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IN THE SUPREME COURT OF MISSOURI

SC93951

DAVIS R. CONWAY AND SHERI D. CONWAY, PLAINTIFFS/APPELLANTS,

V.

CITIMORTGAGE, INC., AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, DEFENDANTS/RESPONDENTS

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT COURT,
ST. CHARLES COUNTY, MISSOURI
THE HONORABLE JON A. CUNNINGHAM, JUDGE

APPELLANTS' SUBSTITUTE REPLY BRIEF

Mitchell B. Stoddard, MBE # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 *tel*
(314) 692-2002 *fax*
mbs@clalaw.com

Attorneys for Appellants

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REPLY ARGUMENT

A. Introduction

Respondents do not contest that the MMPA is a remedial statute that must be broadly interpreted to accomplish its intended purpose of protecting consumers. Rather, Respondents argue that interpreting the phrase "after the sale" to mean the MMPA applies to unlawful acts that occur *after* a sale is akin to exercising "judicial fiat." (Resp. Sub. Br. at 4). In other words, Respondents are asking the Court to find that the MMPA's plain language is "too remedial," and must be narrowly tailored to fit within the standards established by, for example, federal securities laws. Respondents' interpretation of the MMPA reflects an "overly meticulous definition"[1] of "in connection with," and exhibits a fundamental misunderstanding of the Legislature's desire to protect consumers from businesses, not the other way around.

B. The Phrase "in connection with" does not Impose the Temporal Restrictions on MMPA Claims to the Extent Urged by Respondents

Respondents are largely correct when they argue that Appellants' interpretation of *after the sale* "*would encompass any dispute occurring at any point subsequent*

[1] In *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712 (Mo.App. E.D. 2008), the court held the MMPA was intentionally drafted broadly to prevent evasion by "overly meticulous definitions." *Id*. at 716.

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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." (Resp. Br. at 15). Apart from the word "minimal," which Appellants would delete, Respondents have accurately summed up Appellants' argument. Respondents go even further, however, and suggest that Appellants' interpretation of *after the sale* "would extend [MMPA protection] into infinity." (Resp. Br. at 15). While "infinity" may be a stretch, it is not inconceivable that the MMPA could apply for the duration of a *lifetime*.

That was precisely the case in S*chuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo.App. S.D. 2006), where the defendant breached its *lifetime* warranty to the plaintiff. *Id*. at 231. The "temporal nexus" Respondents seem committed to imposing on the MMPA is apparently broad enough to encompass a *lifetime* worth of coverage in certain instances. If the MMPA can apply for a lifetime, anything less than a lifetime should be within bounds as well.

Respondents would presumably concede that, with respect to *Schuchmann* at least, MMPA liability can extend for a *lifetime*. Thus, if the defendant's breach in *Schuchmann* had occurred fifty, rather than five years after the sale, Respondents presumably would agree that the MMPA still applies. It is not clear, however, whether Respondents' "temporal nexus" theory could survive where there is a fifty-year span between the sale and unlawful practice.

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C. Respondents' "Temporal Nexus" Theory is Arbitrary, Since Minor Changes to the Facts in Schuchmann would Result in no MMPA Liability

Ironically, Respondents' "temporal nexus" argument would not have changed the result in *Schuchmann* if, for example, the length of time between the unlawful act and the breach of the lifetime warranty were *significantly* longer. However, making even less significant changes to the *Schuchmann* facts *would* produce a different result, since almost no other fact pattern could survive Respondents' MMPA analysis.

For example, assume that instead of alleging a breach of the lifetime warranty, the plaintiff instead alleged the defendant failed to act in good faith by refusing to honor the warranty. There is practically no discernible difference between these two claims; however, Respondents' believe that no MMPA violation would result because breaching the duty of good faith does not occur "in connection with" a sale and, in fact, would render that phrase "meaningless." (Resp. Br. at 22). Similarly, assume that the *Schuchmann* defendant sold its business shortly after selling the HVAC unit to the plaintiff, and the new owner subsequently refused to honor the lifetime warranty. Respondents presumably believe the MMPA would not apply because the post-sale unlawful act was done by a non-party to the initial sale. (Resp. Br. at 7, 8, 10, 14, 18, 19, 20, 24, 25). Moreover, Respondents believe that *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. 2007) would not apply in

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this instance merely because the defendant was a downstream (i.e., after the sale), as opposed to an upstream (i.e., before the sale) party. (Resp. Br. at 24-25).

The above examples reveal how arbitrary and illogical Respondents' arguments play out when facts similar to those in *Schuchmann* change, even slightly. Respondents have simply failed, and understandably so, to articulate a rational basis for justifying their narrow, restrictive interpretation of the MMPA.

