IN THE
SUPREME COURT OF MISSOURI

No. SC93951

DAVIS R. CONWAY and SHERI D. CONWAY,

Appellants

v.

CITIMORTGAGE, INC. and
FEDERAL NATIONAL MORTGAGE ASSOCIATION, INC.,

Respondents.

Appeal From Eleventh Judicial Circuit,
St. Charles County, Missouri
Cause No. 1111-CV11266
Honorable Jon A. Cunningham, Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

BRYAN CAVE LLP
Louis F. Bonacorsi, #28331
Amy J. Thompson #44352
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
(314) 259-2020 (facsimile)
lfbonacorsi@bryancave.com
athompson@bryancave.com

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

POINT RELIED ON

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE MISSOURI MERCHANDISING PRACTICES ACT ("MPA") DOES NOT APPLY TO ACTIONS THAT BEAR NO RELATIONSHIP TO APPELLANTS' INITIAL LOAN TRANSACTION, BECAUSE SUCH CONDUCT IS NOT "IN CONNECTION WITH" A SALE AS REQUIRED BY THE MPA.

(Responding To Appellants' Point I).

State ex rel. Koster v. Portfolio Recovery Assoc., 351 S.W.3d 661 (Mo. App. E.D. April 5, 2011).

State ex rel. Koster v. Prof'l. Debt Mgmt. LLC, 351 S.W.3d 668 (Mo. App. E.D. April 5, 2011), *transfer denied* Dec. 2, 2011.

Missouri Merchandising Practices Act, § 407.020 RSMo.

STATEMENT OF FACTS

Appellants, Davis R. and Sheri D. Conway, obtained a mortgage loan from Pulaski Bank in 2007 to purchase property located at 4156 Hueffmeier Road in Wentzville, Missouri ("Hueffmeier Property"). (LF at 5 ¶ 6). The loan was secured by a Deed of Trust. (*See* Substitute Brief of Appellants ("App.Brf.") at 15). Sometime after loan origination, CitiMortgage, Inc., ("CMI") began servicing the loan. (LF at 5, ¶ 7). Neither CMI nor Fannie Mae (hereafter "Respondents") was a party to the original 2007 loan transaction. (*See* LF at 5, ¶ 7) (acknowledging that, "Plaintiffs . . . purchased a mortgage loan from Pulaski Bank").

According to the Conways, they planned to renovate the house and so never moved in. (LF at 5, ¶ 8). They continued to reside at 403 Quiet Field Court in St. Peters, Missouri ("the Quiet Field Property"). *Id.* A few months later, in June 2008, the vacant house on the Hueffmeier Property was damaged by fire and, ultimately, was torn down. (LF at 5, ¶ 9). The Conways received $150,000 in insurance proceeds as a result of the fire and that money was held in escrow by CMI to pay for reconstruction. (LF at 5, ¶ ¶ 9-10). The Conways began building a larger new house and planned on spending $350,000 more to rebuild, in addition to the insurance proceeds. (LF at 5 ¶ 10). CMI released insurance money to the Conways as they submitted the bills. (LF at 5, ¶ 10).

By August 1, 2009, the Conways had spent all but $15,000 of the $150,000 in insurance money but were not close to completion of the new house. (LF at 5, ¶ 11). Appellants allege that CMI informed them it could not release the final $15,000 until the house was complete. (LF at 5, ¶ 12).

The Conways fell behind on their mortgage payments and went into default. (*See* LF at 6, ¶ 13). By January 2011, the Conways had stopped construction on the unfinished home. (LF at 5, ¶ 12). As a result, the final $15,000 in insurance proceeds, intended for reconstruction of the home, remained in escrow. (LF at 5-6, ¶ ¶ 12-17). By April 2011, the Conways continued in default and the Property was sold at foreclosure on April 21, 2011. (LF at 6, ¶ ¶ 13-14).

The Conways brought suit against CMI and Fannie Mae on December 21, 2012. (LF at 1). The Conways ("Appellants") asserted only a single cause of action under the Missouri Merchandising Practices Act ("MPA"). (LF at 8). The Conways alleged that Respondents used "fraud, false pretense, false promise, misrepresentation or unfair practice" in connection with the 2007 sale of the mortgage loan to Appellants by Pulaski Bank. (LF at 7, ¶ 23). While Appellants contend that the operative consumer "sale" supporting their MPA claim was the initial loan transaction (LF at 7 ¶ 22), they fail to assert any allegations of wrongdoing or unfair practices associated with this initial loan transaction. (*See* LF at 4-8). Instead, the Conways complain about alleged acts and/or omissions of the Respondents leading up to, and in connection with, the 2011 foreclosure. (*See* LF at 7, ¶ 22).

Significantly, Appellants do not allege that they ever advised CMI that the Quiet Field Property should be listed as the official address at which they were to receive all mortgage statements and official notices. (*See generally*, LF at 4-8). Nevertheless, Appellants make the conclusory allegation that the Notice of Sale should not have gone to the Hueffmeier Property because Respondents had "actual and constructive notice"

that they were residing elsewhere. (LF at 7, ¶ 22(a)). Based on this assertion, Appellants then contend that they failed to receive proper notice of the foreclosure sale and that sending the Notice of Sale to the Hueffmeier Property rather than the Quiet Field Property violated the MPA and deprived them of the opportunity to redeem the property after the sale. (LF at 6, ¶ 15; 7, ¶ 22(a)). The Conways also complain of CMI's failure to apply the remaining funds to Plaintiffs' arrearage and remit the $15,000 escrow balance to them after foreclosing. (LF at 7, ¶ 22(b)&(c)).

In sum, all of Appellants' allegations relate to the servicing of their loan and the foreclosure on their Property rather than the handling of their initial loan transaction. (*See* LF at 7, ¶ 22).

Respondents filed a joint Motion to Dismiss for Failure to State a Claim on June 11, 2012. (LF at 2 and 13). The Trial Court granted the Motion to Dismiss on March 6, 2013. (LF at 28-29). The Court of Appeals upheld that dismissal. *Conway v. CitiMortgage, Inc.*, ED 99836, 2013 WL6235864 (Mo.App.E.D. December 3, 2013).

