Meyer ex rel. Coplin v. Fluor Corp*., 220 S.W.3d 712, 715 (Mo. banc 2007). The MBA's brief solely addresses application of substantive law to the merits unrelated to the requirements of class certification under Rule 52.08. Most notably, the MBA advocates for (1) a new interpretation of a statute; and (2) ignoring the Missouri legislature's intent, and precedent of all districts of the Court of Appeals established for the past forty years, to adopt the "rebuttable presumption" approach instead of the absolute bar rule. *Missouri Credit Union v. Diaz*, 545 S.W.3d 856, 860 (Mo. App. 2018).

"A class certification hearing is a procedural matter in which ***the sole issue*** is whether plaintiff has met the requirements for a class action." *Meyer ex rel. Coplin*, 220 S.W.3d at 715 (emphasis added). The MBA brief doesn't assist this Court in resolving this sole issue. The MBA never mentions Rule 52.08, Rule 23 of the Federal Rules of Civil Procedures, numerosity, commonality, typicality, adequacy, predominance, or superiority, so it's brief is irrelevant to the ***sole issue*** before the Court, the propriety of class certification. Thus, this Court shouldn't address the MBA's arguments regarding post-default interest and the substantive consumer protections of UCC Article 9. However, if the Court nonetheless enter-

tains these arguments, it should, as argued in Sections III and IV of this brief, find them unpersuasive. It should reject Relator's and the MBA's argument regarding post-default interest, which would be contrary to statute and would allow interest to be charged on interest. Regarding UCC Article 9, this Court should continue to apply the approach established for decades in Missouri (by statute and common law): the absolute bar rule.

II. Res judicata does not preclude class members against whom Relator obtained collection judgments.

Relator argues class certification was granted in error because it had previously obtained collection judgments against numerous class members. Relator, however, omits that its collection judgments were obtained in associate circuit divisions, precluding application of res judicata,

The deficiency judgments obtained by Relator, as with the clear majority of collection actions against consumers in Missouri, were pursued and obtained in the associate circuit division[2] under chapter 517. The "compulsory counterclaim rule does not apply" to "an action filed in an associate circuit division under chapter 517. *Becker Glove International, Inc. v. Jack Dubinsky & Sons, et al.*, 41 S.W.3d 885, 886 (Mo. banc 2001). This is consistent with the purpose behind consumer

[2] A search of Case.net for cases filed by Relator against individuals reveals that all were filed and concluded in the Associate Circuit Divisions. NCLC requests that the Court take judicial notice of this fact. *Higginbotham v. Higginbotham,* 384 S.W.3d 316, 317 n.2 (Mo. App. 2012) (court may take judicial notice of its own records); *State v. Johnson,* 150 S.W.3d 132, 137 (Mo. App. 2004); *Heidrick v. Smith,* 169 S.W.3d 180, 186 n.3 (Mo. App. 2005). This appears to have been left out of the record on which Relator relies. (A688-696).

class actions, permitting and encouraging the class action as a vehicle for relief to unsophisticated consumers. *Dale v. DaimlerChrysler Corp*, 204 S.W.3d 151, 182 (Mo. App. 2006). This purpose is well served where, like here, a high interest, buy-here-pay-here used car operation, ran through a web of similarly named affiliates, pursued hundreds of consumers each year in Missouri courts for collection. (A246–51).

Res judicata doesn't apply where the compulsory counterclaim rule doesn't apply. *Hemme v. Bharti*, 183 S.W.3d 593, 599 (Mo. banc 2006) ("If the compulsory counterclaim rule does not apply, neither does claim preclusion (res judicata)."). For this reason alone, Respondent's argument fails.

And for res judicata to operate as a bar, the causes of action must be "identical." *Terre du Lac Ass'n v. Terre du Lac, Inc.,* 737 S.W.2d 206, 212 (Mo. App. 1987); *Oberle v. Monia*, 690 S.W.2d 840, 842 (Mo. App. 1985); *People's-Home Life Ins. Co. v. Haake*, 604 S.W.2d 1, 7 (Mo. App. 1980). Collection claims are "separate claims" from consumer protection claims under the UCC or Chapter 408. *First Community Credit Union v. Levison,* 395 S.W.3d 571, 580 (Mo. App. 2013). *Levison* is instructive because the credit union pursued collection for breach of an installment contract for the purchase of a vehicle and the consumer claimed the form presale notice used by the credit union violated the content requirements of § 400.9-614. *Id*. at 575–76. In finding the parties' claims constituted distinct judicial units, the Court described the consumer's class counterclaim as "an independent cause of action." *Id*. at 580; *Consumer Finance Corp. v. Reams,* 158

S.W.3d 792, 796 n. 2 (Mo. App. 2005) (deficiency collection action is a different claim from a claim for damages under § 400.9-625). A class counterclaim based on violations of the UCC or Chapter 408 is simply not the same claim or cause of action as a collection claim for breach of a retail installment contract. *Id.* Thus, the judgments obtained by Relator against Missouri consumers don't bar their participation as class members.

Moreover, Relator's and MBA's arguments would erode the fundamental purposes of consumer class actions. Allowing individuals whose vehicles were repossessed, after high-interest used car deals went badly, to band together and attempt to gain relief based on common, form-driven grievances serves a fundamental purpose of Rule 52.08 and consumer class actions in general.[3] In most, if not all, consumer class actions, the absent class members are unaware they have legal rights enforceable against an overreaching creditor. This concept of fairness is embodied in the superiority requirement of Rule 52.08(b)(3), which allows the trial court to consider "the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Dale*, 204 S.W.3d at 182 (internal quotes omitted).

Consumer class actions are intended to benefit "small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step to get involved

[3] All citations and references to "Rules" are to the Missouri Supreme Court Rules of Civil Procedure, unless specified otherwise.

in litigation to vindicate their rights." *State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 490 (Mo. banc 2003). A class action allows consumers, often trapped in high interest transactions, such as here, to balance the scales, which is an all too infrequent occurrence.[4] Improperly applying res judicata to this action would undermine these purposes and make class action relief a practical impossibility for many consumers.

III. Section 408.553 bars lenders from accruing post-default, pre-judgment interest.

Relator and the MBA also argue creditors should be allowed to stand idly by after a consumer defaults, not acting on their rights but waiting while compiling contract interest charges into a claimed "balance." Then, months or years after default, the creditor should be allowed to sue on this inflated amount as the "principal;" obtain a (belated) judgment; and compound contract interest charges onto the judgment amount, which already contains contract interest.

