IN THE UNITED STATE DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

JASON ALLEN, individually and on behalf of all other similarly-situated current citizens of Missouri, Plaintiff, vs. JELLY BELLY CANDY COMPANY, Defendant.	Case No: **NOTICE OF REMOVAL** Removed from the Circuit Court of the City of St. Louis, State of Missouri Case No. 1622-CC11517

Defendant Jelly Belly Candy Company ("Jelly Belly") hereby effects the removal of this action from the Circuit Court of the City of St. Louis, Missouri to the United States District Court for the Eastern District of Missouri, Eastern Division. Removal is proper and this Court has subject-matter jurisdiction under the diversity statute, 28 U.S.C. § 1332(a), because Plaintiff and Jelly Belly are completely diverse and there is over $75,000 in controversy exclusive of interest and costs. Venue is proper under 28 U.S.C. § 1391 because a number of allegedly mislabeled products were sold in the City of St. Louis, Missouri, which is part of the District to which this case has been removed.

FACTUAL BACKGROUND AND STATE COURT PROCEEDINGS

1. On December 12, 2016, Plaintiff filed this lawsuit in the Circuit Court for the City of St. Louis, Missouri's Twenty-Second Judicial Circuit. On January 11, 2017, Plaintiff effectuated service of Plaintiff's Petition on Defendant Jelly Belly.

2. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the state court case file

is attached hereto as **Exhibit A** and incorporated herein by reference. Exhibit A includes all process, pleadings, motions and orders filed in this case.

3. Plaintiff's Petition alleges that the labels of Jelly Belly's Superfruit Mix, Sport Beans, and Sports Beans Extreme ("Jelly Belly Products") are false and misleading. *See* Ex. A., Petition ¶ 2.

4. Based on those allegations, the Petition alleges claims for violation of Missouri Merchandising Practices Act, RSMo. § 407.020 (the "MMPA"), and unjust enrichment. Ex. A., Petition ¶¶ 39–51.

5. The Petition seeks compensatory damages, disgorgement, restitution, injunctive relief, and attorneys' fees on behalf of Plaintiff, as well as a putative class consisting of all Missouri citizens who purchased the Jelly Belly Products since December 12, 2011. Ex. A., Petition ¶ 29, Prayer for Relief.

6. On January 11, 2017, Plaintiff, through counsel, made a settlement demand of $150,000 to settle Plaintiff's individual claims. Ex. B.

REMOVAL IS PROPER UNDER 28 U.S.C. § 1332(a)

7. District courts have traditional diversity jurisdiction over civil actions in which (1) there is complete diversity of citizenship, and (2) the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a).

The Parties Are Completely Diverse

8. Jelly Belly is incorporated in California and maintains its corporate headquarters in Fairfield, California. Petition ¶ 8. Accordingly, Jelly Belly is a citizen of California. *See* 28 U.S.C. § 1332(c)(1) (explaining a corporation is a "citizen of any State by which it has been incorporated and of the State where it has its principal place of business"); *see also Hertz Corp.*

v. Friend, 559 U.S. 77, 92–93 (2010) (explaining a corporation's principal place of business is the place where "a corporation's officers direct, control, and coordinate the corporation's activities," which is typically "the place where the corporation maintains its headquarters").

9. Plaintiff is a Missouri citizen and resident of the City of St. Louis. *See* Ex. A., Petition ¶ 6.

10. Accordingly, the complete diversity requirement is satisfied because Plaintiff is a citizen of Missouri and Jelly Belly is a citizen of California. *See* Ex. A., Petition ¶¶ 6 and 8.

The Amount In Controversy Is Satisfied

11. An action is removable when "the matter in controversy exceeds the sum or value of $75,000 . . . ." 28 U.S.C. § 1332(a).

12. The amount-in-controversy standard is satisfied if the removing party can make a "plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). In the Eighth Circuit, the amount in controversy is measured by "the value to the plaintiff of the right sought to be enforced." *Schubert v. Auto Owners Ins. Co.*, 649 F.3d 817, 821 (8th Cir. 2011) (quoting *Advance Am. Servicing of Ark. v. McGinnis*, 526 F.3d 1170, 1173 (8th Cir. 2008)).

13. With respect to his individual claims, Plaintiff seeks compensatory damages, or in the alternative, disgorgement or restitution pay. Although Plaintiff is vague about the precise "restitution" he seeks, his demand for restitution places in controversy at least the value of the retail sale, $2.29, generated by his alleged purchase of Jelly Belly's Superfruit Mix. Petition ¶ 6. Based on this, Plaintiff alleges the total value of his individual claim is at most equal to the refund of the purchase price, or $2.29. *Id.* ¶ 10.

14. Plaintiff also seeks attorneys' fees under the MMPA, Petition ¶ 29, Prayer for

Relief, which Courts consider in determining whether the amount in controversy exceeds the jurisdictional threshold. *Crawford v. F. Hoffman–La Roche Ltd.*, 267 F.3d 760, 766 (8th Cir. 2001) (removing party may include statutory attorney fees and punitive damages in amount in controversy); *see also Dowell v. Debt Relief Am., L.P.*, No. 07-27, 2007 WL 1876478, at *2 (E.D. Mo. June 27, 2007) (holding that attorneys' fees authorized under the MMPA count towards the amount in controversy and are considered when determining whether a plaintiff's individual claim meets the amount in controversy requirement of § 1332(a) (citing *Rasmussen v. State Farm Mut. Auto Ins. Co.*, 410 F.3d 1029, 1030 (8th Cir. 2005))); *Chamers v. Penske Truck Leasing Corp.*, No. 11-381, 2011 WL 1459155, at *4 (E.D. Cal. Apr. 15, 2011) (noting that the court could "reasonably anticipate thousands of dollars in attorneys' fees," recognizing that fees "often exceed the damages," and concluding that jurisdictional threshold was satisfied); *see also* Ex. A., Petition, Prayer for Relief.

15. Here, should Plaintiff prevail on his claims, it is highly likely (and more than plausible) that Plaintiff will accrue, and request, attorneys' fees in excess of $75,000. Although Plaintiff's alleged actual damages under the MMPA are minimal, Missouri courts have awarded attorneys' fees of over $100,000 under the MMPA where the plaintiff's damages, like the damages here, are minimal. *See, e.g.*, *Heckadon v. CFS Enters., Inc.*, 400 S.W.3d 373, 377 (Mo. Ct. App. 2013) (awarding attorney's fees of $114,390 when actual damages were $2,144); *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 195 (Mo. Ct. App. 2013) (awarding attorney's fees of $165,350 when actual damages for individual plaintiff were $11,008); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 369 (Mo. 2012) (en banc) (awarding

attorneys' fees of $72,000 when actual damages were $4,500)[1]; *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1025 (8th Cir. 2000) (claimed attorneys' fees of $125,000 with actual damages of $7,835); *see also Simmons v. PCR Tech.*, 209 F. Supp. 2d 1029, 1034–35 (N.D. Cal. 2002) (concluding that amount in controversy exceeded $75,000 based on court's recognition that the lawsuit would "require substantial effort from counsel" and its experience that fee awards are often significant).

16. While attorneys' fees cannot be precisely calculated at this time, maintaining a cause of action under the MMPA will require substantial effort from Plaintiff's counsel as the parties will need to conduct discovery into a whole host of issues, including, but not limited to, the premium allegedly paid for the Jelly Belly Products, how a reasonable consumer would construe the labeling at issue, and whether the labeling at issue complied with applicable regulations. Plaintiff will also have to engage in dispositive motion practice as Jelly Belly anticipates filing dispositive motions attacking the viability of Plaintiff's claims. As but one example, Jelly Belly expects to file a motion to dismiss, challenging Plaintiff's standing to assert claims for products he did not purchase and whether he has sufficiently alleged a claim under the MMPA. In light of the importance of this litigation to Jelly Belly—given its potential impact on its product labeling nationwide—it is highly likely (and more than plausible) that Plaintiff will expend more than $75,000 in attorneys' fees to litigate this matter to conclusion.

17. The amount in controversy is further satisfied because it would cost at least $75,000 to comply with Plaintiff's request for injunctive relief. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 33, 347 (1977) (noting that the amount in controversy is measured by

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[1] *See* Brief of Respondents, *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. 2012) (No. SC91369), 2011 WL 5104230, at *60. Ex. C.

the value of injunctive relief). In connection with his claim under the MMPA, Plaintiff seeks an injunction restraining Jelly Belly from "continuing to engage in deceptive, unfair, and false marketing of the Product." Ex. A, Petition, Prayer for Relief; R.S. Mo. Stat. § 407.025(1) (granting courts the discretion to "provide such equitable relief as [they] deem[] necessary or proper.") "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *James Neff Kramper Family Farm P'ship v. IBP, Inc*., 393 F.3d 828, 833 (8th Cir. 2005) (quoting *Hunt*, 432 U.S. at 347); *see also Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 929 (8th Cir.1965) ("although injury in an injunction suit may not be capable of exact valuation in money, this fact of itself does not negative federal jurisdiction"); *Sutter v. Aventis CropScience USA Holding, Inc*., 145 F. Supp. 2d 1050, 1053–54 (S.D. Iowa 2001) (denying motion to remand where value of injunctive relief sought exceeded $75,000); *Luna v. Kemira Specialty, Inc*., 575 F. Supp. 2d 1166, 1172–73 (C.D. Cal. 2008) (determining that amount in controversy exceeded $75,000 based on value of requested injunctive relief).

18. Here, the injunctive relief Plaintiff seeks would require Jelly Belly to cease selling the Jelly Belly Products in its current packaging. In order to comply with such an injunction, Jelly Belly would need to remove all boxes of the Jelly Belly Products from the shelves in stores and destroy those products. Doing this will require paying employees or an outside vendor to accomplish this task. Because Jelly Belly would not be able to sell the Jelly Belly Products during the several months it would take to create new packaging, it would incur a significant loss of sales during that time. *See, e.g., Saab v. Home Depot U.S.A., Inc.*, No. 06-0319-CV-W-SOW, 2006 WL 1877077, at *3 (W.D. Mo. July 6, 2006) (finding subject matter jurisdiction based on the requested injunctive relief that would cause the defendant to lose revenue). Based on the

steps needed to satisfy Plaintiff's injunctive relief, the cost of complying would exceed $75,000. Ex. D., Swaigen Decl., ¶¶ 3–4.

19. Finally, Plaintiff's settlement demand in the amount of $150,000 confirms that the amount in controversy exceeds the jurisdictional requirement. *See, e.g.*, *Parshall v. Menard, Inc.*, No. 4:16-CV-828 (CEJ), 2016 WL 3916394, at *4 (E.D. Mo. July 20, 2016) (rejecting the plaintiff's argument that his settlement demand of $217,500 did not support a finding that the amount in controversy has been met); *Prater v. Ball*, No. 12–CV–3493–S–DGK, 2013 WL 1755549, at * 2 (W.D. Mo. April 24, 2013) (explaining that a settlement offer is not necessarily determinative of the amount in controversy, but finding that the plaintiff's $500,000 settlement offer exceeded the $75,000 limit and the amount in controversy was satisfied); *Hall v. Vlahoulis*, No. 06–6107–CV-SJ-FJG, WL 2007 WL 433266, *1 (W.D. Mo. Feb. 5, 2007) (agreeing that settlement letters allow a defendant to reasonably ascertain the amount in controversy and finding a plaintiff's settlement demand for $300,000 demonstrated the amount in controversy exceeds $75,000); *see also Vermande v. Hyundai Motor Am., Inc.*, 352 F. Supp. 2d 195, 202 (D. Conn. 2004) (finding that "most courts have sensibly concluded that Rule 408 does not prevent them from considering a settlement demand for purposes of assessing the amount in controversy").