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE MISSOURI MERCHANDISING PRACTICES ACT ("MPA") DOES NOT APPLY TO ACTIONS THAT BEAR NO RELATIONSHIP TO APPELLANTS' INITIAL LOAN TRANSACTION, BECAUSE SUCH CONDUCT IS NOT "IN CONNECTION WITH" A SALE AS REQUIRED BY THE MPA.

(Responding To Appellants' Point I)

Appellants cannot establish a relationship between the origination of Appellants' loan in 2007 and the alleged fraudulent acts in 2011. Nevertheless, in an effort to assert a claim under the Missouri Merchandising Practices Act ("MPA"), they seek to expand the scope of the MPA by judicial fiat. The MPA regulates commercial practices "in connection with" the sale or advertisement of merchandise. Appellants' claimed wrongful acts were not, however, made "in connection with" the sale or advertisement of merchandise. Appellants' argument — that foreclosure activity falls under the MPA because, at some point in the past, there was a sale — ignores the plain language of the statute. Thus, their claims fail and the trial court's granting of Respondents' Motion to Dismiss was proper. Respondents respectfully request the Court to uphold the well-reasoned judgment of the trial court and affirm the dismissal of the Appellants' claims.

A. Standard of Review.

The standard of review for an appellate court reviewing the grant of a motion to dismiss is *de novo*. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). In reviewing

the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and are construed liberally in favor of the plaintiffs. *Id.* A motion to dismiss is appropriately granted if the facts alleged in the plaintiffs' petition fail to "meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

Although courts treat all of the factual allegations in a petition as true, "conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief can be granted." *Hansen v. Ritter*, 375 S.W.3d 201, 205 (Mo.App.W.D. 2012) (quoting *Hendricks v. Curators of the Univ. of Mo.*, 308 S.W.3d 740, 747 (Mo.App.W.D. 2010)). [1]

[1/] Thus, this Court is not required to accept as true the bare legal conclusion that Respondents were required to send the foreclosure notice to the Quiet Field address because they had "actual and constructive" notice of a different address. Though not at issue in this appeal, mailing a foreclosure notice to the address furnished by borrowers for mailing official loan related correspondence constitutes proper notice to a borrowers' "last known address," even where the mortgagee has notice of a different address for the borrower. *Woolsey v. Bank of Versailles*, 95 S.W.2d 662, 667 (Mo.App.W.D. 1997) (sending notice to last address furnished by borrower for purpose of mailing loan-related notices sufficient, even where lender had notice of a new/different address).

B. Only Conduct That Bears a Relationship In Fact to the Sale is Actionable Under the MPA.

1. Foreclosure and Loan Servicing Activities Are Not Activities "In Connection with" a sale.

The MPA makes it unlawful to engage in:

> deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact *in connection with the sale or advertisement of any merchandise* in trade or commerce.

§ 407.020.1 RSMo. Thus, the MPA expressly qualifies its prohibition of unfair practices by requiring proof that the unfair practice occurred "in connection with the sale or advertisement of merchandise." §407.020.1 RSMo. (emphasis added). Therefore, if the alleged acts of deception or unfair practices are not in connection with the sale or advertisement of merchandise, such acts cannot form the basis of a statutory claim under the MPA. *State ex rel. Koster v. Prof'l. Debt Management LLC*, 351 S.W.3d 668, 671 (Mo.App.E.D. 2011), *transfer denied* Dec. 6, 2011 (upholding dismissal of MPA claim based on post-sale conduct by debt collector because actions were not "in connection with the sale or advertisement"); *See also Williams v. Regency Fin'l. Corp.*, 309 F.3d 1045, 1050 (8th Cir. 2002) (no MPA claim against secured creditor relating to repossession of car because alleged violations were not in connection with sale or transfer of car to the debtor).

In *Koster v. Portfolio Recovery Associates*, and its companion, *Koster v. Prof'l.*

Debt Management, the Attorney General lost arguments nearly identical to those Appellants make here. *See State ex rel. Koster v. Portfolio Recovery Assoc.*, 351 S.W.3d 661 (Mo.App.E.D. 2011), *transfer denied* Dec. 6, 2011 and *Koster v. Prof'l. Debt Management*, 351 S.W.3d 675. In both cases, the Attorney General sought transfer to this court and in both cases, this Court denied transfer. Now, Appellants here and in the companion case, *Watson v. Wells Fargo*, Cause No. SC93769, seek to re-argue the same arguments they previously urged and were rejected in *Portfolio Recovery* and *Prof'l Debt Management* in their entirety.

Both *Portfolio Recovery* and *Prof'l. Debt Management* involved allegations of post-sale wrongdoing by third party debt collectors that had allegedly violated the MPA by engaging in unfair practices. 351 S.W.3d at 662-63. The debt collectors were not, however, parties to the initial consumer transaction, nor were the consumers complaining of unfair practices related to the initial transaction. *Id.* at 663. The trial court granted Respondents' Motion to Dismiss after concluding that the alleged unfair acts were not made "in connection with the sale or advertisement of any merchandise," as required by the MPA. *Id.* The trial court's dismissal was upheld on appeal on the same basis, namely, because the MPA was held not to extend to activities that occurred after the initial sale of merchandise that bore no connection to the sale and were performed by persons who were not parties to the initial transaction. *Id.* at 667.

In concluding that the phrase "in connection with a sale," did not apply to post-sale conduct the Eastern District stated:

> We are not persuaded that actions occurring after the initial sales

> transaction, which do not relate to any claims or representations made before or at the time of the initial sales transaction, and which are taken by a person who is not a party to the initial sales transaction, are actions made 'in connection with' the sale or advertisement of merchandise as required by the MPA.

Id. at 667. *See also Williams*, 309 F.3d at 1050 (claims relating to repossession of car were not in connection with sale or transfer of car to the debtor).

In *Prof'l. Debt Management*, the court of appeals "guided by the unequivocal plain language of the MPA as drafted by the legislature" held that activities that took place long after, and were unrelated to the original transaction, were not activities "in connection with" the sale or advertisement of merchandise and therefore, did not fall within the ambit of the MPA. 351 S.W.3d at 675. The court refused to "undertake a legislative role and write into the MPA language that does not exist." *Id.* at 672, 675.