As argued in Section I of this brief, this issue isn't before the Court. The lower court didn't rule on the proper calculation of post-judgment interest, but only on the question of class certification. The only relevance of this issue to this appeal is that it's one of the questions Respondent identified as being common to the class. To rule on the merits of this issue when it hasn't been addressed below and isn't

[4] *See* e.g., *The Need*, Missouri Supreme Court, Judges Tool Kit on Pro Bono Legal Assistance, https://www.courts.mo.gov/page.jsp?id=40233 ("The 'Justice Gap' is a major gap between the legal needs of low-income people and the legal help that they receive.")

necessary for resolution of the matter before the Court would be to issue an advisory opinion. It would be a decision in a vacuum.

Regardless, the position of Relator and the MBA is contrary to statutory and common law. If adopted, it would facilitate consumer abuses.

The MBA asserts Mo. Rev. Stat. § 408.553 requires the accrual of post-default, prejudgment, contract rate interest. The MBA's reading conflicts with the statute's plain language, the intent of the legislature, the statute's remedial, consumer protection nature, and cases interpreting it.

Section 408.553 was enacted in 1979 with the title, "Recovery Limitation." Laws of Missouri 1979 p. 578; *Bullington v. State*, 459 S.W.2d 334, 341 (Mo. banc 1970) ("the title of a statute is necessarily a part thereof and is to be considered in construction."). It provides:

> 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.

By enacting § 408.553, the legislature was primarily concerned with limiting compound interest. "Compound interest generally is not allowable on a judgment." *Wallemann v. Wallemann*, 817 S.W.2d 548, 549 (Mo. App. 1991). "Compound interest is interest upon interest; where accrued interest is added to the principal sum and the whole treated as a new principal for the calculation of interest for the next period." *Id.* "Simple interest is interest computed ***solely on principal***." *Id.* (emphasis added). Section 408.553 provides the creditor is to get post-judgment

interest "at the simple interest equivalent of the rate provided in the contract." If the underlying judgment includes prejudgment interest (as argued by the MBA), then "when post-judgment interest accrues on the amount of the Judgment," *see* MBA's Brief p. 11, there would be interest upon interest because the prejudgment interest was added to the principal sum and the whole treated as a new principal (i.e. the judgment balance) for calculation of post-judgment interest.

As both opinions in *Hollins v. Capital Solutions Investments I, Inc*., 477 S.W.3d 19 (Mo. App. 2015) noted, creditors need to obtain a "final judgment" before compiling contract interest charges. Judge Odenwald's opinion states that had Ms. Hollins brought a timely claim under 408.553, "she would have obtained a massive reduction in the amount of interest recoverable by CSI under Missouri law." *Id*. at 26. Judge Dowd's opinion (joined by Judge Gaertner) reiterates the point, describing § 408.553 as a "statutory limitation on prejudgment interest" requiring that interest "does not begin to accrue until the date of a 'final judgment' and then only at the 'simple interest equivalent of the rate provided in the contract.'" *Id*. at 29. Creditors can have their simple contract interest but not a double recovery through compound interest. All that's required is to act: file the collection action promptly and, if appropriate, obtain a judgment.

Relator's collection lawsuits illustrate the point. For example, in *General Credit Acceptance Company v. Tracie Otis*, 15SL-AC05247, St. Louis County Circuit Court, Associate Division, a retail installment contract was signed on May 11,

2012. By December 18, 2012, a default was alleged.[5] On February 10, 2015, over two years later, Relator sued for collection. Judgment was taken against Ms. Otis on August 10, 2015 for $12,135.59, which includes $2,539.51 of interest (before final judgment) at the contract rate of 28.92%. Per the garnishment application executed on August 28, 2015 (17 days later), Relator charged an additional $163.46 in post judgment interest on this balance as of that date, i.e., the per diem contract rate times 17 days.[6] Thus, Relator sat on its rights for over two years while wrongly adding an additional $2,539.51 in interest (over 26% of the judgment) to the claimed principal due. Then, after obtaining a judgment, Relator continues to compile contract interest on this balance, which already includes more than $2,600 of "contract interest." This isn't compatible with the "recovery limitation" embodied in § 408.553.

There's no difference between this conduct and the practices of the even-higher interest consumer lender in *Hollins*, which § 408.551 clarifies. Nor is the limitation embodied in § 408.553 inconsistent with § 365.100. Creditors may obtain their contract interest by promptly acting on their rights and obtaining their

[5] The varying right to cure notices are confusing at best. In the earliest of the four right to cure notices attached to the petition, default is alleged as early as May 29, 2012, i.e., the same month as the contract.

[6] The per diem interest rate shown on the judgment is calculated as follows .2892/365 = .0007923287; that sum times the judgment balance of $12,135.59 equals $9.615. This sum times 17 days = $163.46.

rightful judgments. Under § 408.553, creditors may not, however, sit on their rights and compound interest charges.

The sky will not fall by giving § 408.553 its plain meaning. Many, if not most, creditors comply. *See e.g.*, *America's Car Mart v. Puryear*, 17AE-AC00631, Platte County Circuit Court, Associate Division, judgment entered December 7, 2017; *Ally Financial, Inc. v. Julie and Kenneth Kutter*, 16CY-CV03761, Clay County Circuit Court, Associate Division, Judgment entered June 16, 2016; *Ford Motor Credit, LLC v. Kommel*, 1616-CV02466, Jackson County Circuit Court, Associate Division, judgment entered March 8, 2016. Auto lenders have been enjoying ever-increasing volume gains in recent years, to historically unprecedented levels.[7] The protection afforded consumers by § 408.553 is significant—a contractual interest rate accrues after judgment is entered against the consumer. Creditors may not wait to exercise their rights while charging ever-increasing contract interest to a claimed balance and then compound those interest charges after judgment. This isn't a radical or even novel concept. The statute provides a common sense limitation on compound interest creditor tactics.

This is the same result reached by several circuit court judges in Missouri. *Rivers*, No. 1722-AC10854-01; *CSAC v. Crawford*, No. 1522-AC03346-02 (Mo. Cir.

[7] See e.g., *"Motor Vehicle Loans Owned and Securitized,"* Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/MVLOAS NCLC requests the Court take judicial notice of this federally conducted and published economic research. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) ("It is appropriate to take judicial notice of . . . information . . . made publicly available by government entities[.]").

Feb. 15, 2018); *The Loan Company v. Sims*, No. 1422-AC04574-01 (Mo. Cir. Jun. 27, 2018). These decisions belie the MBA's contention that § 408.553 "unambiguously" supports its position. The *Hollins* court couldn't have been clearer about the meaning of § 408.553 and is the only court to opine on the statute:

> This statute indicates interest on these types of loans ***does not begin to accrue*** until the date of a 'final judgment' and then only at the 'simple interest equivalent of the rate provided in the contract.' Therefore, the trial court's judgment, which includes $729.90 in ***interest from the date the debtor defaulted*** until the date of the default judgment is in violation of the statute.

Id. (emphasis added).