20. In sum, although a fact-finder might legally conclude that Plaintiff is only entitled to $2.29—or less—in actual damages, Defendant could be found liable for attorneys' fees and injunctive relief exceeding $75,000. As a result, the total amount in controversy could well exceed the jurisdictional threshold. Removal is therefore proper. *See Claxton v. Kum & Go, L.C.*, No. 6:14-CV-03385-MDH, 2014 WL 6685816, at *3–4 (W.D. Mo. Nov. 26, 2014) (finding subject matter jurisdiction over the plaintiff's individual claim, accepting the defendant's

argument that it could be found liable for attorneys' fees exceeding $100,000 under the MMPA even though a fact-finder might legally conclude the plaintiff is entitled to $4,480.49 or less in actual damages); *see also Heckadon*, 400 S.W.3d at 377; *Simmons*, 209 F. Supp. 2d at 1034–35.

VENUE IS PROPER

21. A substantial part of the acts or omissions alleged in the Petition occurred in the Eastern District of Missouri because Plaintiff purchased the Jelly Belly product at issue in the City of St. Louis, Missouri. Ex. A., Petition ¶ 6. Accordingly, venue is proper under 28 U.S.C. § 1391.

REMOVAL IS TIMELY

22. Under 28 U.S.C. § 1446(b), notice of removal of a civil action must be filed within thirty (30) days of the defendant's receipt of service of the summons and the Petition. On January 11, 2017, Jelly Belly accepted service of the summons and Petition. *See* Ex. A, Acknowledgement of Summons and Petition. This Notice of Removal is accordingly timely.

OTHER REQUIREMENTS FOR REMOVAL ARE MET

23. Defendant Jelly Belly, the only Defendant, has not had any attorneys enter an appearance, file any responsive pleadings, or file any papers responding to the Petition in the state court.

24. Defendant will promptly give written notice of the filing of this Notice of Removal to all parties, and a copy of this Notice will be filed with the Clerk of the Circuit Court as required by 28 U.S.C. § 1446(d).

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CONCLUSION

WHEREFORE, Notice is given that this action is removed from the Circuit court of the City of St. Louis, Missouri, to the United States District Court for the Eastern District of Missouri, Eastern Division.

Dated: February 10, 2017

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: */s/ Paul A. Del Aguila*

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Attorneys for Defendant
Jelly Belly Candy Company

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February 2017, a true and correct copy of the foregoing document was served upon the following via the Court's electronic notification system and via e-mail to:

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Attorneys for Plaintiff

/s/ *Paul A. Del Aguila*

EXHIBIT A

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

Judge or Division: BRYAN L HETTENBACH	**Case Number: 1622-CC11517**
Plaintiff/Petitioner: JASON ALLEN **vs.**	Plaintiff's/Petitioner's Attorney/Address: MATTHEW HALL ARMSTRONG 8816 MANCHESTER RD SUITE 109 SAINT LOUIS, MO 63144
Defendant/Respondent: JELLY BELLY CANDY CO	Court Address: CIVIL COURTS BUILDING 10 N TUCKER BLVD SAINT LOUIS, MO 63101
Nature of Suit: CC Other Tort	(Date File Stamp)

Summons for Service by Registered or Certified Mail

The State of Missouri to: **JELLY BELLY CANDY CO**
Alias:

C/O JOHN E DIGUISTO R/AGT
ONE JELLY BELLY LANE
FAIRFIELD, CA 94533

COURT SEAL OF
CIRCUIT COURT OF MISSOURI
CITY OF ST LOUIS

You are summoned to appear before this court and to file your pleading to the petition, copy of which is attached, and to serve a copy of your pleading upon the attorney for the Plaintiff/Petitioner, or Plaintiff/Petitioner, if pro se, at the above address all within 30 days after the return registered or certified mail receipt signed by you has been filed in this cause. If you fail to file your pleading, judgment by default will be taken against you for the relief demanded in the petition.

December 13, 2016
Date Issued

THOMAS KLOEPPINGER
Clerk

Further Information:

Certificate of Mailing

I certify that on 12-13-2016 (date), I mailed a copy of this summons and a copy of the petition to Defendant/Respondent JELLY BELLY CANDY CO by registered or certified mail, requesting a return receipt by the addressee only, to the said Defendant/Respondent at the address furnished by Plaintiff/Petitioner.

12-13-2016
Date

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

JASON ALLEN, individually and on behalf of all other similarly-situated current citizens of Missouri,	)	
Plaintiff,	)	No. _____
v.	)	**JURY DEMAND**
JELLY BELLY CANDY COMPANY,	)	
Defendant.	)	
Serve by Mail:	)	
JELLY BELLY CANDY COMPANY John E. DiGuisto RAGT One Jelly Belly Lane Fairfield CA 94533	)	

CLASS ACTION PETITION

Plaintiff, Jason Allen, individually and on behalf of all other similarly-situated current citizens of Missouri, allege the following facts and claims upon personal knowledge, investigation of counsel, and information and belief.

CASE SUMMARY

1. This case arises out of Defendant Jelly Belly Candy Company's ("Defendant") deceptive, unfair, and false merchandising practices regarding its Superfruit Mix (including the Acai, Barbados Cherry, Blueberry, Cranberry and Pomegranate flavored beans), its Sport Beans (including the Berry, Green Apple, Orange, Fruit Punch Juicy Pear, Lemon Lime flavored beans), and its Sports Beans Extreme (including the Extreme Cherry, Extreme Watermelon, and Extreme Pomegranate flavored beans) (the "Products").

2. On the labels of the Products, Defendant list Evaporated Cane Juice ("ECJ") as an ingredient. ECJ, however, is not juice at all—it is sugar in disguise. In May 2016, the FDA made clear that "the term 'evaporated cane juice' is false and misleading because it suggests that the sweetener is 'juice' or is made from 'juice' and does not reveal that its basic nature and characterizing properties are those of sugar." The FDA continued: "The term 'evaporated cane juice' is not the common or usual name of any type of sweetener" and "this ingredient should instead be declared on food labels as 'sugar.'"

3. By mislabeling sugar as ECJ, Defendant misleads consumers into thinking those Products have less sugar than they actually contain.

4. In addition, by claiming the Products contain ECJ, the labels of the Products create the false impression and have the tendency and capacity to mislead consumers (*see* 15 CSR 60-9.020) into believing that the Products contain less sugar than they actually contain. Moreover, the overall format and appearance of the labels of the Products have the tendency and capacity to mislead consumers (15 C.S.R. 60-9.030) because they create the false impression that the Products contain less sugar than they actually contain.

5. Plaintiff brings this case to recover damages for Defendant's false, deceptive, and misleading marketing and advertising in violation of the Missouri Merchandising Practices Act ("MMPA") and Missouri common law.

PARTIES

6. Plaintiff Jason Allen is a Missouri citizen and resident of the City of St. Louis. On at least one occasion during the Class Period (as defined below), including in October or November 2016, Plaintiff purchased Defendant's Supefruit Mix at Straub's for personal, family, or household purposes after reviewing the labels, which deceived him. If Plaintiff had known

the Product contained sugar disguised as ECJ, he would not have purchased it or would have paid less for it. The purchase price of the Product was $2.29.

7. The labels of each of the Products—including those Plaintiff has not purchased—are substantially similar in that each lists ECJ as an ingredient. Accordingly, Plaintiff has standing to pursue claims relating to Products he did not actually purchase.

8. Defendant Jelly Belly Candy Company is incorporated in California with its principal place of business located in Fairfield, California.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of the Court.

10. Plaintiff believes and alleges that the total value of his individual claims is, at most, equal to the refund of the purchase price he paid for the Product, or $2.29.

11. Because the value of Plaintiff's claims is typical of all class members with respect to the value of the claim, the total damages of Plaintiff and Class Members, inclusive of costs and attorneys' fees is far less than the five million dollar ($5,000,000) minimum threshold to create federal court jurisdiction.

12. There is therefore no diversity or CAFA jurisdiction for this case.

13. Defendant cannot plausibly allege that it had sufficient sales of the Products in Missouri during the Class Period to establish an amount in controversy that exceeds CAFA's jurisdictional threshold.

14. This Court has personal jurisdiction over Defendant pursuant to Missouri Code § 506.500, because Defendant has had more than minimum contacts with the State of Missouri and has purposefully availed itself of the privilege of conducting business in this state. In addition, as

explained below, Defendant has committed affirmative tortious acts within the State of Missouri that gives rise to civil liability, including distributing the fraudulent Products for sale throughout the State of Missouri. This Court has specific jurisdiction over Defendant.

15. Venue is proper in this forum pursuant to Missouri Code § 508.010 because Plaintiff is a City of St. Louis resident and the injury occurred in the City of St. Louis and because Defendant is not a resident of this State.

16. Plaintiff and Class Members do not seek to recover punitive damages or statutory penalties in this case.

ALLEGATIONS OF FACT

17. Defendant manufactures, sells, and distributes jelly beans, including the Products.

18. Plaintiff is a consumer who is interested in purchasing foods that do not contain added sugar.

19. Knowing that consumers like Plaintiff are increasingly interested in purchasing products that do not contain added sugar, Defendant has sought to take advantage of this growing market by labeling certain products as containing ECJ instead of sugar.

20. By affixing such a label to the packaging of the Products, Defendant is able to entice consumers like Plaintiff to purchase its Products and to pay a premium for the Products and/or to purchase more of the Products than they otherwise would have had the truth be known.

21. The labels of the Products are deceptive, false, unfair, and misleading in that Defendant lists ECJ as an ingredient instead of sugar.

22. ECJ is not juice. It is sugar.

23. By calling added sugar "ECJ," Defendant misleads Plaintiff and reasonable consumers into believing that the Products contain less sugar then they actually do.

24. The FDA could not be more clear: "Sweeteners derived from sugar cane should not be listed in the ingredient declarations by names such as 'evaporated cane juice,' which suggests that the ingredients are made from or contain fruit or vegetable 'juice[.] We consider such representations to be false and misleading[.]"

25. As a result of Defendant's deceitful labels, Defendant was able to charge and Plaintiff and class members paid a premium for the Products.

26. The Products, moreover, were worth less than they were represented to be, and Plaintiff and Class Members paid extra for them due to the ECJ representation.

27. No reasonable consumer would know or should know when reviewing the Products' labels that ECJ is sugar.

28. Defendant's misrepresentations violate the MMPA's prohibition of the act, use, or employment by any person of any 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, RSMo.

CLASS ALLEGATIONS

29. Pursuant to Missouri Rule of Civil Procedure 52.08 and § 407.025.2 of the MMPA, Plaintiff brings this action on her own behalf and on behalf of a proposed class of all other similarly situated persons ("Class Members" of the "Class") consisting of:

> All Missouri citizens who purchased Jelly Belly Candy Company Superfruit Mix (including the Acai, Barbados Cherry, Blueberry, Cranberry and Pomegranate flavored beans); Sport Beans (including the Berry, Green Apple, Orange, Fruit Punch Juicy Pear, Lemon Lime flavored beans); and/or Sports Beans Extreme (including the Extreme Cherry, Extreme Watermelon, and Extreme

Pomegranate flavored beans), for personal, household, or family purposes in the five years preceding the filing of this Petition (the "Class Period").