D. Respondents are Grasping at Straws when they Compare the MMPA to Federal Securities Laws and Sentencing Guidelines

Respondents cite the Securities Exchange Act of 1934 for the proposition that "in connection with" requires a "temporal nexus" between the sale of securities and the alleged unlawful act. Respondents neglect the fact that the Securities Exchange Act imposes pleading requirement that are non-existent in the MMPA.

Respondents' comparison of the MMPA to securities fraud legislation was anticipated long ago by former Attorney General William Webster, when he wrote:

> The third amendment to section 407.020 was in inclusion of the phrase "Any act declared unlawful by this subsection violates this subsection whether committed before, during or after the sale or advertisement." The original Act, as well as the pre-1985 amendments, failed to provide any guidance regarding a nexus between "unlawful act" and the "sale or

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> advertisement" of the merchandise. The statutory terms merely specified that the fraud must be "in connection with" the "sale or advertisement." Since the phrase "in connection with" is nondescript as to scope, and has been subject to a very narrow definition in security sales violations, the new phrase was necessary to make it clear that the legislature intended to confer jurisdiction over consumer fraud whether it occurred "before, during or after" the solicitation or sales transaction (citations omitted).

William Webster, Richard Thurman and Mike Finkelstein, *Combatting Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act*, 52 Mo. L. Rev. (1987) at 384. Thus, the Legislature intentionally drafted the MMPA so as to avoid any confusion that "in connection with" could be given the same interpretation as under federal securities laws.

As Respondents have noted, § 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). (Resp. Br. at 11). In *Burger v. Hartley*, 896 F. Supp. 2d 1157, 1173 (S.D. Fla. 2012), the court set forth the elements of a § 10b(5) claim as follows: (1) a material misrepresentation or omission, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance upon the misrepresentation or omission, (5) economic loss, and (6) loss causation.

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These elements mirror common law fraud, and notably absent is any language, unlike the MMPA, prohibiting "unfair practices."

The third element in *Burger* ("a connection between the misrepresentation or omission and the purchase or sale of a security") strongly suggests the fraudulent act must have *induced* the purchase of a security. If so, the violation could not *possibly* post-date the sale, since a sale could never be induced by an after-the-fact event. Moreover, the MMPA specifically excludes "scienter," "reliance" or "materiality" as elements of a claim.[2] Thus, drawing comparisons between the MMPA and federal securities laws does little to advance Respondents' argument.

Respondents' reliance on the United States Sentencing Guidelines is about as far removed from the MMPA as one can get. Respondents have cited *United States v. Smith*, 535 F.3d 883, 885 (8th Cir. 2008), which held that requiring a firearm to be present during the commission of a felony in order to trigger the enhanced sentencing guidelines under U.S.S.G. § 2k2.1(b)(6)(B)(2011) did not occur *in connection with* the principal crime of "knowingly and intentionally possessing methamphetamine in violation of 21 U.S.C. § 844(a))." *Id.* at 883. However, the court noted that the facts before it were "rare," which, in itself,

[2] For example, 15 CSR 60-9.020(2) states: "Reliance, actual deception, knowledge of the deception, intent to mislead or deceive, or any other culpable mental state such as recklessness or negligence, are not elements of deception as used in section 407.020.1."

necessarily means the customary standard *is* to find, for enhanced sentencing purposes at least, a connection between the possession of a firearm and a crime. *Id*. at 885. Moreover, the unlawful firearm possession in *Smith* occurred *concurrently* with the principal crime, which means the two events *did* have a "temporal nexus." This would be akin to CitiMortgage unlawfully foreclosing on Appellants' property within seconds after the closing. If anything, *Smith* provides that a "temporal nexus" alone is an insufficient basis for establishing a link between events. *Smith* hardly helps Respondents' argument.

Similarly, Respondents' reliance on *Popkin v. Gindlesperger*, 426 Md. 1, 43 A.3d 347 (2012) is unavailing. In *Popkin*, the issue boiled down to whether a statute that permitted witnesses and documents to be subpoenaed "in connection with" a police officer's disciplinary hearing allowed for the subpoenas to be issue before the hearing, or only at the time of the hearing. *Id*. at 10-11, 353. In finding that subpoenas could only be issued at the time of the hearing, the court noted that the statute omitted the phrase "before a hearing." *Id*. at 11-12, 354. This was significant because the Legislature had specifically included "before a hearing" in other sections of the same statute. *Id*. at 11-12, 354. Thus, there was a clear legislative intent in *Popkin* to restrict "in connection with" to the actual hearing itself. By contrast, the there is no indication in the MMPA that the Missouri Legislature intended to restrict coverage to unlawful acts occurring before a sale. To the contrary, the Missouri Legislature intended the MMPA to apply to unlawful acts occurring *before, during or after* a sale.