Under *Hollins*, Relator violated § 408.553 by charging interest after default but before judgment, which also means it violated the UCC because the amounts stated in its presale and post-sale notices would be artificially inflated by including prohibited interest. *See Mancuso v. Long Beach Acceptance Corp*., 254 S.W.3d 88, 95 (Mo. App. 2008) (collecting cases); *Rivers*, No. 1722-AC10854-01, *Crawford*, No. 1522-AC03346-02.

Like the Merchandising Practices Act (§ 407.010 *et seq.*), §§ 408.551 to 408.562 are "designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices." *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. banc 1992). Section 408.553 prevents a lender from abusing a consumer who has unequal bargaining power by sitting on its hands until close to the expiration of the statute of limitations before pursuing legal action,

so that the unknowing consumer racks up more debt through accrued interest. If the Court finds any ambiguity in § 408.553, it should nonetheless interpret the statute liberally to serve its purpose—to protect consumers. *United Pharmacal Co. v. Mo Bd. of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006) ("Remedial statutes are interpreted liberally to give broad meaning to their remedial purpose.").

IV. The MBA's request for this Court to adopt the rebuttable presumption approach based on equitable principles is precluded by the General Assembly's adoption of the absolute bar approach and would produce an inequitable outcome.

The MBA also argues this Court should abandon decades of precedent and adopt the "rebuttable presumption" approach rather than the "absolute bar" rule for courts to use when deciding whether a creditor that has violated the UCC's repossession notice requirements can nonetheless recover a deficiency judgment against the consumer. As argued in Section I of this brief, this issue isn't before the Court. But if the Court decides to address it, it should reject the MBA's argument, for the reasons discussed below.

a. The plain and unambiguous interpretation of §§ 408.556 and 408.557 prevent lenders from collecting a deficiency judgment when they do not comply with Article 9, Part 6 of the UCC and renders the MBA's policy arguments irrelevant.

The first fundamental flaw in the MBA's position is it fails to address the dispositive point that renders its arguments immaterial: the Missouri legislature enacted laws codifying the absolute bar rule under Chapter 408. This fact renders all the MBA's arguments about equity and the intent of the UCC irrelevant. As this Court has repeatedly explained, even if it disagrees with the Missouri legislature,

its "function is to interpret the law; it is not to disregard the law as written by the General Assembly." *Weiss v. Rojanasathit*, 975 S.W.2d 113, 121 (Mo. banc 1998) (quoting *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. banc 1968)); *see also Blaske v. Smith & Entzeroth, Inc*., 821 S.W.2d 822, 829 (Mo. banc 1991) (quoting *Batek v. Curators of Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996) ("It is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination."); *see also Goerlitz v. City of Maryville*, 333 S.W.3d 450, 456 (Mo. banc 2011) ("This Court must defer to the plain language of the statute, the time-honored principle of separation of powers and the recognition that policy decisions such as presented in this case are within the providence of the legislature."). What is important is the Missouri legislature's intent, and the Court need look no further than §§ 408.556 and 408.557 to determine that the General Assembly intended to bar secured creditors from obtaining deficiency judgments if they violate Article 9 of the UCC. *Ford Motor Credit Co. v. Updegraff*, 218 S.W.3d 617, 620–23 (Mo. App. 2007); *Diaz*, 545 S.W.3d at 860; § 408.556.

One year after Missouri adopted the absolute bar rule as part of its common law in *Gateway*, the General Assembly codified the absolute bar rule in §§ 408.556 and 408.557 for any retail installment transaction as defined by § 365.020 made primarily for personal, family or household purposes.

Section 408.556 provides:

> In any action brought by a lender against a borrower arising from default, the petition ***shall allege*** the facts of the borrower's default, ***facts sufficient to show compliance with the provisions of sections 400.9-601 to 400.9-629***, which provisions are hereby deemed applicable to all credit transactions, with respect to any sale or other disposition of collateral for the credit transaction, the amount to which the lender is entitled, and an indication of how that amount was determined.

§ 408.556 (emphasis added); *see also* § 408.557 ("When a lender sells or otherwise disposes of collateral in a transaction in which an action for a deficiency may be commenced against the borrower, ***prior to bringing any such action*** or upon written request of the borrower***, the lender shall give the borrower the notice provided in section 400.9-614*** for consumer goods transactions.") (emphasis added).

To state a cause of action for a deficiency judgment, a creditor must plead sufficient facts to show compliance with, among others, the mandates of §§ 400.9-611 and 400.9-614. *Updegraff*, 218 S.W.3d at 620. "And, the failure to do so would require dismissal, pursuant to Rule 55.27(a)(6), for failure to state a cause of action upon which relief could be granted." *Id.; see also Reno Fin., Ltd. v. Valleroy*, 229 S.W.3d 622, 624 (Mo. App. 2007) ("Compliance with the notice provision of Section 400.9-611 is a prerequisite to recovery of a deficiency judgment after resale of collateral"); *Diaz*, 545 S.W.3d at 863–64.

The intent of the Missouri legislature is unambiguously expressed in § 408.556 that before a creditor can recover a deficiency judgment, the creditor must comply with §§ 400.9-601 to 400.9-629. This is an absolute prerequisite, and courts don't have the authority to change this statutory mandate. The arguments advanced by

the MBA are inapposite because its request to replace the absolute bar rule with the rebuttable presumption rule cannot be granted without rewriting Chapter 408.

b. The Missouri legislature's actions (and inactions) support construing §§ 408.556 and 408.557 to bar deficiency judgments in consumer actions.

The Missouri legislature's actions and inactions when it adopted the revised version of UCC Article 9 in 2001 are additional support for the conclusion that the Court shouldn't rethink its use of the absolute bar rule in consumer cases. When it adopted the revised version of UCC Article 9, the legislature abrogated the common law absolute-bar rule in ***commercial*** actions. *See* § 9-626, UCC Official Comment 3; *Diaz*, 545 S.W.3d at 860. The Revised UCC expressly refrains from affecting common law in consumer transactions. *See* § 9-626, UCC Official Comment 4. Despite the General Assembly's willingness to make non-uniform amendments to the Revised UCC, the General Assembly left the language of § 9-626 intact. *See* § 400.9-626. Similarly, the legislature declined to make any amendments relevant to the proper approach for obtaining deficiency judgments, even though it knew Missouri courts had been applying the absolute bar rule since 1978.

Moreover, the General Assembly chose not to alter the anti-deficiency language in §§ 408.556 and 408.557 when they were amended in 2002. *Boland v. Saint Luke's Health Sys., Inc.*, 471 S.W.3d 703, 712 (Mo. banc 2015) (explaining this Court "presume[s] that the legislature acted with a full awareness and complete knowledge of the present state of the law."); *McKesson Corp. v. Coleman's*

Grant Village, 983 S.W.2d 631, 635 (Mo. App. 1997). Instead, the legislature only changed § 408.556's statutory citations to the former UCC sections to correctly correspond with the similar sections in the Revised UCC.[8] The General Assembly's decision to leave the substance of § 408.556 untouched strongly supports the conclusion it "adopted the judicial construction previously given to the statute." *Bunker v. Rural Elec. Co-op.*, 46 S.W.3d 641, 645 (Mo. App. 2001).