30. Excluded from the Class are: (a) federal, state, and/or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions; (b) any entity in which Defendant has a controlling interest, to include, but not limited to, their legal representative, heirs, and successors; (c) all persons who are presently in bankruptcy proceedings or who obtained a bankruptcy discharge in the last three years; and (d) any judicial officer in the lawsuit and/or persons within the third degree of consanguinity to such judge.

31. Upon information and belief, the Class consists of at least hundreds of purchasers. Accordingly, it would be impracticable to join all Class Members before the Court.

32. There are numerous and substantial questions of law or fact common to all of the members of the Class and which predominate over any individual issues. Included within the common question of law or fact are:

a. whether the representation that the Products contain ECJ instead of sugar is false, misleading, unfair, and deceptive;

b. whether Defendant violated the MMPA by selling the Products with false, misleading, and deceptive representations;

c. whether Defendant's acts constitute deceptive and fraudulent business acts and practices or deceptive, untrue, and misleading advertising;

d. whether Defendant was unjustly enriched; and

e. the proper measure of damages sustained by Plaintiff and Class Members.

33. The claims of the Plaintiff are typical of the claims of Class Members, in that they share the above-referenced facts and legal claims or questions with Class Members, there is a

sufficient relationship between the damage to Plaintiff and Defendant's conduct affecting Class Members, and Plaintiff has no interests adverse to the interests other Class Members.

34. Plaintiff will fairly and adequately protect the interests of Class Members and have retained counsel experienced and competent in the prosecution of complex class actions including complex questions that arise in consumer protection litigation.

35. A class action is superior to other methods for the fair and efficient adjudication of this controversy, since individual joinder of all Class Members is impracticable and no other group method of adjudication of all claims asserted herein is more efficient and manageable for at least the following reasons:

a. the claim presented in this case predominates over any questions of law or fact, if any exists at all, affecting any individual member of the Class;

b. absent a Class, the Class Members will continue to suffer damage and Defendant's unlawful conduct will continue without remedy while Defendant profits from and enjoys its ill-gotten gains;

c. given the size of individual Class Members' claims, few, if any, Class Members could afford to or would seek legal redress individually for the wrongs Defendant committed against them, and absent Class Members have no substantial interest in individually controlling the prosecution of individual actions;

d. when the liability of Defendant has been adjudicated, claims of all Class Members can be administered efficiently and/or determined uniformly by the Court; and

e. this action presents no difficulty that would impede its management by the court as a class action, which is the best available means by which Plaintiff and members of the Class can seek redress for the harm caused to them by Defendant.

36. Because Plaintiff seeks relief for the entire Class, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying

adjudications with respect to individual member of the Class, which would establish incompatible standards of conduct for Defendant.

37. Further, bringing individual claims would overburden the Courts and be an inefficient method of resolving the dispute, which is the center of this litigation. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interest of other members of the Class who are not parties to the adjudication and may impair or impede their ability to protect their interests. As a consequence, class treatment is a superior method for adjudication of the issues in this case.

38. Defendant has acted on grounds that apply generally to the Classes, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

CLAIMS FOR RELIEF

COUNT I

Violation of Missouri's Merchandising Practices Act

39. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

40. Missouri's Merchandising Practices Act (the "MMPA") prohibits the act, use, or employment by any person of any 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, RSMo.

41. Defendant's conduct in representing that certain of the Products contain ECJ when they in fact contain added sugar constitutes the act, use or employment of deception, fraud, false pretenses, false promises, misrepresentation, unfair practices and/or the concealment, suppression, or omission of any material facts in connection with the sale or advertisement of

any merchandise in trade or commerce because Defendant misrepresents that the Products contain ECJ instead of sugar, thereby leading Plaintiff and reasonable consumers to believe that the Products contain less sugar than they actually do.

42. In addition, by claiming the Products contain ECJ instead of sugar, the labels of the Products create the false impression and have the tendency and capacity to mislead consumers (*see* 15 CSR 60-9.020) into believing that the Products contain less sugar than they actually contain. Moreover, the overall format and appearance of the labels of the Products have the tendency and capacity to mislead consumers (15 C.S.R. 60-9.030) because they create the false impression that the Products contain less sugar than they actually contain.

43. Neither Plaintiff nor any reasonable consumer when reviewing the ingredient lists of the Products would know nor should know that ECJ is actually sugar in disguise.

44. Because the Products contain added, disguised sugar, the Products as sold were worth less than the Products as represented, and Plaintiff and Class Members paid a premium for them. Had the truth be known, Plaintiff and Class Members would not have purchased the Products or would have paid less for them.

45. Plaintiff and Class Members purchased the Products for personal, family, or household purposes and thereby suffered an ascertainable loss as a result of Defendant's unlawful conduct as alleged herein, including the difference between the actual value of the product and the value of the product if it had been as represented.

46. Plaintiff also seeks to enjoin Defendant's ongoing deceptive practices relating to its claims on the Products' labels and advertising.

COUNT II

Unjust Enrichment

47. Plaintiff repeat and re-allege the allegations of the preceding paragraphs as if fully set forth herein.

48. By purchasing the Products, Plaintiff and the class members conferred a benefit on Defendant in the form of the purchase price of the fraudulent Products.

49. Defendant appreciated the benefit because, were consumers not to purchase the Products, Defendant would have no sales and make no money.

50. Defendant's acceptance and retention of the benefit is inequitable and unjust because the benefit was obtained by Defendant's fraudulent and misleading representations about the Products.

51. Equity cannot in good conscience permit Defendant to be economically enriched for such actions at Plaintiff and Class Members' expense and in violation of Missouri law, and therefore restitution and/or disgorgement of such economic enrichment is required.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all similarly situated persons, prays the Court:

a. grant certification of this case as a class action;

b. appoint Plaintiff as Class Representative and Plaintiff's counsel as Class Counsel;

c. award compensatory damages to Plaintiff and the proposed Class, or, alternatively, require Defendant to disgorge or pay restitution of its ill-gotten gains;

d. for an award of declaratory and equitable relief declaring Defendant's conduct to be in violation of MMPA and enjoining Defendant from continuing to engage in deceptive, unfair, and false marketing of the Product;

e. award pre- and post-judgment interest;

f. award reasonable and necessary attorneys' fees and costs; and

g. for all such other and further relief as may be just and proper.

Dated: December 12, 2016

Jason Allen, Individually, and on Behalf of a Class of Similarly Situated Individuals, Plaintiff

By: /s/ Matthew H. Armstrong

Matthew H. Armstrong (MoBar 42803)
ARMSTRONG LAW FIRM LLC
8816 Manchester Rd., No. 109
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Attorneys for Plaintiff and the Putative Class

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

Judge or Division: BRYAN L HETTENBACH	**Case Number:** 1622-CC11517
Plaintiff/Petitioner: JASON ALLEN vs.	Court Address: CIVIL COURTS BUILDING 10 N TUCKER BLVD SAINT LOUIS, MO 63101
Defendant/Respondent: JELLY BELLY CANDY CO	
Nature of Suit: CC Other Tort	(Date File Stamp)

Notice and Acknowledgement for Service by Mail

(Circuit Division Cases)

Notice

To: JELLY BELLY CANDY CO

C/O JOHN E DIGUISTO R/AGT
ONE JELLY BELLY LANE
FAIRFIELD, CA 94533

The enclosed summons and petition are served pursuant to Missouri Supreme Court Rule 54.16.

You may sign and date the acknowledgement part of this form and return one copy of the completed form to the sender within thirty days of 13-DEC-2016.

If you are served on behalf of a corporation, unincorporated association, including a partnership, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within thirty days, you or the party on whose behalf you are being served may be required to pay any expenses incurred in serving a summons and petition in any other manner permitted by law.

If you do complete and return this form, you or the party on whose behalf you are being served must answer the petition within thirty days of the date you sign in acknowledgment below. If you fail to do so, judgment by default may be taken against you for the relief demanded in the petition.

I declare, under penalty of perjury, that this notice was mailed on 13-DEC-2016.

Signature

Acknowledgment of Receipt of Summons and Petition

I declare, under penalty of filing a false affidavit, that I received a copy of the Summons and of the Petition in the above captioned matter.

1/11/17
Date

Signature

Attorney for Jelly Belly Candy Co
Relationship to Entity/Authority to receive service of process

Allen, et al. v. Jelly Belly Candy Company
In the 22nd Judicial Circuit Court, City of St. Louis, Missouri Case No. 1622-CC11517

DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed in the County of Sacramento, State of California and my business address is Greenberg Traurig, LLP, 1201 K Street, Suite 1100, Sacramento, CA 95814. On this day I caused to be served the following document(s):

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND PETITION

☒ by placing ☐ the original ☒ a true copy into sealed envelopes addressed and served as follows:

Matthew H. Armstrong Armstrong Law Firm LLC 8816 Manchester Rd., No. 109 St. Louis, MO 63144 Tel.: 314-258-0212 Email: matt@mattarmstronglaw.com Stuart L. Cochran Cochran Law PLLC 12720 Hillcrest Rd., Ste. 1045 Dallas, TX 75230 Tel.: 214-300-1765 Email: scochran@scochranlaw.com	Attorneys for Plaintiff Jason Allen, individually, and on behalf of a Class of Similarly Situated Individuals

☒ **BY MAIL**: I am familiar with this firm's practice whereby the mail, after being placed in a designated area, is given fully prepaid postage and is then deposited with the U.S. Postal Service at Sacramento, California, after the close of the day's business.

☐ **BY PERSONAL SERVICE**: I caused such envelope to be delivered by hand.

☐ **BY OVERNIGHT COURIER**: I caused such envelope to be placed for collection and delivery in accordance with standard overnight delivery procedures for delivery the next business day.

☐ **BY ELECTRONIC SERVICE**: I caused such document to be delivered by electronic means to the address listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 11, 2017 at Sacramento, California.

Paula Hendrickson

EXHIBIT B

From: Matt Armstrong [mailto:matt@mattarmstronglaw.com]
Sent: Wednesday, January 11, 2017 12:23 PM
To: Del Aguila, Paul (Shld-Chi-LT)
Cc: Stuart Cochran
Subject: Re: Jelly Belly

Paul,

Thanks for taking my call. I spoke with our client and my co-counsel and we are prepared to make a demand to settle this case individually. Based upon my discussions, I am authorized to settle this matter for $150,000 which consists of a $5,000 incentive award for each client and $145,000 in attorneys' fees and costs. Please let us know your client's response to this offer.

-Matt

Matt Armstrong
Armstrong Law Firm LLC
314-258-0212
matt@mattarmstronglaw.com
Admitted in Missouri, Illinois, and DC
Privileged and Confidential.