In short, under existing Missouri law, the alleged unfair practice must relate directly to the "*initial* sale or advertisement," and to claims or representations made "*before* or *at the time of* the initial sales transaction" to fall under the MPA. *See Portfolio Recovery*, 351 S.W.3d at 667; *Prof'l. Debt Mgmt*, 351 S.W.3d at 675 (emphasis added). The MPA simply does not reach actions related to foreclosures that take place long after the initial loan transaction, by entities that were not parties to the original transaction, where there is no allegation of unfair practices at or before the time of the original transaction.

Federal courts have reached the same conclusion regarding the meaning of the MPA as in *Portfolio Recovery* and *Prof'l. Debt Management.* *See e.g.*, *Williams,* 309 F.3d at 1050 (MPA did not apply to borrower's claims against auto finance company seeking to enforce its lien because alleged unfair practices were not "in connection" with the purchase but instead related solely to repossession of a car). *Hutsler v. Wells Fargo Home Mtge., Inc*., 2013 WL 5442559 (E.D. Mo. Sept. 30, 2013) (dismissing MPA claim involving allegations of wrongful foreclosure and failure to properly consider loss mitigation options or explain decisions because the alleged conduct in 2012 had no relationship in fact to the advertisement or sale of the loan transaction in 2001). [2/]

[2/] *See also Wivell v. Wells Fargo Bank, NA*, 2013 WL 3665529, *6 (W.D.Mo. Mo. July 12, 2013) (dismissing MPA claim on ground that foreclosure was not an advertisement and borrowers did not purchase or lease anything beyond the initial purchase of their home); *Reitz v. Nationstar Mtge. LLC*, __ F.Supp._, 2013 WL 3282875, *19 (E.D.Mo. June 27, 2013) (alleged unfair practices relating to denial of loan modification requests failed to state a MPA claim because borrower did not "purchase or lease" anything); *Hinten v. Midland Funding, LLC*, 2013 WL 5739035 (E.D. Mo. June 10, 2013) (dismissing MPA claim in class action alleging unfair debt collection practices because actions were not in connection with a sale); *Hess v. Wells Fargo Home Mtge.*, 2012 WL 872752 (E.D.Mo. March 14, 2012) (allegations relating to foreclosure efforts and post-origination transfer of note and deed of trust failed to state a claim under the MPA because there was no relationship between the initial purchase and the alleged

2. Appellants and the Attorney General Misinterpret the "In Connection With a Sale or Advertisement" Requirement.

Appellants, and the Attorney General writing as *amicus curiae*, take issue with the definition of "in connection with" used in *Portfolio Recovery*. In particular, the Attorney General complains that the *Portfolio Recovery* court used only one of multiple definitions for the term "connection" listed in the *Merriam-Webster Dictionary* and failed to interpret the phrase "in connection with" as a whole. (AGs Brf. at 6, 14). However, a review of caselaw interpreting the same phrase used in other statutes and regulations supports the existing and predominant view that the plain meaning of "in connection with" requires, at the very least, a temporal nexus between the alleged unfair practice and the sale.

---

conduct); *Barnes v. Fed. Home Loan Mtge. Corp.*, 2013 WL 1314200 (W.D.Mo. March 28, 2013) (dismissing MPA claim relating to right to enforce the note on grounds that Defendants were strangers to the initial loan transaction, and servicing a loan is not a sale); *Ball v. Bank of New York*, 2012 WL 6645695, *5 (W.D.Mo. Dec. 20, 2011) (alleged conduct relating to foreclosures and the ownership of promissory notes was not in connection with sale or advertisement); *Willis v. U.S. Bank*, 2012 WL 3043023 (E.D. Mo. July 25, 2012) (dismissing MPA claim for unfair practices relating to a requested loan modification and ownership of the Note because allegations were not "in connection with" the initial purchase).

For example, the Securities Exchange Act of 1934 ("1934 Act"), similar to the MPA, is a broad remedial statute that empowers government enforcement to protect the public and private action. *See Tcherepnin v. Knight*, 389 US 332 (1967) (describing the 1934 Act as remedial statute). Using language similar to the MPA, § 10b(5) of the 1934 Act makes it unlawful "[t]o use or employ, *in connection with the purchase or sale of any security* . . . any manipulative or deceptive device or contrivance . . . ." 15 U.S.C. § 78j(b). Interpreting this provision, the United States Supreme Court has emphasized that the remedial purposes of the 1934 Act are not a justification for interpreting a specific provision "more broadly than its language and the statutory scheme reasonably permit." *Touche Ross & Co. v. Redington*, 442 US 560, 578 (1979) (quoting *SEC v. Sloan*, 436 U. S. 103, 116 (1978)). Thus, under § 10b(5), the "in connection with" test has been construed as requiring that the deception "coincide" with the sale of securities, *SEC v. Zandford*, 535 US 813, 822 (2002), and have "direct pertinence" to the purchase or sale of the securities at issue. *Rand v. Anaconda-Ericsson, Inc*., 794 F.2d 843, 847 (2d Cir.), *cert. denied*, 479 U.S. 987 107 S.Ct. 579 (1986) (citing *Chemical Bank v. Arthur Andersen & Co*., 726 F.2d 930, 942 (2d Cir.) *cert. denied*, 469 U.S. 884 (1984).

Accordingly, courts have determined that where otherwise fraudulent statements or omissions occur solely after the decision to buy or sell securities, those statements or omissions cannot be deemed "in connection with" a purchase or sale of securities. *Burns v. Prudential Securities, Inc*., 218 F.Supp.2d 911 (N.D.Ohio 2002). *See also In re JWP Inc. Securities Litig*., 928 F.Supp. 1239, 1253 (S.D.N.Y.1996) ("Misrepresentations made after the purchase or sale in question cannot satisfy the 'in connection with'

requirement."); *Sassoon v. Altgelt 777, Inc*., 822 F. Supp. 1303 (N.D.Ill. 1993) (defendant's silence after the "purchase or sale" could not possibly have caused the transaction and only its silence prior to the purchase or sale could even conceivably be actionable under 10(b)); *Schwartz v. Novo Industri*, A/S, 658 F.Supp. 795, 799 (S.D.N.Y.1987) ("statements made ... subsequent to plaintiff's purchase[] are not in themselves actionable under Section 10(b)"); *Cahill v. Arthur Andersen & Co*., 659 F.Supp. 1115, 1124 (S.D.N.Y.1986) ("[S]ince plaintiff had already sold his shares at the time of the publication of the preliminary prospectus, he cannot have been injured by defendant's allegedly fraudulent acts occurring more than two years after the sale").