This Court must adhere to statutes drafted by Missouri's legislature, even when it disagrees with the statute's intent:

> [A]lthough [this Court finds] the result the plaintiffs argue for is appealing, the method of using a common law equitable maxim to work around the dictates of section 537.100 is inherently problematic. Equity should not be deployed in a manner that countermands the clear intent and language of the legislature, particularly in regard to a statutorily created cause of action … Equity Courts may not disregard a statutory provision, for where the Legislature has enacted a statute which governs and determines the rights of the parties under stated circumstances, equity courts equally with courts of law are bound thereby. ***Equity follows the law more circumspectly in the interpretation and application of statute law than otherwise.***

Boland, 471 S.W.3d at 713 (emphasis in original). The Missouri legislature's actions (and inactions) are strong support for the conclusion that it approved of the courts' use of the absolute bar rule. This Court need not address the MBA's arguments based on equity and the intent of the UCC, because it's outside the province of the courts to rewrite the statutes enacted by the legislature.

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[8] In § 408.556 "400.9-501 to 400.9-507" was replaced with "400.9-601 to 400.9-629," and in 408.556.4 "§ 400.9-504" was changed to "§§ 400.9-601 to 400.9-629." *See* L.2002, S.B. No. 895, § A.

c. The absolute bar rule is the most equitable approach, and the most effective approach to effectuate the UCC's intent.

In its Point II, the MBA presents two main arguments: (1) the rebuttable presumption approach is more "equitable" than the absolute bar rule; and (2) the rebuttable presumption rule "is consistent with the intent of the UCC." As argued in the preceding two sections, these arguments are improperly asking the Court to rewrite Missouri statutes, so the Court shouldn't consider them. In addition, the MBA's argument relies on cases that deal with non-consumer transactions or with failure to comply with the UCC's requirement of a commercially reasonable sale. By contrast, it's uncontroverted that Weatherspoon's counterclaim flows from (1) the inadequacy of Relator's notices (2) in a consumer transaction. The MBA's argument ignores these crucial differences.

Throughout Article 9, non-consumer transactions are treated differently than consumer transactions; unsophisticated consumers are given greater protection. The UCC imposes upon creditors two "separate and distinct" requirements: "The first obligation … concerns notice. A secured party is required to provide notice of a sale of collateral to debtors 'so that they may take whatever actions they can to protect their interest,' such as discharging the debt and reclaiming the collateral, finding another purchaser, or assuring that any sale by the creditor is done in a commercially reasonable manner." *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 212–13 (Mo. App. 2002) (citing *Textron Financial Corp. v. Trailiner Corp.*, 965 S.W.2d 426, 431–32 (Mo. App. 1998)). *Accord*, *Boulevard Bank v. Malott,*

397 S.W.3d 458, 463 (Mo. App. 2013). *See also Mancuso*, 254 S.W.3d at 95 (purpose of the notice requirement is "to apprise the debtor of the details of disposition so that [he] may take appropriate action to protect his [ ] interest"). "The second obligation … concerns commercial reasonableness. A creditor who chooses to sell the collateral must do so in a reasonably commercial manner. The commercial reasonableness requirement, 'is designed to encourage the creditor to seek the most advantageous sale price and thus reduce the possibility and amount of any deficiency.'" *Id*. at 213 (quoting *Textron*, 965 S.W.2d at 431); *Holt v. Peoples Bank of Mt. Washington*, 814 S.W.2d 568, 571 (Ky. 1991). The MBA's conflation of two distinct Article 9 requirements undermines its analysis.

The MBA suggests, without support, that the UCC's only purpose is to compensate aggrieved parties. *See* MBA's Amicus Brief p. 27 ("The policy of the UCC is to allow full recompense to an aggrieved party by application of the remedies provided in the UCC[.]"). However, the UCC drafters also endeavored to encourage compliance (or deter noncompliance) with the Code:

> "The Uniform Commercial Code's drafters included the statutory penalty for consumer goods in Section 9–507(1) because they believed that compensatory damages would not be a sufficient deterrent in the average consumer case. See [2 J. White & R. Summers, Uniform Commercial Code (3d Ed.1988) § 27–18, p. 623]. They intended that the statute would provide the minimum recovery for consumers who prove that a secured party did not proceed in accordance with the Uniform Commercial Code. See 9 R. Anderson, Anderson on the Uniform Commercial Code § 9–507:21 (1985)." *Davenport v. Chrysler Credit Corp*., 818 S.W.2d 23, 31 (Tenn. Ct. App. 1991).
>
> ***The purpose of ... [UCC § 9–507] is to encourage creditors to comply with all provisions of part 5 or face the consequences of non-***

> ***compliance***. We agree with the view that the drafters created a statutory penalty in UCC [§] 9–507 to 'up the ante for those who would abuse the consumer' because ***in most cases, compensatory damages are 'an insufficient deterrent to creditor misbehavior in nickel and dime consumer transactions where such damage will amount to very little***....' [2 J. White & R. Summers, supra, § 27–18, p. 623]." *Erdmann v. Rants*, 442 N.W.2d 441, 443 (N.D.1989). "The penalty evinces a strong policy by the UCC drafters and our Legislature that the best protection for consumers is creditor compliance with all of the default provisions of part 5. A flat penalty for noncompliance is the means chosen by the framers of the UCC and our Legislature to ensure that creditors take careful steps to comply with those default provisions.

Jacobs v. Healey Ford-Subaru, Inc., 231 Conn. 707, 724, 652 A.2d 496, 505 (1995) (emphasis added). "Revised Article 9, like its predecessor, provides a minimum, statutory, damage recovery for a debtor ... in a consumer goods transaction that is designed to ensure that every noncompliance ... in a consumer-goods transaction results in liability." *Coxall v. Clover Commercial Corp.*, 4 Misc. 3d 654, 667, 781 N.Y.S.2d 567, 579 (Civ. Ct. 2004) (internal citations omitted). Section 400.9-625 damages are "designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." *Mancuso*, 254 S.W.3d 88, 92 (citing § 400.9-625 UCC Comment 4).