> On Jan 11, 2017, at 10:51 AM, <DelAguilaP@gtlaw.com> <DelAguilaP@gtlaw.com> wrote:
>
> Hey Stuart and Matt,
>
> Anything to report on the above matter?
>
> **Paul A. Del Aguila**
> Litigation Shareholder
> Greenberg Traurig, LLP | 77 West Wacker Drive | Suite 3100 | Chicago, IL 60601
> Tel 312.476.5039 | Fax 312.899.0411 | Cell 7738412861
> DelAguilaP@gtlaw.com | www.gtlaw.com
>
> <image001.png>

EXHIBIT C

2011 WL 5104230 (Mo.) (Appellate Brief)
Supreme Court of Missouri, En Banc.

Estate of Max E. OVERBEY, Deceased, and Glenna J. Overbey, Appellants/Cross-Respondents,
v.
Chad FRANKLIN, Respondent/Cross Appellant,
and
CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC, Respondent.

No. SC91369.
March 23, 2011.

Appeal from the Circuit Court of Clay County, Missouri
Division 2 the Honorable Anthony Rex Gabbert, Circuit Judge

Brief of Respondent/Cross-Appellant Chad Franklin and Respondent Chad Franklin National Auto Sales, LLC

Kevin D. Case, No. 41491, Patric S. Linden, No. 49551, Case & Roberts P.C., Two Pershing Square, 2300 Main Street, Suite 900, Kansas City, MO 64108, Tel: (816) 448-3707, Fax: (816) 448-3779, kevin.case@caseroberts.com, patric.linden @caseroberts.com, Attorneys for Respondent/Cross-Appellant, Chad Franklin and Respondent Chad, Franklin National Auto Sales North, LLC.

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***viii** TABLE OF AUTHORITIES

Cases

*1 JURISDICTIONAL STATEMENT OF RESPONDENTS AND CROSS-APPELLANT CHAD FRANKLIN

This matter arises from an action brought by Max E. Overbey and Glenna Overbey (the Overbeys) in the Circuit Court of Clay County, Missouri. Legal File at 16. Cross-Appellant Chad Franklin ("Franklin") is the owner of Chad Franklin National Auto Sales North, LLC ("National Auto Sales"), the co-defendant in the proceedings below. Legal File at 17 (¶15), 136 (¶ 5). The Overbeys brought actions against Franklin for direct liability for Fraudulent Misrepresentation, Negligent Misrepresentation, and violation of the Missouri Merchandising Practices Act. Legal File at 38-44.

Franklin's cross-appeal was originally filed in the Missouri Court of Appeals, Western District, as Clay County is within the geographic boundaries assigned to that appellate court. Franklin's cross-appeal does not involve any of the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution, in that none of the issues in this cross-appeal concern the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or a criminal conviction where the punishment imposed is death. However, Franklin's cross-appeal has been transferred to this Court upon the Overbeys' motion pursuant to Supreme Court Rule 83.01 and Article V, Section 11 of the Missouri Constitution. Supplemental Legal File at SLF 36.

***2 STATEMENT OF FACTS**

Cross-Appellant Chad Franklin ("Franklin") was the owner of Chad Franklin National Auto Sales North, LLC ("National Auto"), a motor vehicle dealership located in North Kansas City, Missouri. L.F. at 17 (¶¶2,5), 135 (¶2), 136 (¶ 5). [1] Appellants/Cross-Respondents Glenna and her husband, Max Overbey [2] (the "Overbeys"), allege that they purchased a vehicle from National Auto in September 2007. L.F. at 22 (¶ 43);Tr. at 142:1-4. [3] They testified that they purchased that vehicle for their grandson, Michael Overbey, and his wife, Mashele Overbey, who was commuting from Ulrich to Warrensburg, Missouri, to attend college. See Tr. at 103:10-11, 104:5-14.

1 All further citations to the Legal File in this matter will be in the form of "L.F. at ___."

2 Max Overbey passed away on September 8, 2010, after the trial in the proceedings below, and his estate was substituted as a plaintiff in this matter on November 4, 2010. L.F. at 298.

3 All citations to the Transcript in this matter will be in the form of "Tr. at ___."

Max, Michael, and Mashele Overbey first went to National Auto Sales in September 2007. Tr. at 58:22-59:6. Michael Overbey testified that they went to National Auto to look for a vehicle based upon advertisements he had seen. *See* Tr. at 56:25-57:13. Those advertisements described a promotional program which stated that eligible purchasers would be able to obtain vehicles for monthly payments of approximately ***3** $43.00 per month. *See* Tr. at 51:4-11. The Overbeys claim that, after a certain period of time, the purchaser would be able to return the vehicle to the dealership and purchase a new vehicle under the same program terms. L.F. at 21 (¶35).

After arriving at the dealership, Max and Michael Overbey spoke to representatives of National Auto, who ultimately proposed an arrangement under which the Overbeys would make a cash investment of $500.00 and monthly payments of $45.00 per month. See Tr. at 229:23-230:6 (discussing Plaintiff's Exhibit 12).

The purchase transaction was not completed on that date, as Glenna Overbey was not present. She came to the dealership three days later, on September 15, 2007, to complete the transaction paperwork. Tr. at 117:2-5. As part of that paperwork, the Overbeys executed a Retail Installment Contract providing for monthly payments of $719.52 per month. Tr. at 158:25-159:1. After completion of the transaction paperwork, the Overbeys were provided two checks by National Auto, in the amounts of $3,253.00 and $1,189.83, for the difference between the monthly payments under the first six months of the retail installment contract and the $45.00 per month payment to be made by the Overbeys, as well as additional amounts toward the sales tax on the purchase. Tr. at 73:12-74:4; 230:21-231:14. The Overbeys deposited these checks into their bank account. Tr. at 150:25-151:10. The Overbeys were instructed to return in six months to trade the vehicle in for a new vehicle under the program. Tr. at 63:2-11; 69:12-18. However, when they returned to the dealership, the employees they had transacted ***4** business with before were no longer employed by the dealership. Tr. at 113:6-8. Mashele Overbey testified that the dealership denied having any knowledge that the Overbeys purchased their vehicle under any promotional program. Tr. at 113:8-15.

There was no evidence of any direct involvement by Chad Franklin in the Overbey transaction. Max, Glenna, Michael, and Mashele Overbey each denied speaking with Chad Franklin at any point, either before or after the purchase of the vehicle. Tr. at 88:7-12; 125:14-126:16; 188:2-11; 238:24-239:11. This was despite Michael Overbey's numerous attempts to call Franklin. Tr. at 82:8-10. While Mashele Overbey testified that she heard a television advertisement in which Chad Franklin said "You're going to be another satisfied customer," there was no evidence that Franklin had any role in crafting the dealership's advertisements. Tr. at 86:4-11, 126:23-127:7.

Michael Overbey also testified that, in April 2008, when the Overbeys returned to the dealership, he was present when a National Auto employee purportedly called Franklin. Tr. at 98:10-99:16. This employee related that he asked Franklin about where certain former employees of National Auto were now working and whether Franklin had any personal knowledge of the Overbey transaction:

Q. Were you on the phone when Ben called Mr. Franklin?

A. No, he was on the phone.

Q. So it was just a conversation --

***5** A. Between Ben and him in front of me.

Q. And you have no personal knowledge what was actually said between the two other than -

A. He asked him about the deal and asked him about where Nick was and basically they had come up that Nick was working now at Van Chevrolet and was no longer in the employment of Chad Franklin and he had absolutely no knowledge about any deal made, and that's what Ben told me.

Q. That's what Ben was recounting to you that Mr. Franklin said, is that true?

A. Yeah.

Tr. at 98:23-99:12. There was no other evidence that Chad Franklin made any statements with regard to the Overbey transaction or that he otherwise engaged in any conduct related to that transaction.

The Overbeys brought suit against both National Auto and Franklin, as well as American Suzuki Motor Corporation ("ASMC"), the manufacturer of the vehicle, and Wells Fargo Bank, N.A. ("Wells Fargo"), the lender financing their loan for the vehicle, in the Circuit Court of Jackson County, Missouri. L.F. at 16. In their First Amended Petition, the Overbeys sought damages under several theories: Fraudulent Misrepresentation (Counts I, IV, and VII), Unlawful Merchandising Practice under ***6** Section 407.020 and 407.025, RSMo 2006 (Counts II, V, and VIII), and Negligent Misrepresentation (Counts III, VI, and IX). L.F. at 26-43. In addition to seeking to hold Franklin directly liable, they also asserted a claim seeking to pierce the corporate veil of National Auto. L.F. at 43-44. Both ASMC and Wells Fargo were subsequently dismissed from the case. L.F. at 6, 10.

The matter proceeded to jury trial on August 8, 2010. L.F. at 11, 300. Despite raising claims against Franklin and National Auto under numerous theories, the Overbeys dismissed nearly all of their claims at the beginning of trial. Tr. at 9:20-10:3. The case moved forward and was submitted to the jury solely upon the Overbeys' claims under the Merchandising Practices Act, as set forth in Counts II and VIII of the Petition. *See id.;* L.F. at 29-31, 41-42 (First Amended Petition); L.F. at 203, 206 (verdict directors). At both the close of the Overbeys' evidence and at the conclusion of all of the evidence, Franklin moved for entry of directed verdict, on the basis that the Overbeys had failed to adduce sufficient evidence to support a verdict against Franklin holding him individually liable for violation of the Missouri

Merchandising Practices Act and because the Overbeys had neither pleaded nor proved any claim for piercing the corporate veil of National Auto in order to impose direct liability on Franklin. L.F. at 186-198. These motions were denied by the Circuit Court. Tr. at 240:14-241:4; 241:6-12.

***7** The claim against Franklin was submitted to the jury upon the following Not-in-MAI [4] verdict director, which was submitted by the Overbeys:

[4] The Overbeys offered this Not-in-MAI instruction in reliance upon Sections 407.020, 407.025, 407.145, RSMo, as well as 15 CSR 60-9.070(1) and 60-9.110(3). L.F. at 206.

Instruction No. 10

Your verdict must be for Plaintiffs on their claim of violation of the Missouri Merchandising Practices Act against Defendant Chad Franklin, if you believe Plaintiffs were damaged by Defendant Chad Franklin's use of misrepresentation or the omission of any material fact in connection with the sale of the 2007 Suzuki motor vehicle to Plaintiffs.

A misrepresentation is an assertion that is not in accord with the facts.

Omission of a material fact is any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her.

***8** L.F. at 206.

At the conclusion of trial, the jury rendered verdicts against both National Auto and Franklin. L.F. at 209-210; Tr. at 271:16-20, 271:25-272:4. The jury awarded actual damages against National Auto in the amount of $76,000.00, and punitive damages of $250,000.00. L.F. at 209; Tr. at 271:21-24. With regard to Franklin, the jury awarded actual damages of $4,500.00, and punitive damages of $1,000,000. L.F. at 210; Tr. at 272:5-8. Judgment was entered in accordance with the jury's verdict on August 12, 2010. L.F. at 211-214.

On Monday, September 13, 2010, Franklin timely filed an authorized post-trial motion seeking entry of judgment notwithstanding the verdict, or in the alternative, remittitur of the jury's punitive damages award. L.F. at 233-235. First, Franklin argued that entry of JNOV was necessary because there was insufficient evidence to support the jury's liability finding against Franklin. L.F. at 234, 236-243. Second, Franklin argued that the jury's punitive damages award was excessive under the holdings of *State Farm v. Campbell,* and *BMW v. Gore,* as well as being in excess of the statutory punitive damages caps under Section 510.265, RSMo 2005. L.F. at 235, 243-252. The Overbeys filed a motion to amend the judgment, asking the Court to award attorneys fees in the amount of $67,000.00. L.F. at 215-228.