Similarly, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") prohibits state-law based class actions alleging "a misrepresentation or omission of a material fact *in connection with the purchase or sale* of a covered security." 15 U.S.C. § 78bb(f)(1)(A). The United States Supreme Court recently confirmed that, under SLUSA, the phrase "in connection with" means that actions were "*material to*" and "*coincide[d] with*" the purchase or sale of a covered security. *Chadbourne & Parke LLP v. Samuel Troice*, __U.S.__, 134 S.Ct. 1048, 1066 (Feb. 26, 2014) (emphasis added internal quotations omitted). *See also Roland v. Green*, 675 F.3d 503, 520 (5th Cir. 2012) (holding SLUSA's "in connection with" requires that the fraud and the stock sale "coincide or be more than tangentially related").

Likewise, the phrase is also found in the Federal Acquisition Streamlining Act ("FASA"), which limits jurisdiction of the courts to hear the protests of government contractors "in connection with the issuance or proposed issuance of a task or delivery

order." 41 U.S.C. § 4106(f)(1) (2006). In *Mori Assoc. v. United States*, 113 Fed.Cl. 33, 38 (2013), the Court of Federal Claims explained that the phrase "in connection with" means that there must be "a *direct and causal* relationship between two things that are mutually dependent." *Id.* at 37 (citing *DataMill, Inc. v. United States*, 91 Fed. Cl. 740, 756 (2010)) (emphasis added). Additionally, procurement decisions made *after* task orders have been issued are not be affected by the FASA prohibition because of the lack of a direct, causal relationship between the two. *Mori Assoc*., 113 Fed.Cl. at 38.

The United States Sentencing Guidelines also contain an "in connection with" requirement with respect to defendants found to have "used or possessed any firearm or ammunition *in connection with* another felony offense . . . ." U.S.S.G. § 2k2.1(b)(6)(B) (2011) (emphasis added). Courts, interpret "in connection with" as requiring that the firearm must have had some "purpose or effect" with respect to the crime, and its presence could not have been "the result of accident or coincidence." *US v. Regans*, 125 F.3d 685, 686 (8th Cir. 1997). The Eighth Circuit Court of Appeals has also interpreted the requirement as meaning that there must be a "temporal link" between the firearm and the felony. *See US v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008) (where evidence failed to prove a "temporal link" between firearm and the possession of a quantity of illegal drugs, government failed to show that the gun had been used in connection with the crime of possession). Indeed, even in *United States v. Loney*, a case cited by the Attorney General in his *amicus* brief, the Third Circuit, interpreted the "in connection with" test as requiring that the gun have been carried both "*during* and in relation to" the crime. 219 F.3d 281, 287 (3rd Cir. 2000) (emphasis added).

These cases confirm that the plain meaning of the phrase requires that the alleged conduct and the specified event "coincide" and be directly pertinent (material) to each other. The Eastern District used slightly different words in *Portfolio Recovery* and *Prof'l. Debt Management*, when it found that, to be "in connection with a sale or advertisement,' the purported unfair practice must have occurred "before or at the time of" the initial sales transaction" and have a relationship in fact with the initial sales transaction. However, the interpretation was the same. *Portfolio Recovery*, 351 S.W.3d at 665; *Prof'l. Debt Management*, 351 S.W.3d at 672. *Accord Popkin v. Gindlesperger*, 43 A. 3d 347, 354 (Md. 2012) (defining "'in connection with" as requiring a "relationship in fact" and determining that statutory requirement that action be "in connection with a disciplinary hearing" required that the action take place during the hearing).

The Attorney General relies on *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005) for the proposition that the "in connection with" is satisfied any time conduct is in some way "linked with" a sale, (see AG's Brf. at 14). *Cutty's*, however, is distinguishable because the defendant was a party to the initial transaction and the alleged misconduct of deceptive representations and omissions relating to the camping club and collecting fees began at the time of original sale. *See id.* at 521, 528. Thus, *Cutty's* does not support the Attorney General's proposition that a tangential connection to a past sale is sufficient to satisfy the "in connection with" requirement.

3. The "Before, During, and After" Section of the MPA Does not Eliminate the Requirement that the Purported Unfair Practice be "In Connection With" a Sale or Advertisement of Merchandise.

Appellants' argue that "stand-alone post-sale unlawful acts" *are* covered by the MPA because of the "before, during and after the sale language" that appears in the last sentence of § 407.020.1 RSMo. This language reads:

> Any act, use or employment ***declared unlawful*** by this subsection violates this subsection ***whether committed before, during or after the sale***, advertisement or solicitation.

(Emphasis added). Based on this language, Appellants claim that the MPA "applies to acts occurring "before, during or after the sale." (*See* App.Brf. at 12). Under this theory, however, a "sale" would extend into infinity. Such an interpretation would encompass any dispute occurring at any point subsequent to a sales transaction between a consumer and a commercial entity, regardless of how long after the sale it occurred, so long as it had some minimal nexus to the sale.

Focusing on just this one sentence of the MPA would rob the phrase "in connection with" a sale of any meaning and render it superfluous. The legislature is presumed not to have enacted a meaningless provision." *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 805 (Mo. banc 2003). *Cf. DePeralta v. Dlorah, Inc. d/b/a Nat'l American University,*, 2012 WL 4092191, *8 (W.D.Mo. Sept. 17, 2012) (cautioning that allowing MPA claims where alleged conduct was not in connection with sale or advertisement would give plaintiffs "a roving commission" to ferret out

violations). *See also Staley v. Missouri Dir. of Rev.*, 623 S.W.2d 246, 250 (Mo. banc 1981) ("[a]ll provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning").

Moreover, this "before, during and after" provision is limited to, acts "declared unlawful." *Id.* Thus, under § 407.020.1, an act must first be "unlawful" as defined by the MPA before the phrase, "committed before, during or after the sale" is considered. §407.020.1 RSMo. By the plain terms of the MPA therefore, if an act is not "in connection with" a sale or advertisement, it is not unlawful, and therefore the "before, during and after" proviso would never be triggered. *See* § 407.020.1 RSMo (defining "unlawful practice" as any unfair practice *in connection with the sale or advertisement* of any merchandise in trade or commerce . . . ." (emphasis added)). *See also* MAI 39.01.