The need for consumer-debtor protection is amplified in repossession cases. "Repossession statutes are enacted to protect the consumer from well documented repossession abuses and to encourage and promote compliance with the laws that govern such actions." *Jacobs*, 652 A.2d at 504. The MBA complains it would be unfair to lenders to both bar recovery and permit consumers to obtain an affirma-

tive recovery. However, if a sophisticated lender takes the simple steps of drafting a form notice that complies with the state's laws—a form provided in the statute—consumers with little-to-no familiarity with the UCC can be protected. The MBA contends the threat of § 400.9-625(c)(2) damages alone is enough to ensure compliance with Article 9. However, most offending creditors get away with their violations because over 90% of debtors fail to appear in court and have default judgments entered against them. *See* "The Structure and Practices of the Debt Buying Industry," Federal Trade Commission, p. 45 (2013).[9] Thus, even if a creditor violates the UCC in repossession cases, there is rarely an actual threat of negative consequences. This undercuts Article 9's effectiveness in ensuring compliance with the UCC. Permitting consumers to obtain an affirmative recovery besides barring creditors from deficiency judgments helps preserve Article 9's value as a deterrent and follows the stated purpose of the law.

d. The MBA's proposal would deviate from Missouri's common law, and there would be no compelling reason to change approaches to anti-deficiency laws.

Adopting the rebuttable presumption approach would require Missouri courts to drastically depart from the state's well-established law. "Missouri courts have consistently applied the absolute bar rule since 1978," which was first expressed in Missouri in *Gateway*. *See McKesson Corp.*, 938 SW.2d at 633 n. 1. The MBA

[9] Federal Trade Commission, The Structure and Practices of the Debt Buying Industry (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

cites no Missouri case applying a rule other than the absolute bar rule when a defective notice was sent. Although the MBA has found one Missouri case, *Commercial Credit Equipment Corp. v. Parsons*, 820 S.W.2d 315 (Mo. App. 1991), that criticized the absolute bar rule, it did so for a ***commercial*** transaction involving commercial unreasonableness, not a defective notice. *See Cub Cadet Corp*., 78 S.W.3d at 212–13 (finding *Parsons* not to be germane to a defective notice case). Missouri precedent uniformly supports application of the absolute bar approach in defective notice claims.

In contrast to the *dicta* in a single non-germane decision cited by the MBA, a long line of cases, including many from the Western District, explain in detail the importance of complying with the UCC ***consumer*** protections. *See e.g., Boulevard Bank*, 397 S.W.3d 458.

"Missouri has long held that the right to a deficiency exists only if the creditor strictly complies with the statutory requirements of the UCC, regardless of whether there was any resulting harm to the debtor from the failed notice." *In re Downing,* 286 B.R. 900, 905 (Bankr. W.D. Mo. 2002). This has been the law since at least 1979. The Missouri legislature demonstrated it knew how to abandon the "absolute bar" rule and did so regarding ***commercial transactions***. The Missouri legislature, however, declined the opportunity to modify the established approach to deficiency judgments in ***consumer transactions***, and accepted the use of the "absolute bar" approach followed under the UCC provisions and decades of common law.

This conclusion is bolstered by the well settled principal that "[t]he legislature is presumed to know the existing case law when it enacts a statute." *Scruggs v. Scruggs*, 161 S.W.3d 383, 391 (Mo. App. 2005). The common law rules remain in effect "[u]nless a statute clearly abrogates the common law either expressly or by necessary implication." *Mika v. Cent. Bank of Kansas City*, 112 S.W.3d 82, 90 (Mo. App. 2003) (internal quotation omitted). Here, § 400.9-626 does nothing to abrogate the common law rule creating an "absolute bar." If the Missouri legislature wanted to abandon the "absolute bar" rule for consumer transactions, it could have easily done so by deleting from § 400.9-626(a) "other than a consumer transaction" following "arising from a transaction" and omitting subsection (b), as legislatures in a few states have done as a way of adopting the rebuttable presumption rule for consumer cases. *See, e.g.,* § 679.626, Fla. Stat.; Idaho Code § 28-9-626; MD.CODE ANN., Com. Law § 9-626; MISS. CODE ANN. § 75-9-626; Neb. Rev. St. UCC § 9-626. Instead, the Missouri legislature expressly did the opposite by stating "a court may continue to apply established approaches." § 400.9-626(b); *see also* § 400.9-626 cmt. 4 (§ 400.9-626(b)) "leaves the court free to continue to apply established approaches to [consumer] transactions"). Other states have also recognized the *uniform* version of § 9-626 has no impact on continued use of the absolute bar rule in consumer transactions. *See e.g., Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244, 253 (Del.2009) (citing 6 Del. C. § 9-626) ("That presumption, however, does not apply here, because Hicklin bought her car in a consumer transaction."). The conclusion the Missouri legislature intended the absolute bar to

remain in effect for consumer transactions is confirmed by its amendment to § 408.556, which only applies to consumer transactions, a year after Revised Article 9 of the UCC was adopted in Missouri.

The Missouri legislature's intent to retain the absolute bar rule is also confirmed by the history behind deficiency judgments, which are in derogation of the common law. Under the common law established in Missouri, when a buyer defaulted on his or her agreement with a seller, the seller could elect from two remedies: (1) let the debtor keep the collateral and sue for breach of contract; or (2) repossess the collateral, rescind the agreement and keep what has been paid. *Diaz*, 545 S.W.3d at 860. This second option results in what has now been coined an absolute bar to a deficiency. *Laclede Power Co. v. Estate of Ennis Stationery Co.*, 79 Mo. App. 302, 307 (Mo. App. 1899). Before the early 1960s, "the basic law remained largely the same, the basic remedies remained largely the same and the basic tactics of creditors' attorney's remained largely the same." Frank W. Koger, "Recent Developments in Missouri: Commercial Law," 48 UMKC L.Rev. 531 (1980).

The remedies for a creditor changed when Missouri adopted the UCC in 1963. In derogation of the long-standing common law, the UCC allowed deficiency judgments after repossession of collateral. *Gateway*, 577 S.W. at 863 ("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"). One year after the decision in *Gateway*, the legislature enacted §

408.556, which provided a bar to deficiency judgments if a secured party failed to plead compliance with the UCC, and this precedent has uniformly been followed in Missouri ever since.

What this history clarifies is Missouri has always viewed deficiencies not as a matter of right, but with strong disfavor. Lenders have the option to refrain from repossessing the car and instead to sue for the entire remaining balance under the loan. When a lender exercises the extraordinary statutory remedy of repossessing a consumer's car, which under the common law in existence for over 100 years would have automatically terminated the consumer's debt, it must now strictly comply with statutory safeguards.

There is nothing unfair about requiring strict compliance with a statute as a condition of an *additional* remedy only provided by that statute. "Failure to adhere to the relevant statute results not in punishment, but merely in the inability to invoke the operation of the remedial statutory provisions." *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 779 (Del. 1980).

The burdens placed on lenders under the UCC are minimal—they merely need to use a safe-harbor form provided in the statute—while the results of noncompliance may be very onerous to the consumer. *Id.* "This unequal relationship has been recognized by numerous cases." *Id.* There is no "unfairness in protecting the debtor's rights to the exclusion of those of the creditor when the creditor has been placed in such a high degree of control of the relationship and carries such a small burden in order to gain the advantages of the Statute." *Id.* This is even more force-

ful today than it was in *Wilmington* because Article 9 has been revised to provide "clear instructions and a 'Safe-Harbor Form of Notification' to assist creditors in complying with the notification requirement." *States Resources*, 339 S.W.3d at 598 n. 8.