The Circuit Court denied Franklin's post-trial motion on November 18, 2010. L.F. at 300, 303. However, it entered an amended judgment on that date, awarding the ***9** Overbeys attorneys fees. *Id.* However, the court awarded attorneys fees in the amount of $72,000.00, five thousand dollars more than the Overbeys sought in their motion. *See* L.F. at 217, 303-304. The Amended Judgment also reduced the punitive damages award against Franklin to $500,000. *See id.* However, the judgment did not treat this reduction as a remititur under Missouri Supreme Court Rule 78.10 or afford the Overbeys the option to accept that reduction or reject that reduction under subsection (b) of that Rule. *See id.*

Franklin timely filed his Notice of Appeal of the Circuit Court's First Amended Judgment on Monday, November 29, 2010, seeking to appeal that judgment to the Missouri Court of Appeals, Western District. L.F. at 333. The Overbeys cross-appealed the First Amended Judgment by filing a notice of appeal to this Court on the same date. L.F. at 337.

The Overbeys subsequently filed a motion to transfer Franklin's appeal to this Court, which was granted by the Court of Appeals on December 16, 2010. S.L.F. at 35.

***10 RESPONDENTS' RESPONSE TO APPELLANTS' POINTS RELIED ON**

I. THE TRIAL COURT DID NOT ERR IN REDUCING THE OVERBEYS' PUNITIVE DAMAGES AWARD IN ACCORDANCE WITH SECTION 510.265, RSMO 2005, AS THIS STATUTE DOES NOT VIOLATE THE SEPARATION OF POWERS BETWEEN THE LEGISLATURE AND THE JUDICIARY UNDER ARTICLE II, SECTION 1, OF THE MISSOURI CONSTITUTION, IN THAT THIS STATUTE IS AN APPROPRIATE EXERCISE OF THE LEGISLATURE'S AUTHORITY TO MODIFY OR LIMIT CAUSES OF ACTION AND DOES NOT IMPROPERLY INVADE THE JUDICIAL FUNCTION AND THE OVERBEYS WAIVED ANY ARGUMENT THAT THE STATUTE VIOLATES THE SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND THE LEGISLATURE BY FAILING TO RAISE THAT ARGUMENT IN THE PROCEEDINGS BEFORE THE TRIAL COURT.

Fust v. Attorney General for the State of Mo., 947 S.W.2d 424 (Mo. banc 1997)

Northern Pipeline Const. Co. v. Marathon Pipe Co., 458 U.S. 50, 53 (1982)

Siegall v. Solomon, 166 N.E.2d 5, 8 (1960)

***11 II. THE TRIAL COURT DID NOT ERR IN APPLYING SECTION 510.265, RSMO 2005, TO REDUCE THE OVERBEYS' PUNITIVE DAMAGES AWARD AGAINST FRANKLIN, BECAUSE THAT STATUTE DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY GUARANTEED BY ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION, IN THAT (1) THE STATUTE DOES NOT APPLY UNTIL AFTER THE JURY HAS COMPLETED ITS CONSTITUTIONAL TASK, (2) THE STATUTE DOES NOT IMPACT THE PROCESS OF HOW THE JURY IS TO MAKE THE DETERMINATION OF PUNITIVE DAMAGES, AND (3) THE STATUTE IS ESSENTIALLY AN ATTEMPT TO CODIFY THE PRINCIPLES UNDERLYING THE DUE PROCESS PRINCIPLES OF STATE FARM V. CAMPBELL AND BMW V. GORE, WHICH DO NOT IMPLICATE THE RIGHT TO JURY TRIAL.**

Adams by and through Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992)

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. banc 2005)

Ross v. Kansas City Power & Light, 293 F.3d 1041, 1049-50 (8th Cir. 2002)

***12 III. THE TRIAL COURT DID NOT ERR IN REDUCING THE OVERBEYS' PUNITIVE DAMAGES AWARD AGAINST FRANKLIN UNDER SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE THE RIGHT TO EQUAL PROTECTION WITHIN ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, IN THAT UNDER THE APPROPRIATE, RATIONAL BASIS, STANDARD OF REVIEW, THE STATUTE SATISFIES THE REQUIREMENTS THAT (1) THE LEGISLATION HAS A LEGITIMATE PURPOSE AND (2) THE LEGISLATURE REASONABLY BELIEVED THAT THE CHALLENGED CLASSIFICATION WOULD PROMOTE THAT PURPOSE.**

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 83 (1978)

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140, 144 (Mo. banc 2005)

Neill v. Gulf Stream Coach, Inc., 966 F.Supp. 1149, 1155 (M.D. Fla. 1997)

***13 IV. THE TRIAL COURT DID NOT ERR IN REDUCING THE OVERBEYS' PUNITIVE DAMAGES AWARD AGAINST FRANKLIN UNDER SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT CONSTITUTE "SPECIAL LEGISLATION" UNDER ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION, IN THAT (1) THE LEGISLATION INVOLVES OPEN-ENDED CLASSIFICATIONS AND IS NOT ARBITRARY OR WITHOUT LEGITIMATE LEGISLATIVE PURPOSE AND (2) THE LEGISLATURE REASONABLY BELIEVED THAT THE CHALLENGED CLASSIFICATION WOULD PROMOTE THAT PURPOSE**

Jackson County v. State, 207 S.W.3d 608, 611 (Mo. banc 2006)

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)

***14 V. THE TRIAL COURT DID NOT ERR IN REDUCING THE OVERBEYS' PUNITIVE DAMAGES AWARD AGAINST FRANKLIN UNDER SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE THE OVERBEYS' RIGHT TO DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, IN THAT THE STATUTE DID NOT DIVEST THE OVERBEYS OF ANY VESTED PROPERTY RIGHTS**

Fust v. Attorney General for the State of Mo., 947 S.W.2d 424 (Mo. banc 1997)

Felling v. Wire Rope Corp. of America, Inc., 854 S.W.2d 458, 462 (Mo. App. 1993)

***15 VI. THE TRIAL COURT DID NOT ERR IN REDUCING THE OVERBEYS' PUNITIVE DAMAGES AWARD AGAINST FRANKLIN UNDER SECTION 510.265, RSMO 2005, BECAUSE THE OVERBEYS CLAIM DID NOT FALL WITHIN THE STATUTORY EXCEPTION FOR CLAIMS BROUGHT BY THE STATE, IN THAT THE PLAIN MEANING OF THE STATUTE DOES NOT ADMIT A CONSTRUCTION THAT WOULD ALLOW "PRIVATE ATTORNEY GENERAL" CLAIMS TO QUALIFY FOR THAT EXCEPTION.**

*Utility Svc. Co, Inc. v. Department of Labor and Indus. Relations,*331 S.W.3d654, 2011 WL 795867 (Mo. banc March 1, 2011)

State ex rel. Ligett & Myers Tobacco Co. v. Gehner, 292 S.W. 1028 (Mo. 1927)

City of Springfield ex rel. Board of Pub. Utils. v. Brechbuhler, 895 S.W.2d 583 (Mo. banc 1995)

***16 VII. THE TRIAL COURT DID NOT PLAINLY ERR IN REDUCING THE PUNITIVE DAMAGES AWARD PURSUANT TO SECTION 510.265, RSMO 2005, BECAUSE THERE WAS NO BASIS UPON WHICH THE TRIAL COURT COULD CONCLUDE THAT SAID STATUTE LIMITED THE OVERBEYS' RIGHT OF ACCESS TO THE COURTS, IN THAT THERE WAS NO EVIDENCE THAT THE STATUTE PRECLUDED THEM FROM OBTAINING LEGAL REPRESENTATION.**

State ex rel. York v. Daugherty, 969 S.W.2d 223, 224 (Mo. banc 1998)

Land Clearance for Redevelopment v. Kansas City, 805 S.W.2d 173, 175-76 (Mo. banc 1991)

***17 CROSS-APPELLANT CHAD FRANKLIN'S POINTS RELIED ON**

I. THE TRIAL COURT ERRED IN DENYING FRANKLIN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE OVERBEYS FAILED TO ADDUCE SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT FRANKLIN HAD VIOLATED THE MISSOURI MERCHANDISING PRACTICES ACT WITH REGARD TO THE OVERBEY TRANSACTION, IN THAT THE OVERBEYS FAILED TO OFFER ANY EVIDENCE THAT FRANKLIN HAD PERSONALLY ENGAGED IN ANY CONDUCT THAT VIOLATED THE MISSOURI MERCHANDISING PRACTICES ACT AS TO THE OVERBEYS' TRANSACTION AND THE OVERBEYS DID NOT SEEK TO IMPOSE INDIVIDUAL LIABILITY UPON FRANKLIN THROUGH A CLAIM SEEKING TO PIERCE THE CORPORATE VEIL OF CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC.

Mobius Mgmnt. Sys., Inc. v. West Physician Search, LLC, 178 S.W.3d 186, 188 (Mo. App. 2005)

Bank of Belton v. Bogar Farms, Inc., 154 S.W.3d 513, 520 (Mo. App. 2005)

***18 II. THE TRIAL COURT ERRED IN FAILING TO REDUCE THE PUNITIVE DAMAGES AWARD AGAINST FRANKLIN TO A SINGLE-DIGIT MULTIPLE OF THE ACTUAL DAMAGES ASSESSED AGAINST FRANKLIN, BECAUSE THE REDUCED PUNITIVE DAMAGES AWARD OF $500,000 WAS STILL FAR IN EXCESS OF THE AMOUNT PERMITTED UNDER THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE MISSOURI CONSTITUTION, IN THAT THE EVIDENCE ADDUCED AT TRIAL DOES NOT SUPPORT AN AWARD OF PUNITIVE DAMAGES OF AN AMOUNT OVER 111 TIMES THE AMOUNT OF ACTUAL DAMAGES BASED UPON (1) THE REPREHENSIBILITY OF FRANKLIN'S CONDUCT, (2) THE DISPARITY BETWEEN THE HARM ACTUALLY OR POTENTIALLY SUFFERED BY THE OVERBEYS AND THE PUNITIVE DAMAGE AWARDED, AND (3) THE DIFFERENCE BETWEEN THE PUNITIVE DAMAGES AWARDED AND COMPARABLE CIVIL PENALTIES THAT COULD BE IMPOSED IN SIMILAR CASES.**

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 46 (2003)

BMW of America v. Gore, 517 U.S. 559, 576 (1996)

Bennett v. Reynolds, 315 S.W.3d 867, 879 (Tex. 2010)

***19 III. THE TRIAL COURT ERRED IN AWARDING THE OVERBEYS ATTORNEYS FEES IN THE AMOUNT OF $72,000, BECAUSE THAT AWARD WAS NOT SUPPORTED BY COMPETENT EVIDENCE, IN THAT THE OVERBEYS' COUNSEL PRESENTED EVIDENCE OF INCURRING ATTORNEYS FEES OF ONLY $67,000 AND THERE WAS NO EVIDENTIARY BASIS FOR THE TRIAL COURT'S AWARD OF AN ADDITIONAL $5,000 IN ATTORNEYS FEES, INDICATING THAT THE AWARD WAS ARBITRARY AND LACKED CAREFUL CONSIDERATION.**

City of Burlington v. Dague, 505 U.S. 557, 562 (1992)

Watts v. Lane County, 922 P.2d 686, 690 (Or.App. 1996)

Franklin v. Franklin, 213 S.W.3d 218, 230 (Mo. App. 2007)

***20 ARGUMENT**

RESPONSE TO APPELLANTS' POINT I

I. The Trial Court did not err in reducing the Overbeys' punitive damages award in accordance with Section 510.265, RSMo 2005, as this statute does not violate the separation of powers between the legislature and the judiciary under Article II, Section 1, of the Missouri Constitution, in that this statute is an appropriate exercise of the legislature's authority to modify or limit causes of action and does not improperly invade the judicial function and the Overbeys waived any argument that the statute violates the separation of powers between the executive and the legislature by failing to raise that argument in the proceedings before the trial court.