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E. Respondents' Interpretation of "in connection with" Entirely Supplants the Phrase "after the sale" and Renders it Meaningless

By including the phrase "in connection with" in the MMPA, the Legislature undoubtedly intended to ensure the existence of a "link" between the unlawful act and the sale. However, the Legislature also had a reason for including the phrase "after the sale" as well. Respondents have ignored this reason, other than to conclude that *after the sale* merely "modifies" *in connection with*. (Resp. Br. at 17).

The problem with this interpretation is that it renders *after the sale* meaningless. It means the ONLY necessary inquiry is whether the unlawful practice occurred *in connection with* the sale or advertisement of merchandise. If so, there will be an MMPA violation *regardless* of whether the unlawful practice occurred before, during or after the sale. The fact that the unlawful act may have occurred after the sale does absolutely nothing to establish whether an MMPA violation occurred. In such case, *after the sale* does not "modify" *in connection with*, it gets eviscerated by it completely. Since it cannot be assumed that *after the sale* is mere surplus language,[3] Respondents owed at least *some* analysis as to why the Legislature felt it was important to include *after the sale* in the MMPA.

Undoubtedly, Respondents' response is that Appellants' interpretation of *after the sale* renders *in connection with* meaningless. Respondents, like the Eastern

[3] See, *Bolt v. Giordano*, 310 S.W.3d 237, 242 (Mo.App. W.D. 2010).

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District, cannot fathom how *after the sale* and *in connection with* can stand side-by-side, with equal weight, under the MMPA's statutory scheme. However, this is true only because Respondents and the Eastern District have given *in connection with* such a narrow interpretation by restricting its applicability to pre-sale "claims and representations."[4] By contrast, a broad interpretation of *in connection with* goes beyond pre-sale claims and representations and considers, based on the nature of the sale itself, whether there is a connection between the unlawful act and the sale. The fundamental disconnect between Respondents and Appellants is that Respondents consider "in connection with" as a means by which the Legislature intended to *restrict* MMPA claims, while Appellants consider it to be a means by which the Legislature *expanded* them. If Appellants are correct, a plaintiff will almost always meet the "in connection with" test, as long as there is at least an indirect connection between the sale and unlawful act.

[4] See, *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661, 667 (Mo.App. E.D. 2011), and *State ex rel. Koster v. Professional Debt Management, LLC*, 351 S.W.3d 668, 674 (Mo.App. E.D. 2011).

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F. Respondents' Allegation that the Foreclosure Notice was Properly Sent to Appellants is a Factual Issue, and is Being Raised for the First Time Before this Court

Respondents cite *Woolsey v. Bank of Versailles*, 951 S.W.2d 662 (Mo.App. W.D. 1997) for the proposition that Respondents' foreclosure notice was adequate because it was sent to Appellants' "last known address."[5] However in *Woolsey*, the Court noted that the plaintiffs had specifically requested the defendant to mail all correspondence to the property that was ultimately foreclosed. *Id*. at 667. "At no time did the Borrowers request that the Bank mail correspondence pertaining to the loan to Edith Woolsey's home address, or the home address of any other Borrower . . . Nor is there any evidence in the record that the Bank ever did so on its own volition." Facts such as these were never developed in the instant case, and Respondents never raised this issue in their motion to dismiss. The Court should not consider affirming the trial court on this basis.

CONCLUSION

For the foregoing reasons, Appellants pray the Court to reverse the trial court's dismissal and to remand the case for further proceedings consistent with the Court's Opinion.

[5] Respondents incorrectly cited *Woolsey* as "95 S.W.2d 662."

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Respectfully Submitted,

/s/ Mitchell B. Stoddard
Mitchell B. Stoddard, # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 *tel*
(314) 692-2002 *fax*
E-Mail: mbs@clalaw.com

Attorneys for Appellants

CERTIFICATION

The undersigned certifies that on this 27th 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: Amy J. Thompson, Attorney for Respondents, One Metropolitan Square, 211 N. Broadway, Ste 3500, St. Louis, Missouri 63102.

The undersigned further certifies this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 2,741 words.

/s/ Mitchell B. Stoddard
Mitchell B. Stoddard, # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 tel
(314) 692-2002 fax
mbs@clalaw.com

Attorneys for Appellants