If a lender wants to avoid the presale notice requirements, strict application of those requirements, and the "absolute-bar rule," it could simply sue for breach of contract in lieu of repossessing the collateral and proceeding under the UCC. When lenders elect a different course of action, the Court shouldn't hear them to complain about the consequences they face for violating the statutory scheme giving them that option.

e. The MBA invites Missouri to join the minority.

The MBA argues 28 states follow the rebuttable presumption approach. *See* MBA Brief p. 18. Besides only citing cases from 27 states, the MBA is wrong because it ignores controlling cases or statutes (often because the cases it cites are commercial cases or deal with commercial reasonableness instead of defective notices). The correct breakdown is:

a. 21 states have adopted the absolute bar rule for consumer transactions (by common law or statute): Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Iowa, Kansas, Kentucky, Maine,

Massachusetts, Michigan, Minnesota, Missouri, Montana, South Carolina, Texas, Utah, Vermont, Wisconsin, and Wyoming.[10]

b. 17 have adopted the rebuttable presumption for consumer transactions (mostly by non-uniform amendment to the UCC and some by common law).[11]

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[10] *Gateway,* 577 S.W.2d at 860 ("any right to a deficiency accrues only after strict compliance with the relevant statutes"); *see also Bank of Bearden v. Simpson*, 808 S.W.2d 341 (Ark. 1991); Cal. Com. Code § 9626(b); *Mack Fin. Corp. v. Crossley*, 550 A.2d 303 (Conn. 1988); *Colt Employee Fed. Credit Union v. Lagassie*, 316 A.2d 512 (Conn. Ct. Com. Pl. 1973); *Hicklin*, 970 A.2d 244; D.C. Code § 28-3812; *HEW Fed. Credit Union v. Battle*, 772 A.2d 252 (D.C. 2001); *Parrish v. Chrysler Financial Services Americas, LLC.*, 332 Ga. App. 683 (App. 2015); Iowa Code § 537.5103(1); Kan. Stat. Ann. § 16a-5-103; *Hopkins v. Kan. Teachers Cmty. Credit Union*, 2010 WL 3398767 (W.D. Mo. Aug. 24, 2010) (Kan. law); *Holt*, 814 S.W.2d 568; Me. Stat. tit. 11, § 9-1626; *ROC-Century Associates v. Giunta*, 658 A.2d 223 (Me. 1995); M.G.L.A. 255B § 20B; *In re Nurse*, 2009 WL 2913419 (Bankr. E.D. Pa. June 18, 2009) (Mass. law); *U.S. Trust Co. v. Carreiro*, 2000 Mass. App. Div. 159 (Dist. Ct. 2000); *Diversified Fin. Sys., Inc. v. Schanhals*, 513 N.W.2d 210 (Mich. App. 1994); *Mashak v. Meeks-Hull*, 76 U.C.C. Rep. Serv. 2d 582 (Minn. App. 2012); *Bank of Sheridan v. Devers*, 702 P.2d 1388 (Mont. 1985); S.C. Code Ann. § 37-5-103(1); *Gen. Motors Acceptance Corp. v. Carter*, 349 S.E.2d 342 (S.C. App. 1986); *Greathouse v. Charter Nat'l Bank-Southwest*, 851 S.W.2d 173 (Tex. 1992); *Haggis Mgmt., Inc. v. Turtle Mgmt., Inc.*, 745 P.2d 442 (Utah 1985); *Ford Motor Credit Corp. v. Welch*, 861 A.2d 1126 (Vt. 2004); Wis. Ann. Stat. § 425.209; *Vic Hansen & Sons, Inc. v. Crowley*, 203 N.W.2d 728 (Wis. 1973); *Coones v. Fed. Deposit Ins. Corp.*, 848 P.2d 783 (Wyo. 1993).

[11] *May v. Women's Bank, N.A.*, 807 P.2d 1145, 1147 (Colo. 1991); *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) (commercial case and applied to consumers by non-uniform amendment to the UCC); *Mack Financial Corp. v. Scott*, 606 P.2d 993, 100 Idaho 889 (1980); (commercial case and applied to consumers by non-uniform amendment to the UCC); *First Galesburg Natl. Bank & Trust Co. v. Joannides*, 469 N.E.2d 180, 181 (Ill. 1984); *Vanek v. Indiana Nat'l Bank*, 540

c. 3 have applied the rebuttable presumption to commercial transactions but have no cases about applying to consumer transactions.[12]

The MBA invites this Court to disregard the statutorily codified absolute bar rule and decades of common law to join the minority view. This Court should decline such an invitation.

f. The MBA's "double recovery" and offset theories misconstrue Missouri law and rest upon flawed premises.

The MBA's "double recovery" and offset theories, which it raises as Point III, misconstrue Missouri law and rest upon flawed premises. Plaintiffs impermissibly

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N.E.2d 81, 83 (Ind. Ct. App. 1989) aff'd 551 N.E.2d 1134 (1990) (commercial case and applied to consumers by non-uniform amendment to the UCC); *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234, 237 (Miss. 1979) (applied to consumers by non-uniform amendment to the UCC); *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 920 (Nev. 1977) (commercial case and applied to consumers by non-uniform amendment to the UCC; statute requiring specific post-repossession notice is absolute bar to deficiency); *Block v. Diana*, 600 A.2d 520, 524 (N.J. Super. Ct. App. Div. 1992) (applied to consumers by non-uniform amendment to the UCC); *Gregory Poole Equip. Co. v. Murray*, 414 S.E.2d 563, 568 (N.C. Ct. App. 1992) (commercial case); *State Bank of Towner v. Hansen*, 302 N.W.2d 760, 767 (N.D. 1981) (commercial case and applied to consumers by non-uniform amendment to the UCC); *Assocs. Capital Servs. Corp. v. Riccardi*, 408 A.2d 930, 934 (R.I. 1979); *FDIC v. Morgan*, 727 S.W.2d 500, 501 (Tenn. Ct. App. 1986); *Woodward v. Resource Bank*, 436 S.E.2d 613, 617 (Va. 1993) (applied to consumers by non-uniform amendment to the UCC); *McChord Credit Union v. Parrish*, 809 P.2d 759, 762 (Wash. Ct. App. 2 1991) (applied to consumers by non-uniform amendment to the UCC); *Bank of Chapmanville v. Workman*, 406 S.E.2d 58, 64 (W. Va. 1991).