The interpretation advanced by Appellants focuses on the "before, during and after a sale" language and disregards the "in connection with a sale" language. "[I]t is fundamental that a section of a statute should not be read in isolation from the context of the whole act," as Appellants suggest. *State v. Haskins*, 950 SW 2d 613, 615 (Mo.App. S.D. 1997) (citing *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 592, 7 L.Ed.2d 492 (1962). In interpreting legislation, courts '"must not be guided by a single sentence ..., but [should] look to the provisions of the whole law, and its object and policy.'" *Haskins*, 950 S.W.2d at 615 (quoting *Nat'l Adver. v. Highway & Transp. Comm'n*, 862 S.W.2d 953, 955 (Mo.App.E.D. 1993).

Furthermore, Appellants' argument has already been rejected by the court of appeals in *Portfolio Recovery* and *Prof'l. Debt Management*. *See* 351 S.W.3d at 667; 351

S.W.3d at 674. In those cases, the Eastern District properly gave effect to the entire statute by construing the "in connection with" and "before, during, and after" requirements together. *See* 351 S.W.3d at 667; 351 S.W.3d at 674. The Eastern District determined that the "before, during or after the sale," clause did not eliminate but rather, modified the requirement that the alleged unlawful activity must be made "in connection with" the sale or advertisement. 351 S.W.3d at 667; 351 S.W.3d at 674. Under the Eastern District's interpretation, the MPA extends only to conduct "after" a sale if the post-sale conduct bears a direct relationship in fact to the sale or advertisement itself. *Id.*

C. Defendants Alleged Actions Were Neither Temporally Related Nor Pertinent to the Initial Transaction and Thus Were Not "In Connection With" a Sale.

Appellants acknowledge in the Amended Petition that the "sale" on which they base their MPA claim is "the sale of the mortgage loan to plaintiffs." (LF at 7 ¶ ¶ 21-24). Nevertheless, like the plaintiffs in *Portfolio Recovery* and *Prof'l. Debt Management*, Appellants failed to allege any facts connecting their allegations to the original loan transaction. Instead, Appellants allege that Respondents engaged in unfair practices by: (a) sending notice of the foreclosure sale to the Hueffmeier address, rather than the Quiet Field address; (b) continuing to hold the $15,000 in insurance proceeds for repairs rather than paying down Plaintiffs' arrearage; (c) failing to remit the $15,000 escrow balance to Plaintiffs after foreclosing; (d) failing to provide proper notice of the foreclosure sale in violation of § 443.325 RSMo. (LF at 7, ¶ 22). Therefore, all of the wrongdoing alleged by Appellants involves the foreclosure on Appellants' home and CMI's handling of the

insurance funds. These activities occurred long ***after*** the conclusion of the original loan transaction and involve different parties from the ones the Conways dealt with in connection with the original loan transaction.

Appellants obtained their original loan from Pulaski Bank, not Fannie Mae or CMI. LF at 5, ¶ 7. *Portfolio Recovery, Prof'l. Debt Management*, and federal cases interpreting Missouri law have all held that the MPA does not extend to activities that occurred after the initial sale of merchandise by defendants who were not parties to the original consumer transaction. *See* 351 S.W.3d at 667; 351 S.W.3d at 675. *Accord, Willis v. U.S. Bank*, 2012 WL 3043023, *3 (E.D. Mo. July 25, 2012) (dismissing claim in part because servicer was not a party to the initial transaction); *Ball v. Bank of New York*, 2012 WL 6645695, *5-6 (W.D.Mo. Dec. 20, 2011) (actions were not sufficiently "in connection with" sale in part because servicers were strangers to the original loan transaction); *Barnes v. Fed. Home Ln. Mtge. Corp.*, 2013 WL 1314200 (W.D.Mo. March 28, 2013) (dismissing MPA claim against investor and servicer in part on ground that plaintiff had not purchased or leased anything from defendants who were not parties to the initial loan transaction). Because it is undisputed that Respondents were strangers to the initial loan transaction, Appellants cannot establish that their alleged post-sale conduct was "in connection with" the sale.

Appellants' claims are not pertinent to any unfair practices, claims, or representations that coincide with or were made "before or at the time of the initial transaction." There is no relationship in fact between the alleged unfair practices and the only relevant transaction: the closing of Appellants' mortgage loan. § 407.020 RSMo;

Portfolio Recovery, 351 S.W.3d at 665-67. The Conways' allegations in their Amended Petition are not "in connection with" the sale or advertisement of merchandise. The MPA simply does not reach Respondents' alleged conduct. *See Prof'l. Debt Management*, 351 S.W.3d at 674-75. Thus, the trial court's ruling should be affirmed.

D. ***Portfolio Recovery*** **and** ***Prof'l. Debt Management*** **Are Not in Conflict with** ***Schuchmann*** **and** ***Peel.***

Appellants and the Attorney General claim that *Portfolio Recovery* and *Prof'l. Debt Management* were wrongly decided and conflict with *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo. App. S.D. 2006) and *Peel v. Credit Acceptance Corp.*, __S.W.3d,__, 2013 WL 2301095 (Mo.App.W.D. May 28, 2013). *Schuchmann* and *Peel* are both distinguishable, however, because both dealt with defendants who took part in the original sales transaction, and both cases involved allegations of misconduct at the time of, and directly pertinent/causally related to, the initial transaction.