A. Standard of Review.

Respondents concur that this Court engages in *de novo* review of a lower court's determinations with regard to the constitutionality of a statute, provided that the constitutional issue was not waived by failing to raise that issue at the first opportunity before the trial court. *City of Arnold v. Tourkakis,* 249 S.W.3d 202, 204 (Mo. banc 2008).

It is well-settled, however, that this Court "will avoid the decision of a constitutional question if the case can be fully determined without reaching it." *State ex* ***21** *rel. Union Elec. Co. v. Public Service Comm'n,* 687 S.W.2d 162, 165 (Mo. banc 1985). This approach is based upon the fundamental principal that "[a] statute is to be construed so as to render it constitutional, if this is possible." *Id.* (citing *Westin Crown Plaza Hotel Co. v. King,* 664 S.W.2d 2, 5 (Mo. banc 1984); *State Tax Com'n v. Administrative Hearing Comm'n,* 641 S.W.2d 69, 73 (Mo. banc 1982)). Statutes are presumed to be constitutional. *Ehlmann v. Nixon,* 323 S.W.3d 787 (Mo. banc Oct. 10, 2010) (citing *State v. Kinder,* 89 S.W.3d 454, 459 (Mo. banc 2002)). As such, the challenged statute "will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. of City of St. Louis v. State,* 47 S.W.3d 366, 368-69 (Mo. banc 2001) (internal citations omitted). As discussed in the next section, the Overbeys' constitutional challenge to Section 510.265, RSMo 2005, is mooted by the issues raised within Franklin's Cross-Appeal.

B. It is unnecessary for this Court to reach Appellants' challenge to the constitutionality of Section 510.265, RSMo 2005.

In the proceedings below, the Circuit Court reduced the jury's $1 Million award of punitive damages against Cross-Appellant Franklin to $500,000. The Court did not clearly set forth its rationale for that reduction. However, the amount of the reduced award strongly suggests that the reduction was in accordance with ***22** Section 510.265, RSMo 2005. Accordingly, the Overbeys have sought to assert a challenge to the constitutionality of said statute.

As discussed above, if there is some independent and valid basis for concluding that the punitive damages awarded against Franlin must be reduced to or below the limits set forth in Section 510.265, RSMo 2005, then this Court can (and must) decline to take up the Overbeys' constitutional attack upon the statute. Such alternative grounds are raised and are preserved as issues in Franklin's Cross-Appeal, which, if granted, would moot Overbeys' constitutional challenge. Those alternative grounds are summarized in this section and will be developed in greater detail within the briefing regarding Franklin's Points on Cross-Appeal, *infra.*

First, as discussed in Franklin's First Point Relied Upon in his cross-appeal, the Circuit Court erred in denying Franklin's motions for directed verdict and judgment notwithstanding the verdict, for the reason that there was not substantial evidence adduced that would support a finding by the jury that he personally violated the Missouri Merchandising Practices Act with regard to the Overbeys' transaction and could, therefore, be held individually liable upon that claim. If that point is granted, this Court must reverse this matter with directions to the Circuit Court to enter judgment in favor of Franklin. This would, in turn, reverse the award of both actual and punitive damages against Franklin, mooting the Overbeys' constitutional challenge.

***23** Second, as set forth in the argument directed to Franklin's Second Point Relied On, the award of punitive damages in the proceedings below is grossly excessive and violates Franklin's due process rights under both the Missouri and U.S. Constitutions under the doctrines of *BMW v. Gore and State Farm v. Campbell.* If Franklin prevails upon that argument and demonstrates that those due process limitations require entry of punitive damages of an amount less than the $500,000 statutory cap, this Court need not examine the Overbeys' contentions that said statute is unconstitutional. Moreover, this Court need not reach the Overbeys' constitutional attack upon Section 510.265, RSMo 2005, if it determines that a reduction of the punitive damages awarded against Franklin from $1 Million to $500,000 was required on the independent basis of the *State Farm v. Campbell and BMW v. Gore* holdings.

Put another way, if constitutional due process required a reduction of the punitive damages award against Franklin to an amount of $500,000 or below, this would provide a basis for a reduction of punitive damages independent of Section 510.265, RSMo 2005. That independent basis for reducing the punitive damages award renders it unnecessary for this Court to reach the Overbeys' assertions that the punitive damages caps within Section 510.265 are constitutionally infirm.

C. Section 510.265, RSMo 2005, Does Not Violate Separation of Powers.

Section 510.265, RSMo 2005, part of the 2005 tort reform legislation, implements certain caps applicable to punitive damages awards. The Overbeys first argue that these ***24** punitive damages caps violate the separation of powers between the legislature and judiciary, by interfering with the judicial power of remititur. Next, they contend that the statute impairs the role of the jury in assessing damages. Finally, they argue that the statute violates the separation of powers in that it permits the executive branch to determine whether punitive damages limits apply in a particular case by deciding whether to pursue criminal prosecution of the defendant.

Not all of these arguments have been preserved for appeal. Turning first to the third argument, concerning the separation of powers between the judicial and legislative branches, the Overbeys argue that Section 510.265 violates the separation of powers doctrine because it infringes upon the powers accorded to the legislature, contending that it allows the executive branch to determine when punitive damages will be limited. Appellant's Brief at 28-30. This separation of powers argument was not raised in the Overbeys' post-trial motions before the trial court. *See* L.F. at 23-74, 310-311. An argument regarding the constitutionality of a statute is waived if it is not presented at the first opportunity. *State ex rel. York v. Daugherty,* 969 S.W.2d at 224 (citing Adams, 832 S.W.2d at 907). This doctrine is consistent with the more general principals regarding preservation of error, which generally require that allegations of error be timely raised in the proceedings before the trial court. *See generally, e.g., Atkinson v. Corson,* 289 S.W.3d 269, 276 (Mo. App. 2009). Here, as the Overbeys did not raise this argument in the trial court, this Court should consider the argument waived on appeal.

***25** Next, with regard to the Overbeys' argument that Section 510.265 infringes upon the jury's role in assessing damages, this argument was not clearly raised in the proceedings below. *See* L.F. at 273-74, 310-311. While their briefing before the trial court made passing reference to "the jury's function," that discussion is in reference to the role of the judiciary in determining "whether to reduce an amount awarded by the jury." L.F. at 310. Thus, the separation of powers arguments raised by them in the proceedings below concerned whether the statute infringed upon the role of the judiciary with regard to the procedure of remititur. *See id.* As such, this argument also should be deemed waived on appeal. *State ex rel. York v. Daugherty,* 969 S.W.2d at 224.

However, even if this argument has not been waived, it is not well-reasoned, and has been addressed and rejected by this Court with regard to other limitations on punitive damages. The reasoning and analysis of this Court in those prior cases is dispositive and should be followed here.

Specifically, in *Fust v. Attorney General for the State of Mo.,* 947 S.W.2d 424 (Mo. banc 1997), this Court considered the constitutionality of Section 537.675.2, RSMo, which requires fifty percent of a punitive damages award to be paid to the Tort Victims' Compensation Fund. *See id.* at 427. Among the arguments raised in *Fust* was that the statute, by limiting

the punitive damages available to plaintiffs (such as the Overbeys) in court actions, violated the separation of powers between the legislature and judiciary. See id. at 430. The Missouri Supreme Court rejected that argument, finding:

> ***26** Nothing in the text of the statute at hand interferes with the judicial function. Rather, the statute is a limitation on a common law cause of action for punitive damages. Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function. *See Simpson v. Kilcher,* 749 S.W.2d 386, 391 (Mo. banc 1988). There is no violation of the separation of powers provisions of article II, sec. 1, or article V sec. 1.

Id. at 430-31. Similarly, Section 510.265 does not violate the separation of powers, but is instead a proper exercise of the legislature's ability to place reasonable limits upon punitive damages, whether sought in regard to common law causes of action or, as here, the Overbeys' statutory cause of action under the MMPA. Thus, the Overbeys' argument that Section 510.265, RSMo 2005 is unconstitutional under Article II, Section 1, is unpersuasive under the holding of *Fust,* and must be rejected.

It is clearly the role of the courts, through the procedural mechanism of trial, to decide the facts of civil cases. Damages are also part of the facts to be determined via trial. However, this does not mean that the legislature has no role in regulating what damages are permissible or what range of damages may be awarded. Indeed, if the separation of powers doctrine prohibits the legislature from statutory regulation of ***27** punitive damage awards, the numerous statutes authorizing awards of treble damages [5] or setting minimum or mandatory statutory damages would also violate the doctrine of separation of powers. *Arbino v. Johnson & Johnson,* 880 N.E.2d 420, 438 (Ohio 2007). For such reasons, and "[w]ith a few exceptions, the majority of courts in other states examining this issue have determined that legislative limitations on damages do not act as a type of 'legislative remittitur' or otherwise infringe on a trial court's constitutional authority." *Rhyne v. K-Mart Corp.,* 594 S.E.2d 1, 8 (N.C. 2004) (citing collected cases). *See also, Evans ex rel. Kutch v. State,* 56 P.3d 1046, 1055-56 (Alaska 2002) (discussing collected cases).

5 *See, e.g.,* Sections 188.120, 393.1150, 484.020.2, 537.340.1, 537.420, 537.490, 578.445.2, RSMo 2000;

It is also significant that the underlying claim, here, is *not* a common law claim. Rather, it is a claim under the Missouri Merchandising Practices Act, Section 407.010 *et seq.,* RSMo 2000, which was enacted to supplement and expand upon the common law. *See Plubell v. Merck & Co., Inc.,* 289 S.W.3d 707, 713 (Mo. App. 2009) (discussing the difference between civil claims under the MMPA and common law fraud claims); *Clement v. St. Charles Nissan, Inc.,* 103 S.W.3d 898, 899-900 (Mo. App. 2003). The private civil action available under the MMPA, and the damages it makes available, are creations of statute. *See* Section 407.025, RSMo 2000. What a legislature creates a ***28** statutory claim it can, by extension, modify or limit that claim. [6] *See Northern Pipeline Const. Co. v. Marathon Pipe Co.,* 458 U.S. 50, 53 (1982) ("when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies").