[12] *Liberty Bank v. Honolulu Providoring, Inc.*, 650 P.2d 576, 583 (Haw. 1982) (commercial case, no Hawaii court has adopted this rule in a consumer case); *First Nat. Bank of Dona Ana Cty. v. Ruttle*, 778 P.2d 434, 436 (N.M. 1989) (commercial case); *Meyers v. Arnold*, 645 P.2d 577, 579 (Or. 1982) (commercial case);

receive a "double recovery" when they advance "multiple theories of liability" and recover compensatory damages for the same wrongs or obtain favorable judgments from multiple tortfeasors jointly and severally liable. *Hammett v. Atcheson*, 438 S.W.3d 452, 464 (Mo. App. 2014); *Moore Auto. Grp., Inc. v. Lewis*, 362 S.W.3d 462, 468 (Mo. App. 2012). For instance, if a party seeks rescission of a contract as a remedy, "which depends on rejection of the contract as written," that party "could not also obtain actual damages on the contract, as an award of actual damages depends on affirmation of the contract." *Davis v. Clearly Bldg. Corp.*, 143 S.W.3d 659, 669 (Mo. App. 2004). It's not a "double recovery" for an aggrieved party to recover concurrent and consistent remedies; cumulative remedies are permissible. *Ellsworth Breihan Bldg. Co. v. Teha Inc.*, 48 SW 3d 80, 83 (Mo. App. 2001). In contrast to *Davis*, the remedies sought by the class plaintiffs here don't disprove each other; rather, the remedies require the same proof. The class recovers under the UCC by showing that Relator violated the presale or post-sale notice requirements. *See* § 400.9-625(c). To show Relator is barred from collecting a deficiency, the Class must show the same. *Levison*, 395 S.W.3d at 582 ("an improper notice defeats a secured creditor's right to pursue a deficiency"). "Neither of these theories alleges what the other denies nor are they repugnant." *Ellsworth*, 48 S.W.3d at 83.

Once again, the MBA relies on subjective equitable principles to bolster its argument, ignoring the Missouri legislature and its intent. As it did in its Point II, the MBA disregards Chapter 408 in its Point III. Without consideration of Chapter

408, any analysis of the UCC is inherently flawed. Sections 408.556 and 408.557 demand compliance with Article 9, Part 6 of the Missouri UCC before a creditor can obtain a deficiency judgment. And § 400.9-625(c)(2) permits the aggrieved consumer to receive damages "in any event."

The absolute bar and the consumer's right to recover statutory damages are separate and distinct concepts. Because creditors are barred from bringing deficiency actions against consumers, consumers don't receive a "recovery;" rather, creditors have failed in their burden of proof. *Huffman v. Credit Union of Texas*, No. 11-0022-CV-W-ODS, 2011 WL 5008309, at *3 (W.D. Mo. Oct. 20, 2011), *aff'd*, 758 F.3d 963 (8th Cir. 2014) ("a secured party's action for a deficiency judgment accrues only after the secured party strictly complies with statutory requirements, including sending pre-sale notices. Defendant's right to seek a deficiency judgment never accrued and there is nothing to forfeit."); s*ee, e.g., Yazzie v. Gurley Motor Co.*, No. CV 14-555 JAP/SCY, 2016 WL 7494272, at *3 (D.N.M. Mar. 22, 2016) ("If [the creditor] seeks to recover [a deficiency], it must affirmatively assert a claim for a deficiency judgment against the class members according to the standards discussed above."). Put differently, showing a creditor has failed to satisfy the prerequisites for receiving a deficiency judgment under Article 9 and barring it from recovering an alleged deficiency is a defense, not a "recovery" as used in the cases discussing "double recovery."

Had the legislature intended § 400.9-625(c)(2) damages to be offset by the alleged deficiency balance, it would have included language limiting recovery. For

example, in the next subsection (§ 400.9-625(d)), the drafters expressly limit a commercial debtor's recovery when the deficiency is eliminated under § 400.9-626 (which applies only to non-consumer transactions). The drafters' omission of similar limiting language for consumers is telling. "[T]he drafters' failure to provide a section denying a creditor the right to obtain a deficiency cannot be seen as an endorsement of the plaintiff's theory that [Former] § 9-507 (1) was intended to be the debtor's exclusive remedy." *Wilmington Trust Co.*, 415 A.2d at 778. The drafters of the UCC can construct statutes that clearly express their intent:

> [T]he more reasonable conclusion is that precisely because of their learning skill and experience, the drafters of the Uniform Commercial Code, had they truly intended the remedy to be exclusive, would have been scrupulously careful to state it. Their omission of language in § 9-507(1) expressly indicating exclusivity of the remedy thus speaks volumes against the correctness of plaintiff's position.

Id. at 780 (citing *Camden National Bank v. St. Clair, Me.Supr.*, 309 A.2d 329 (Me. 1973)). Missouri courts have embraced the rationale articulated in *Wilmington Trust Co.* and *Camden National Bank* and concluded § 9-625(c)(2) was not intended to be an "exclusive" remedy:

> First, the language in [§ 9-625] itself speaks only of the existence of a cause of action in favor of the debtor and omits any express statement reasonably suggestive of an intention that such cause of action shall be the exclusive remedy available to the debtor.
>
> * * *
>
> Second, in view of the omission of [§ 9-625(c)(2)] expressly to state that it provides an exclusive remedy for notification deficiencies, U.C.C. § 1-103 becomes most significant. Its import is that the right of action established by [§ 9-625(c)(2)], absent clear expression to

> the contrary, must be held cumulative in the context of remedies previously, or otherwise, afforded.

McKesson Corp., 938 SW 2d at 635 (quoting *Camden National Bank*).

Consumers don't receive a "double recovery" when (1) creditors lose their right to a deficiency judgment by failing to perform the elementary task of sending statutorily compliant presale notices and (2) consumers affirmatively recover damages under § 400.9-625(c)(2). When a lender disposes of a consumer's collateral without providing a sufficient presale notice, "cumulative remedies are permissible." *Ellsworth*, 48 SW 3d at 83. This conclusion is supported by the text of § 9-625 (and § 400.9-625). "The only bar to pursing cumulative remedies is satisfaction of the claim." *Id.* at 82. A consumer's claim for statutory damages under § 400.9-625 isn't satisfied by preventing the creditor from recovering for an alleged deficiency.

Further, the deficiency offset approach would place the MBA's misplaced equity argument above statutory mandates and dilute the deterrence value created by the absolute bar rule and § 400.9-625(c)(2). No case cited by the MBA was a consumer case or involved minimum statutory damages. However, in consumer cases like this one, courts have rejected the MBA's argument: "where the minimum recovery is stated as a matter of right, the portion of the deficiency which would have existed even if full value were obtained for the collateral cannot be used to diminish the recovery by the debtor." *Staley Employee Credit Union v. Christie*, 111 Ill. App. 3d 165, 443 N.E.2d 731 (Ill. App. 1982); *see also* 79 C.J.S. Secured

Transactions § 232 ("statutory minimum damages cannot be offset by the deficiency which would have existed even in the absence of a violation.").