Schuchmann involved a seller who promised a lifetime warranty and then failed to honor it post-sale. *See* 199 S.W.2d at 231. The Southern District took note that there was "sufficient evidence" that the defendant was an entity that "preyed on unsophisticated consumers," "by inducing them to buy products based on the promise that the units would work for a "lifetime" or the problem would be fixed," under circumstances where the defendant should have known that the warranty might not be honored. *Id.* at 233. Without engaging in a detailed analysis of the meaning of "in connection with a sale," the *Schuchmann* court focused instead on cases interpreting the

Federal Trade Act, (a statute that employs very different language from the MPA, *see* discussion, *supra* at section H) to decide that the MPA, like the FTC, covers unilateral breaches of a lifetime guarantee. *See id.* at 233-32. In *Portfolio Recovery* and *Prof'l. Debt Management,* the Eastern District expressly recognized *Schuchmann* as an example of a case where there was a direct relationship between the worthless warranty made at the time of the sale and the later conduct of not honoring it. *See* 351 S.W.3d at 667 (citing *Schuchmann*, 199 S.W.3d 228, 231-32); 351 S.W.3d at 674 (citing *Schuchmann*). *Schuchmann* is not in conflict with, and provides no basis for revisiting the reasoning of, *Portfolio Recovery* and *Prof.'l Debt Management.*

Likewise, *Peel* is distinguishable because it involves allegations of unfair and deceptive practices occurring at or before the time of the transaction and a defendant who was directly involved in the original sale. In *Peel*, a seller purported to sell a car financed by the defendant, a closely connected financing entity, that never delivered legal title. *See* 408 S.W.3d at 195. The defendant had an ongoing relationship with the dealer from the time of the original transaction and had known from the beginning about the possession of the title by the dealer's financing entity. The defendant had also provided the sales contract and related documents, all of which bore the name of the defendant, and the consumer loan that enabled the sale to take place. *See id.* at 206. Thus, in *Peel*, the defendant was involved in the deceptive conduct "from the outset of the initial sale." *Id.* at 208.

While the *Peel* court suggests that that the *Portfolio Recovery* analysis is "narrow," even the Attorney General concedes this is dicta. (*See* A.G.'s Brf. at 4). *See*

also Peel, 408 S.W.3d at 207-08. More significantly, the *Peel* court acknowledged there was ample evidence of the necessary relationship in fact between the defendant's actions and the initial consumer transaction, thus satisfying the "in connection with a sale" requirement. 408 S.W.3d at 208. Thus, far from supporting the argument that *Portfolio Reco*very and *Prof'l. Debt Management* read the "before, during and after" language out of the MPA, *Peel* is an excellent example of a case involving conduct after the sale that fell under the MPA because it was directly pertinent to a purported deception that took place at or before the time of the sale.

In this case, the Conways do not complain about the original transaction, nor about any entity involved in the original transaction. Thus, *Peel* is distinguishable and does not conflict with *Portfolio Recovery* and *Prof.'l Debt Management.*

E. *Shelton* is Distinguishable and Misapplies the MPA.

Appellants cite to *In re Shelton*, a federal bankruptcy case, for the notion that cases involving the same "merchandise" and a long-term relationship between the parties meet the requisite "link" to the original sale to fall under the MPA. First, *Shelton* is again distinguishable from the facts of this case. The debtor in *Shelton* complained of the alleged failure to comply with certain HUD regulations incorporated in the original deed of trust and alleged failure to receive the benefit of her mortgage insurance premiums. Here, the Conways make no allegations of noncompliance with regulations or specific terms of the deed of trust, nor do they make any allegation relating to mortgage insurance. (*See* LF at 4-8).

Moreover, Appellants point to *Shelton*'s language to the effect that the MPA may

reach post-sale conduct where it involves a sale that "expressly encompass[ed] the possibility of such events as default and the exercise of rights of default" and contemplated "ongoing activities and benefits to the debtor." *Id.* at 32. If this were to be the standard for determining a connection with the sale, every contract with a default clause would fall within the scope of the MPA regardless of the parties' relationship to the original sale. Such a determination is tantamount to reading the "in connection with" a sale or advertisement requirement out of the MPA. Indeed, this is the very conclusion reached by the Eastern District about *In re Shelton*, "[i]ts interpretation deprives the statutory phrase 'in connection with' of any significant meaning. We find the bankruptcy court's opinion on this issue to be neither binding nor persuasive." *Conway*, 2013 WL 6235864, at *4.

F. The Obligation of Good Faith Does Not Eliminate the "In Connection with a Sale or Advertisement" Requirement.

Appellants claim that CMI failed to act in good faith in foreclosing rather than using the escrow money to pay down their arrearage. (*See* App.Brf. at 17). Appellants then cite to *Ward v. West County Motor Co*., Inc., 403 S.W.3d 82, 86 (Mo. banc April 9, 2013), for the proposition that lack of good faith constitutes an unfair practice and supersedes the requirement that the unfair practice be "in connection with a sale." (*See* App.Brf. at 17). This reasoning also renders the "in connection with" language meaningless as every alleged breach of duty would automatically fall within the MPA's reach. Appellants, however, misread *Ward*, as it does nothing to change the analysis requiring a "connection with" a sale under the MPA. In particular, *Ward* involved a car

dealership's alleged failure to honor oral *pre-sale* promises to return deposits if customers changed their mind about their purchases prior to taking delivery. The plaintiff then sued for breach of this pre-sale promise. *See id.* at 83-84. In deciding the case, the court relied upon 15 CSR § 60-8.040(1), which states: "It is an unfair practice for any person *in connection with* the . . . sale of merchandise to violate the duty of good faith . . . *Id.* at 86 (emphasis added). As there was a clear connection between the original transaction and the wrongful act, the "in connection with" requirement was fulfilled. Thus, there is simply no authority for exempting claims for breach of the duty of good faith dealings from the "in connection with" requirement.

Likewise, *Schuchmann* does not further Appellants' argument that good faith claims do not need to meet the "in connection with" requirement." Quite simply, *Schuchmann* did not involve the alleged violation of the obligation of good faith." *See generally*, *Schuchmann*, 199 S.W.3d 228.

Merely arguing that the obligation of good faith arose at the time CMI "agreed to service Appellants' loan" (App.Brf. at 12) does not bring the claim under the MPA. It is the *breach*, and not the obligation of good faith, that must directly relate to the initial sales transaction. *See* § 407.020.1; *Portfolio Recovery*, 351 S.W.3d at 667-68.

G. Appellants and The Attorney General Attempt to Obscure the Issue by Misconstruing the Law and Focusing on Irrelevant Issues.