6 "[L]egislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 434 (2001). In *Cooper Industries,* the U.S. Supreme Court analogized the legislature's role in defining and limiting what punitive damages might be available to civil plaintiffs to its role in defining criminal offenses and their associated punishments. *See id.*

The Overbeys rely upon two Illinois Supreme Court decisions, *Best v. Taylor Machine Works, and Lebron v. Gottlieb Memorial Hospital,* for the proposition that limitations on damages violate the separation of powers. These cases do not stand for the conclusion that a punitive damages cap offends the separation of powers for two reasons. First, both decisions expressly recognize that "the legislature may limit certain types of damages, *such as damages recoverable in statutory causes of action....*" *Lebron v. Gottlieb Memorial Hosp.,* 930 N.E.2d 895, 906 (Ill. 2010); *Best v. Taylor Mach*

Works, 689 N.E.2d 1057, 1080 (Ill. 1997). Thus, the punitive damages caps within Section 510.265, RSMo 2005, do not violate the separation of powers in the present context, given that the claim at issue here arises via statute, rather than under the common law. ***29** Second, these two Illinois cases are also distinguishable in that the limitations at issue in the Lebron and Best cases were limits upon the plaintiffs' actual (compensatory) damages. *See Lebron,* 930 N.E.2d at 908; Best, 689 N.E.2d at 1063. Here, the issue is a statutory limit on punitive damages which, by their very nature, are not compensatory damages. The Overbeys omit any citation or discussion of the Illinois Supreme Court cases that have repeatedly held that punitive damages limits do not intrude upon the separation of powers between the legislature and the judiciary. *See Siegall v. Solomon,* 166 N.E.2d 5, 8 (1960); *Smith v. Hill,* 147 N.E.2d 321, 327 (1958). Nor do they offer any analysis of the Illinois Supreme Court decision in *Bernier v. Burris,* 497 N.E.2d 763, 776 (1986), which upheld punitive damage limits against allegations that such limits violated equal protection.

Simply put, the punitive damages caps within Section 510.265, RSMo 2005, do not violate the principle of separation of powers. The underlying claim at issue is a statutory claim, not a claim arising under the common law. Thus, the application of Section 510.265 in this context is a proper application of the legislature's inherent authority to define and limit statutory claims. Moreover, even if the Overbeys' underlying claim was not a statutory claim, the statute does not violate separation of powers, as it is a proper exercise of the legislature's authority to regulate non-compensatory damages, and does not intrude upon matters reserved exclusively to the judiciary. Therefore, the Overbeys' First Point On Appeal should be denied.

***30 RESPONSE TO APPELLANTS' POINT II**

II. The trial court did not err in applying Section 510.265, RSMo 2005, to reduce the Overbeys' punitive damages award against Franklin, because that statute does not violate the right to trial by jury guaranteed by Article I, Section 22(a) of the Missouri Constitution, in that (1) the statute does not apply until after the jury has completed its constitutional task, (2) the statute does not impact the process of how the jury is to make the determination of punitive damages, and (3) the statute is essentially an attempt to codify the principles underlying the due process principles of *State Farm v. Campbell and BMW v. Gore,* which do not implicate the right to jury trial.

A. Standard of Review.

As this point concerns an attack upon the constitutionality of a state statute, the standard of review applicable to this point on appeal is identical to the *de novo* standard discussed above with regard to Appellant/Cross-Respondent's First Point on Appeal. *See City of Arnold,* 249 S.W.3d at 204.

***31 B. Section 510.265, RSMo 2005, Does Not Violate The Overbeys' Constitutional Right to Trial by Jury.**

Overbeys next argue that Section 510.265 is unconstitutional because it deprives Overbeys of their right to trial by jury. This argument has also been soundly rejected by this Court and a number of other state courts in similar contexts.

In *Adams by and through Adams v. Children's Mercy Hospital,* 832 S.W.2d 898 (Mo. banc 1992), the Missouri Supreme Court considered whether caps on noneconomic damages (Section 538.210, RSMo) violated the plaintiff's right to trial by jury. *See id.* at 906-07. The Court held that the damages caps did not infringe upon that right because those caps were "not applied until after the jury has completed its constitutional task," and as a result the cap "does not infringe upon the right to a jury trial." *Id.* at 907. Similarly, here, the punitive damages caps are applied after the jury has completed its work and rendered a verdict. Thus, under the analysis of *Adams,* which is binding upon this court, this Court must conclude that the punitive damages limitations within Section 510.265, RSMo 2005, do not violate Overbeys' right to trial by jury.

Similarly, in *Scott v. Blue Springs Ford Sales, Inc.,* 176 S.W.3d 140 (Mo. banc 2005), this Court, looking to its prior holding in *Fust, supra,* observed that "the legislature has the power to create or abolish *or otherwise limit* the remedy

of punitive damages..." Scott, 176 S.W.3d at 142. This Court drew a distinction between "the ***32** judicial process by which claims are determined with the substance of the claims themselves," indicating that legislating the former could impact the right to trial by jury whereas legislation regarding the substance of the claims would not. *Id.* Here, as this Court held in *Adams,* the punitive damages limitation does not impair the judicial function. The statute does not affect how a jury is to weigh or decide the evidence. Rather, it merely places limits on what punitive damages can be awarded in a judgment following the jury' verdict.

The Eighth Circuit has held that a reduction of punitive damages to comply with the constitutional due process limitations under *State Farm v. Campbell and BWV v. Gore* does not implicate the right to jury trial under the Seventh Amendment of the U.S. Constitution. *See Ross v. Kansas City Power & Light,* 293 F.3d 1041, 1049-50 (8th Cir. 2002). [7] The Ross Court reasoned that the reduction was required because "the court must decide this issue as a matter of law." *Id.* at 1050 (citing *Johansen v. Combustion Eng'g, Inc.,* 170 F.3d 1320, 1331 (11th Cir.1999)). Such reductions do not implicate the right to jury trial because they are not "a substitution of the court's judgment for that of the jury" but instead "a determination that the law does not permit the award." *Johansen,* 170 F.3d at 1330-31. In ***33** *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 437 (2001), the U.S. Supreme Court held that the amount of punitive damages assessed by a jury is not a "fact" tried by the jury. *Id.* at 437 (quoting *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)). Based upon that premise, the Supreme Court held that court review of punitive damages awards did not implicate constitutional concerns under the Seventh Amendment. *See id.*

7 "While 'provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions,' analysis of a section of the federal constitution is 'strongly persuasive in construing the like section of our state constitution.'" *Doe v. Phillips,* 194 S.W.3d 833, 842 (Mo. banc 2006).

Similarly, the majority view among the federal circuits is that the legislature's authority to create, alter, or abolish law encompasses the power to alter or limit the kinds and amount of damages available to a prevailing party, without violating the federal constitutional right to jury trial. *See Davis v. Omitowoju,* 883 F.2d 1155, 1159-1165 (3rd Cir. 1989); *Boyd v. Bulala,* 877 F.2d 1191, 1196 (4th Cir. 1989). Other state courts have reached similar conclusions under the corresponding provisions of their state constitutions. *See, e.g., Arbino v. Johnson & Johnson,* 880 N.E.2d 420, 449 (Ohio 2007).

The above authority stands solidly for the proposition that the legislature has broad authority to limit (or abolish altogether) the availability of punitive damages for particular causes of action. This authority clearly extends to the ability to place caps on the amount of punitive damages that can be recovered in a civil action. As these limitations due not intrude upon the judicial fact-finding process, they do not violate constitutional equal protection principles. Accordingly, for the reasons discussed above, the Overbeys' second point on appeal should be denied.

***34 RESPONSE TO APPELLANTS' POINT III**

III. The trial court did not err in reducing the Overbeys' punitive damages award against Franklin under Section 510.265, RSMo 2005, because that statute does not violate the right to equal protection within Article I, Section 2 of the Missouri Constitution and the Fourteenth Amendment of the U.S. Constitution, in that under the appropriate, rational basis, standard of review, the statute satisfies the requirements that (1) the legislation has a legitimate purpose and (2) the legislature reasonably believed that the challenged classification would promote that purpose.

A. Standard of Review.

The standard of review applicable to this point on appeal is identical to that discussed above with regard to Appellant/ Cross-Respondent's First Point on Appeal. *See City of Arnold,* 249 S.W.3d at 204

B. Section 510.265, RSMo 2005, Does Not Violate The Overbeys' Right to Equal Protection.

The Overbeys contend that Section 510.265 RSMo 2005 violates that equal protection provisions of the Missouri and U.S. Constitutions because it treats the Overbeys different than other groups of persons or entities. Specifically, the Overbeys point to three statutory exceptions to the punitive damages caps: (1) claims where the State of Missouri is a plaintiff, (2) claims where the defendant has pleaded guilty or been ***35** convicted of a felony arising out of the conduct at issue, and (3) housing discrimination claims arising under the Missouri Human Rights Act.

1. The Proper Standard Of Review Is Rational Basis Review, Rather Than Strict Scrutiny.

"If the law 'disadvantages a suspect class' or affects a 'fundamental right,' a court must apply strict scrutiny to determine 'whether the statute is necessary to accomplish a compelling state interest,' and whether the chosen method is narrowly tailored to accomplish that purpose." *Doe v. Phillips,* 194 S.W.3d 833, 842 (Mo. banc 2006). Here, the Overbeys do not claim that the statute impacts a suspect class. Rather, they argue that Section 510.265 impinges upon the fundamental right to trial by jury. This is the same argument has been previously rejected by this Court in *Adams, supra.* As discussed in regard to the Overbeys' Point II, above, *Adams* held that the requirement that half of all punitive damages awards be paid to the state did not impinge upon the right to trial by jury. *Adams,* 832 S.W.2d at 907. Just as the limitations on a plaintiff's ability to recover punitive damages discussed in *Adams* do not impact the right to jury trial, the punitive damages caps at issue in the case at bar also have no impact upon that constitutional right. As the right to jury trial is not implicated by the statute, and neither a suspect class or fundamental right is impacted by the statute, this Court must apply rational basis review in deciding the Overbeys' equal protection arguments. *See Committee for Ed. Equality v. State,* 294 S.W.3d 477, 490 (Mo. banc 2009).

***36** In evaluating the Overbeys' equal protection arguments must be evaluated under the "rational basis" standard of review, "the challenged statutory provisions will be upheld if rationally related to a legitimate state interest." *Adams,* 832 S.W.2d at 903. The U.S. Supreme Court has articulated this test as involving two prongs: (1) a determination whether the challenged classification has a legitimate purpose and (2) whether it was reasonable for the legislature to believe that the challenged classification would promote that purpose. *Western & Southern Life Ins. Co. v. State Bd. Of Equalization,* 451 U.S. 648, 668 (1981).

"Rational basis review does not question 'the wisdom, social desirability or economic policy underlying a statute,' and a law is upheld if it is justified by any set of facts." *Committee for Ed. Equality v. State,* 294 S.W.3d 477, 491 (Mo. banc 2009) (quoting *Mo. Prosecuting Attorneys & Circuit Attorneys Ret. Sys. v. Pemiscot County,* 256 S.W.3d 98, 102 (Mo. banc 2008)). "[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.* 449 U.S. 456, 470 (1981). This standard is "highly deferential" in its application. *See Committee for Ed. Equality,* 294 S.W.3d at 491. Indeed, statutory enactments subject to rational basis review are deemed to be presumptively constitutional. *See McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

***37** Here, Section 510.265, RSMo 2005, was enacted as part of a much larger body of legislation adopted in 2005 for the purposes of tort reform. As such, this statute is part of an overall statutory scheme put in place in order to achieve the substantive legislative goals of tort reform. *See* H.B. 393, 93rd Gen. Assy., Reg. Session (Mo. 2005). It is beyond doubt that tort litigation has a direct and significant economic impact. By way of example, merely raising a claim for punitive damages has an associated cost in terms of increasing the potential settlement value of a case and the costs of litigating the claim. *Compare, Neill v. Gulf Stream Coach, Inc.,* 966 F.Supp. 1149, 1155 (M.D. Fla. 1997) (Discussing the impact of punitive damages legislation as "a statutory device directed at reducing the *in terrorem* effect and the expense of litigating cases in which 'throw away' punitive damages claims are made as an added inducement to settle before the pleader has developed any evidentiary basis for the assertion.").