To convince this Court otherwise, the MBA misstates the holdings in *Chemical Sales Co. v. Diamond Chem. Co.,* 766 F.2d 364, 369–70 (8th Cir. 1985). The MBA suggests *Chemical Sales* allowed the creditor to offset its absolutely-barred deficiency balance against the debtor's potential damages. This is wrong because *Chemical Sales* didn't involve statutory damages and wasn't a consumer case where minimum damages are set by § 400.9-625(c)(2). *Chemical Sales'* holding primarily relates to a conversion claim and stands for the unremarkable proposition that the appropriate measure of damages in conversion is the amount plaintiffs were actually damaged (for a conversion claim, this is "the value of the collateral" less the "debt secured by the collateral"). 766 F.2d at 370–71.[13] "Hence it is almost universally held that in the pledgor's suit for conversion the pledgee may recoup the amount of the principal debt." *Russell v. Empire Storage and Ice Co.,* 332 Mo. 707, 59 S.W.2d 1061, 1067 (1933) (the very case cited by *Chemical Sales* for its unremarkable proposition). *Russell*, a conversion case that predates Missouri's adoption of the UCC by decades, dealt with whether the jury was given "the wrong measure of damages" for the conversion of eggs by the lender. *Id.* at 1068. The *Russell* court explained, if these eggs "were worth $11,880, as plaintiffs claim, $7,700 of that value was actually received by them when they borrowed

[13] "Offset," or some variation on the phrase, doesn't appear in *Chemical Sales.*

that amount on them. If these eggs had been immediately either destroyed by defendant's negligence or converted by defendant to its own use, it would only have been liable to plaintiffs for the balance of that value, $4,180. This is good law and good sense, as well as good arithmetic, because that would be the amount plaintiffs were actually damaged." *Id.* at 1067. *Chemical Sales'* and *Russell's* holdings regarding the measure of damages for conversion claims are inapplicable here where the measure of damages and the amount the class members are damaged are statutorily set by § 400.9-625(c)(2).

The MBA also suggests support for its offset argument is found in *Workman*, 406 S.E.2d 58; *Folks v. Tuscaloosa County Credit Union,* 989 So.2d 531, 538 (Ala. Civ. App. 2007); *Savoy v. Beneficial Consumer Disc. Co*., 468 A.2d 465, 467-68 (Pa. 1983); *Coones v. FDIC*, 894 P.2d 613, 616 (Wyo. 1995); and *Kruse v. Voyager Ins. Cos.*, 648 N.E.2d 814, 818 (Ohio 1995). But the MBA's reliance is misplaced, and misunderstands the different approaches applied by these states compared to the approach applied in Missouri by statute and decades of common law. There are "three rules that have been applied by various jurisdictions to deal with the failure of a secured party to give notice … : (1) the 'absolute bar' rule, a.k.a. the 'no notice-no deficiency' rule; (2) the 'rebuttable presumption' rule; and (3) the 'set-off' rule." *Victory Hills Ltd. Partnership I v. NationsBank, N.A. (Midwest)*, 28 S.W.3d 322, 331 (Mo. App. 2000). The "absolute bar" rule acts as a complete bar to the recovery of a deficiency judgment because it creates an irrebuttable "presumption that the value which should have been received by the dis-

position of the collateral equals the balance due on the outstanding debt—a presumption that there is nothing owing the creditor." *Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 881 (Iowa 1997). The rebuttable presumption rule allows the secured party to rebut the presumption that the value of the collateral equals the value of the debt. *Victory Hills*, 28 S.W.3d at 331. Under the setoff rule, the creditor recovers the full deficiency despite noncompliance with UCC requirements, but the deficiency can be reduced by any damages the consumer proves. Missouri applies the absolute bar rule. *Workman*, *Folks*, and *Savoy* are setoff or rebuttable presumption states, so offset was required or allowed because there was no irrebuttable presumption precluding setoff. *Kruse* recognized authority for both positions but refused to consider a setoff because the bank failed to preserve it for appeal. *Coones* involved "commercial litigation," not a consumer transaction where the minimum recovery is stated as a matter of right.

Missouri courts and the General Assembly have known and permitted cumulative remedies in other contexts. For example, the Missouri Merchandising Practices Act's "fundamental purpose is the protection of consumers, and, to promote that purpose" by making certain dubious business practices illegal. *Berry v. Volkswagen Grp. of Am., Inc.*, 397 S.W.3d 425, 433 (Mo. banc 2013). In *Berry*, this Court noted the purpose for allowing additional damages isn't only meant as a remedial measure, "but also prospectively to deter prohibited conduct and protect Missouri citizens." *Id*. Cumulative remedies can further this goal:

> To remedy violations and to deter future prohibited conduct, the statute allows for injunctive relief, payment to the State for the cost of prosecution, punitive damages, restitution to injured consumers, and attorney's fees. All of these remedial measures are important, but the possibility of punitive damages provides one of the most effective deterrents of future misconduct by a defendant or by others who may be similarly tempted to engage in deceptive business practices.

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140, 143 (Mo. banc 2005) (Teitelman J., concurring) (overruled on other grounds by *Badahman*, 395 S.W.3d at 40). Creating a threat of greater damages is "justifiable when wrongdoing is hard to detect." *Poage v. Crane Co*., 523 S.W.3d 496, 524 (Mo. App. 2017). For statutes to effectuate the legislature's goals of protecting consumers, the threat of damages must be "great enough to dissuade a company from engaging in wrongdoing." *Id*. Allowing cumulative remedies is justified in repossession cases given the "well documented repossession abuses," *Jacobs*, A.2d at 504, especially when creditors can easily foreclose the possibility of any damages in defective notice cases if they take the simple steps of copying a compliant notice from the statute.

CONCLUSION

Precluding class certification for consumers who have had collection judgments wrongfully taken against them is contrary to the fundamental purpose of consumer class actions: to allow those who have been wronged, the "small people" Judge Wolff spoke of, to gain collective relief. The merits arguments of Relator and the MBA are irrelevant to the propriety of class certification, the sole issue before this Court. However, if these arguments are addressed, the Court should find against them. The UCC's statutory requirements are of no consequence if

they are ignored. Missouri's long-standing practices of applying the absolute bar rule and permitting cumulative remedies are crucial to deterring creditors' non-compliance and protecting consumers. The contrary arguments contravene legislative intent and would produce inequitable outcomes.

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). The foregoing brief contains 12,064 words, including the cover, the certificate of service, this certificate, and the signature block.

/s/ David Angle

CERTIFICATE OF SERVICE

I certify on December 18, 2018, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record and was also served upon the judge in the trial court by e-mail.

/s/ David Angle