Appellants and the Attorney General expend much energy refuting an argument that Respondents never made and that the trial court never relied upon; namely that the MPA applies only when the defendant is in privity with the consumer. Specifically, the

Attorney General claims that the "relationship in fact" requirement means that a defendant must have had involvement with the initial sales transaction between the buyer and the seller. (*See* AG's Brf. at 10) (citing *Portfolio Recovery*, 351 S.W.3d at 665)). This, the Attorney General asserts, is "simply a privity requirement by another name." (AG's Brf. at 10).

In similar fashion, the Conways complain that the Eastern District failed to follow *Gibbons v. J. Nuckolls, Inc*., 216 S.W.3d 667 (Mo. banc 2007), which held that privity was not a requirement under the MPA. (*See App. Brf. at 13-14*). However, both *Gibbons*, and the *Portfolio Recovery* line of cases make clear that the focus of the inquiry is whether the consumer has established the element of "in connection with the sale or advertisement of any merchandise in trade or commerce." *Gibbons*, 216 S.W.3d at 666.

The issue in *Gibbons* was whether an automobile wholesaler, who had engaged in deceptive conduct *prior to* the retailer's sale of the car to consumer, was a "person" under the MPA. *Gibbons*, 216 S.W.3d at 669. Thus, while the *Gibbons* court held that privity was not necessarily required, it did not hold that a lack of privity was wholly irrelevant.

Gibbons simply holds a party may seek restitution from a prior party in the stream of commerce who engaged in purported wrongdoing at or before the time of the initial sales transaction. *See id.* at 669-70 (parties may bring claims against defendants "who are similarly *upstream* from the consumer sale"). What is significant in *Gibbons* is that the misrepresentation occurred prior to the original transaction and was thus incorporated into the later sale to the consumer. *See id.*

Here, the Respondents were neither parties nor persons upstream from the

consumer sale whose actions played a role in the ultimate sale to the consumer. They are not accused of wrongdoing related to, or affecting, that initial transaction. *Gibbons* does not discuss, and provides no support for, the theory that a non-party who becomes involved with the consumer only after the initial sales transaction has taken place, constitutes conduct "in connection with" a sale simply because a sale may have taken place at some point in the past. *See id.* at 669-70.

What is more, *Portfolio Recovery* and *Prof'l. Debt Management* considered *Gibbons* and concluded that the misrepresentation occurred in connection with the sale to the consumer, because the wholesaler's misrepresentation was incorporated into the retailer's later sale to the consumer, and was relied on by the consumer. *Portfolio Recovery*, 351 S.W.3d at 666; *Prof'l. Debt Management*, 351 S.W.3d at 669. *Portfolio Recovery* explained that *Gibbon*s did not address conduct "that flows forward from the central transaction, as opposed to a fraud that began before the central transaction." *Portfolio Recovery*, 351 S.W.3d at 665. What is fatal to an MPA claim is the lack of a relationship in fact between the alleged wrongful conduct and the sale, not privity.

1. Appellants Attempt to Distract By Focusing on the "Nature of the Merchandise" Which is Not Relevant to the MPA Analysis.

While Appellants suggest the "*nature* of the merchandise" (*see* App.Brf. at 18) (emphasis added)), should be considered when determining whether Appellants could meet the "in connection with" requirement of the MPA, neither the MPA nor the cited caselaw supports this proposition. Instead, it is the relationship between the alleged conduct and the initial sale or advertisement that is determinative of whether a claim falls

under the MPA. *See* § 407.020.1 RSMo.

Nor is the fact that a Deed of Trust can be "traced" back to the initial point of sale or contemplates future performance, relevant to whether alleged post-sale *conduct* "directly relates" to the sale. (*See* AG's Brf. at 19). Most contracts and instruments (and even merchandise) can presumably be "traced" back to the original sales transaction, thus this conjectured standard amounts to no standard at all.

2. Other Cases Cited by Appellants are Inapplicable.

Appellants and the Attorney General rely upon *Narramore v. HSBC Bank USA, N.A.*, 2010 WL 2732815 (D. Ariz. July 7, 2010) (Arizona law) and *Beals v. Bank of America*, N.A., 2011 WL 5415174 (D.N.J. Nov. 4, 2011) (New Jersey law) as precedent for finding post-loan servicing activities suffice to meet the requisite "in connection with" the initial loan transaction. (*See* App.Brf. at 14-15). Neither case is binding on this Court, nor do they stand for the proffered proposition.

In *Narramore* and *Beals*, the district courts interpreted the statutes of different states that are not binding on this court. *See Hanch v. KFC Nat. Mgmt. Corp.*, 615 S.W.2d 28, 33 (Mo. banc 1981) ("We are not bound by general declarations of law made by lower federal courts). *Narramore* merely confirmed the undisputed proposition that a loan can be considered a "sale" under the Arizona statute. *See* 2010 WL 2732815, at *13. The court then suggested that the alleged post-"sale" communications were themselves sufficient to constitute an advertisement under established Arizona precedent. *Id.* Even if Missouri had a similar established precedent (which it does not), there is no allegation in the present matter of an unfair practice capable of constituting an

independent "advertisement."

In *Beals*, the New Jersey statute under review had a much broader definition of "unlawful practice" than the MPA's. *See* 2011 WL 5415174 at *17. That statute defines unlawful practice as conduct "in connection with the sale or advertisement of any merchandise. . . ***or with the subsequent performance of such person as aforesaid*** . . . ." N.J.S.A. 56:8-2 (emphasis added). The MPA contains no similar "subsequent performance" provision. *See* § 407.020.1 RSMo.[3/] Moreover, *Beals'* facts are distinguishable as the focus was on the alleged existence of a newly negotiated and signed loan modification agreement that the district court found constituted the extension of credit. *Id.* at **1-2, 16.

Furthermore, a recent New Jersey case suggests that *Beals* is limited to its facts. *See Depolink Court v. Rochman*, 64 A.3d 579, 587-88 (Sup. Ct. App. Div. 2013) (debt collection not activity "in connection with a sale" under the New Jersey statute if the debt collector is a stranger to the initial loan transaction).

Appellants also cite another distinguishable case, *Huffman v. Credit Union of Texas*, 2011 WL 5008309 (W.D.Mo. 2011). *Huffman* involved a defendant that had a connection to the original transaction, through its agent, as well as allegations of

---

[3/] The MPA's "before, during and after" language is not an equivalent of the New Jersey statute's "*subsequent performance*" provision. Unlike the "subsequent performance" language, the "before, during and after" language is not part of the actual definition of "unlawful practice" and appears only in the last sentence of § 407.020.1.

deceptive omissions at the time of initial purchase. *Id.* at *1, 5. What is more, *Huffman* distinguished *Portfolio Recove*ry and the Eighth Circuit's decision in *Williams* on the ground that those cases dealt with strangers to the initial transaction, whereas *Huffman,* dealt with a party involved in the initial transaction. *Id.* at *6. This case, like *Portfolio Recovery* and *Williams*, and unlike *Huffman*, involves Respondents who were not parties to the initial sales transaction.

H. The Attorney General's Policy Arguments for Overturning *Portfolio Recovery* and *Prof'l. Debt Management* are Misplaced.

The Attorney General seeks to expand the scope of the MPA despite current Missouri precedent, including *Portfolio Recovery* and *Prof'l. Debt Management.* (*See* AGs Brf. at 4-5).

1. The Remedial Nature of the Statute Does Not Justify Ignoring its Limits.

The Attorney General claims that *Portfolio Recovery* and *Prof'l. Debt Management* have been "destructive to consumer rights and the Attorney General's ability to police the marketplace" and "immunize" the mortgage industry for abuses suffered by homeowners after the closing of their loans. (AGs Brf. at 4-5). As support, the Attorney General points to the remedial nature of the statute and to language in *Ports Petroleum v. Nixon*, indicating the statute is designed "to cover every practice imaginable and every unfairness to whatever degree." (AGs Brf. at 2, 14 citing *Ports Petroleum v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001).

The Attorney General appears to reason from this excerpt that the reach of the

MPA must be read to cover all commercial conduct. Interpretation of the MPA begins with determining the meaning of its language and the intent of the legislature. *See State v. Haskins*, 950 S.W.2d 613 (Mo.App. 1997) (it is the function of the courts to construe and apply the law, not make it) and *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). "All canons of statutory interpretation are subordinate to the requirement that the Court ascertain the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning." *Butler*, 895 S.W.2d at 19.

Though a remedial statute may be subject to a liberal construction, courts are not at liberty to ignore the textual limits of the law as it is written. *Brake v. MFA Mutual Insurance Co.*, 525 S.W.2d 109, 112 (Mo.App.St.L. 1975) (construing Missouri's remedial Uninsured Motorist Act). Yet, this is exactly what the Attorney General advocates, a broader interpretation than the present caselaw allows.

Had the Missouri legislature wanted to create a statutory cause of action that did not require connection to a specific sale or advertisement, it certainly could have done so. Indeed, the Attorney General cites to several states' statutes that employ the broad language of the Federal Trade Commission Act, 15 U.S.C. 45(a) which provides exactly that expansive language: "Unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful." *See e.g.*, ALASKA STAT. § 45.50.471; LA. REV. STAT. § 51.1405(A). Other states cited by the Attorney General use the language of the Uniform Deceptive Trade Practices Act and have statutes that provide: Unfair methods of competition and unfair or deceptive acts or practices . . .in the conduct of any trade or

commerce are hereby declared unlawful . . . ." *See e.g.*, IL. COMP. STAT. CHAP. 815 § 505(2).

In fact, and rather telling, none of the cases relied on by the Attorney General interpret statutes imposing the "in connection with a sale" standard found in the MPA, except *Cutty's*, 694 N.W.2d 518, discussed *supra* at Section B(2). (*See* AG's Brf. at 3 n.1).

The Missouri legislature could have enacted a statute like those of Alaska, Louisiana, or Illinois, which do not require a "connection with" a sale or advertisement had it chosen to do so. Instead, it enacted the MPA with its specific language.

The Attorney General seeks to expand its arsenal by ignoring the very wording of the statute. This is precisely what this Court rejected in *Ports Petroleum* when it refused to interpret the MPA as applying to below-market sales of gasoline as the Attorney General urged. *See* 37 S.W.3d at 240. No valid basis exists for this judicial overhaul.

2. Adhering to the Limits of the Statute Does Not Immunize the Mortgage Industry.

Moreover, there presently exist remedies to address the wrongs that concern the Attorney General without the need to overturn *Portfolio Recovery and Prof'l. Debt Management*. Among others, MPA claims can be brought against the wrongdoers, including originating lenders, for conduct at or before the time of sale. In addition, tort, breach of contract, or equitable claims for wrongful foreclosure can be asserted for the type of claims the Appellants urge. *See Woolsey*, 951 S.W.2d at 666 n.2 ("Where there has been a wrongful foreclosure, the aggrieved party can either 'bring a suit in equity to

set aside the sale, or, let the sale stand and sue at law for damages").

The MPA was never intended to cover every commercial transaction. The "in connection with" requirement, in conjunction with the ascertainable loss requirement of § 407.025, operates as a valuable check on the balance struck by the MPA between the consuming public and the sellers of goods and services.

CONCLUSION

The MPA does not encompass Appellants' claims. Appellants alleged no unfair practice with a relationship in fact to their initial loan transaction. Under the plain language of the MPA, the trial court's decision should stand. Appellants failed to state a claim upon which relief should be granted. Respondents therefore respectfully request that this Court affirm the trial court's judgment in favor of Respondents.

Dated: March 18, 2014

Respectfully submitted,

BRYAN CAVE LLP

By: /s/ Amy J. Thompson

Louis F. Bonacorsi, #28331
Amy J. Thompson #44352
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
(314) 259-2020 (facsimile)
lfbonacorsi@bryancave.com
athompson@bryancave.com

Attorneys For Respondents Citimortgage, Inc. and Federal National Mortgage Association, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief for Respondents complies with Rule 55.03, and with the limitations contained in Rule 84.06(b) and local Rule 360. I further certify that this brief contains 9,570 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *Amy J. Thompson*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of March, 2014, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

Attorney for Appellant

Mitchell B. Stoddard
Consumer law Advocates
11330 Olive Blvd.
St. Louis, MO 63141
mbs@clalaw.com

Amicus Curiae

Chris Koster, Attorney General
James R. Layton, Solicitor General
Brian T. Bear
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
James.layton@ago.mo.gov
Brian.bear@ago.mo.gov

/s/ Amy J. Thompson