By enacting limitations upon the amount of punitive damage that are recoverable, the legislature was obviously attempting to mitigate the impact of punitive damages claims on litigation and settlement costs, and thereby engage in economic regulation. A statute enacted to serve the interests of economic regulation must be "upheld absent proof of arbitrariness or irrationality" on the part of the legislature. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 83 (1978). As the Overbeys offer no proof that the statute is arbitrary or irrational, their challenge to the statute necessarily fails.

***38 2. The "State Claims" Exception Has A Rational Basis.**

The Overbeys contend that equal protection principles are violated by the statute because it treats the Overbeys' claims differently than claims raised by plaintiffs falling within any of the three categories discussed above. Turning first to the statutory exception for claims brought by the State of Missouri, the Overbeys argue, in essence, that the punitive damages potentially available should not depend on whether that claim is brought by the State or by a private litigant. As the Overbeys' claim for punitive damages was brought pursuant to the Missouri Merchandising Practices Act (MMPA), Section 407.010 *et seq.,* RSMo 2000, the question is whether treating a claim by a private litigant under the MMPA differently than a claim under the MMPA brought by the state is related to a legitimate state interest.

With regard to MMPA claims brought by the state, such claims are brought by the Attorney General for the unique purpose of protecting the citizens of the state from deceptive commercial practices. The punitive damages sought in such cases are intended to deter misconduct by the defendant and others and ultimately accrue to the benefit of the state. *See, e.g., State ex rel. Nixon v. American Tobacco Co., Inc.,* 34 S.W.3d 122, 125 (Mo. banc 2000). In contrast, only a portion of a punitive damage award accrues to the state in cases where the claim is brought by a private litigant. *See Fust v. Attorney General for the State of Mo.,* 947 S.W.2d 424, 427 (Mo. banc 1997). As the entirety of the punitive damages award in actions brought by the State accrues to the State and its citizens it is reasonable to exclude it from the punitive damages caps. Further, the nature ***39** of the punitive damages claim is somewhat different when the plaintiff is the State as opposed to a private citizen. Punitive damages in the context of a private citizen's claim must arise from the harm caused to that particular plaintiff, and cannot be awarded for harm caused to nonparties. *Philip Morris USA v. Williams,* 529 U.S. 346, 355 (2007). If the claim is brought by the state, however, the punitive damages award could encompass harm caused to *all* of that state's citizens. This, in turn, would rationally justify treating the state's claim for punitive damages differently, and justify exclusion from the punitive damages caps applicable to punitive damages claims brought by private citizens.

3. The "Felony Crime" Exception Has A Rational Basis.

There is also a rational basis for treating the victims of felony crimes different than those who sustain damages from wrongful conduct that is not a felony offense. This is essentially a legislative finding, as a matter of state policy, that felony offenses are inherently more reprehensible than other wrongdoing. As discussed at greater length below, the U.S. Supreme Court has recognized that reprehensibility is a key criterion for assessing the propriety of a punitive damages award under the due process clause of the U.S. Constitution. *See State Farm v. Campbell,* 538 U.S. 408, 409 (2003); *BMW v. Gore,* 517 U.S. 559, 575 (1996). In light of that precedent, it is rational for the legislature to carve out particular types of conduct that it deems particularly reprehensible for special treatment under the state's punitive damages laws. The Missouri Supreme Court has recognized that the State has "legitimate interests" in using punitive damages for ***40** "punishing wrongful conduct and deterring its repetition." *Scott v. Blue Springs Ford Sales, Inc.,* 176 S.W.3d 140, 144 (Mo. banc 2005).

It follows that the "felony crime" exception is a reasonable extension of these principles by allowing a departure from the punitive damages caps to ensure appropriate punishment is provided for felony offenses and in the interest of deterrence. It is also significant that, to qualify for this exception, the defendant must have pleaded or been found guilty of the

felony offense. *See* § 510.265, RSMo 2005. This requires a finding of guilt beyond a reasonable doubt, a burden of proof significantly higher than the "clear and convincing evidence" standard applicable to punitive damages claims generally. *See Croxton v. State,* 293 S.W.3d 39, 44 (comparing "clear and convincing" burden to "guilt beyond a reasonable doubt" standard). It also entails that the defendant has had the benefit of the protections and safeguards provided under the statutes, legal principles, and rules governing criminal procedure. This, in turn, lessens a key due process concern associated with punitive damages, in that they are in the nature of criminal penalties or fines, yet generally imposed without the same procedural safeguards associated with criminal prosecution. *Compare, State Farm v. Campbell,* 538 U.S. at 427 ("Great care must be taken to avoid the use of civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standard of proof"). Thus, the statutory exception to the punitive damages caps that is available when the defendant has pleaded or been convicted ***41** of a felony offense for the conduct that forms the basis of the claim for punitive damages has a rational basis and does not offend equal protection considerations.

4. The "Housing Discrimination" Exception Has A Rational Basis.

With regard to housing discrimination, the state has a rational interest in discouraging housing discrimination in violation of the MHRA. The legislature could rationally conclude that housing discrimination claims may actually involve little in the way of actual damages and that subjecting such claims to the punitive damages caps applicable to other claims might result in either insufficient deterrence to such conduct, or insufficient incentive for potential plaintiffs (and their legal counsel) to pursue such claims. Ultimately, this exception would appear to serve the interests of economic regulation, which must be "upheld absent proof of arbitrariness or irrationality" on the part of the legislature. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 83 (1978). The Overbeys fail to make that required showing, here.

As each of the exceptions to the punitive damages limitations within Section 510.265, RSMo 2005, is rationally related to legitimate government purposes, those exceptions meet the rational basis test. Accordingly, the statute does not offend the Overbeys' rights to equal protection and their third point on appeal should, therefore, be denied.

***42 RESPONSE TO APPELLANTS' POINT IV**

IV. The trial court did not err in reducing the Overbeys' punitive damages award against Franklin under Section 510.265, RSMo 2005, because that statute does not constitute "special legislation" under Article III, Section 40 of the Missouri Constitution, in that (1) the legislation involves open-ended classifications and is not arbitrary or without legitimate legislative purpose and (2) the legislature reasonably believed that the challenged classification would promote that purpose.

In their Fourth Point on Appeal, the Overbeys contend that Section 510.265 constitutes "special legislation." "Special legislation refers to statutes that apply to localities rather than to the state as a whole and statutes that benefit individuals rather than the general public." *Jefferson County Fire Protection Districts Ass 'n v. Blunt,* 205 S.W.3d 866, 868 (Mo. banc 2006).

A. Standard of Review.

As with the preceding points, this Court engages in *de novo* review of a properly-preserved constitutional issue raised on appeal. *See City of Arnold,* 249, S.W.3d at 204. The nature of that review with regard to claims that a statute is "special legislation" depends on the whether the law at issue is based on open-ended characteristics or close-ended characteristics. *See Jefferson County,* 205 S.W.3d at 870. Close-ended characteristics are immutable facts such as "historical facts, geography, or geographic status." *Id.;* ***43** *City of Springfield v. Sprint Spectrum, L.P.,* 203 S.W.3d 177, 184 (Mo.

banc 2006). Conversely, open-ended characteristics are mutable, such that the membership of the group can change over time. A statute based on close-ended characteristics is facially special and presumed unconstitutional unless the party defending the statute demonstrates a "substantial justification" for the treatment of the defined group. *Jefferson County,* 205 S.W.3d at 870. However, where a statute is based on open-ended characteristics, the test "is similar to the rational basis test used in equal protection analyses." *Id.* In those circumstances, "[t]he burden is on the party challenging the constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose." *Id.* (citing *Treadway v. State,* 988 S.W.2d 508, 511 (Mo. banc 1999)); *Blaske v. Smith & Entzeroth, Inc.,* 821 S.W.2d 822, 832 (Mo. banc 1991).

B. This Point on Appeal should be denied, as the Overbeys seek to raise arguments that were not presented to the trial court.

The Overbeys' arguments under this point primarily develop arguments that there is no rational basis for the three exemptions set forth in Section 510.265, RSMo 2005. They first contend that "[t]he exemption for the State as a plaintiff excludes other similarly situated plaintiffs raising similar claims as the State." Appellant's Brief at 41-42. They next argue that the exemption for defendants convicted of felony crimes arising from the civil matter lacks a rational basis because it "excludes defendants who have engaged in illegal actions but have not been criminally convicted." *Id.* at 42-43. Third, they contend that the housing discrimination exception "excludes other victims of ***44** statutory created laws and other plaintiffs who have low compensatory or actual damages." *Id.* at 43-44. None of these arguments were developed in the Overbeys' briefing before the trial court. *See* L.F. at 279-80. Rather, their arguments before the trial court were simply that the statute "singles out three classes of victims and leaves other classes limited under the statute." *Id.* As the arguments raised by the Overbeys in the present appeal were not submitted within the Overbeys' briefing before the trial court, they should be deemed waived and not preserved for appeal. *State ex rel. York v. Daugherty,* 969 S.W.2d at 224 (Mo. banc 1998)

C. This Point on Appeal should be denied, as Section 510.265, RSMo 2005, is not "special legislation."

Section 510.265, RSMo 2005, does not constitute "special legislation." The Overbeys offer no argument that any of the exceptions within Section 510.265 are "closed end" classifications that require "substantial justification" for disparate treatment amongst the groups so classified. *See, e.g., Jackson County v. State,* 207 S.W.3d 608, 611 (Mo. banc 2006). Rather, they analyze the statute under the assumption that the statutory classifications are open-ended, applying the rational basis tests to each classification. The Statute involves three open-ended classifications: (1) private civil plaintiffs with potential punitive damage claims; (2) plaintiffs who have claims involving certain areas of law; and (3) plaintiffs who bring claims against persons convicted of crimes. None of the classifications are based upon fixed, immutable characteristics, rendering them open-ended classifications. *See id.* at 611. Thus, this court must apply the ***45** same standard as the equal protection analysis discussed above with regard to the Overbeys' Point III, above. In accordance with the above demonstration, this Court should conclude that, because Section 510.265, RSMo 2005, does not violate equal protection under the rational basis standard, the statute is not "special legislation" prohibited by the Missouri Constitution. *Compare, Evans ex rel. Kutch,* 56 P.3d at 1057 ("The plaintiffs' contention fails, because our test for whether a provision violates the 'ban on special legislation' is identical to the equal protection test already discussed.")

While the Overbeys contend that the statute's exclusion of claims brought by the State makes it a special law, they offer no authority for that proposition. Indeed, Missouri statutory law is replete with situations where the State is accorded different treatment than its citizens, perhaps the most obvious of which are the sovereign immunity statutes, Section 537.600 *et seq.,* RSMo 2000. Under the Overbeys' reasoning, the sovereign immunity statutes would constitute "special legislation" that would be presumptively unconstitutional. Such a result is clearly absurd.

The only authority the Overbeys cite in support of their argument is the case of *Batek v. Curators of University of Missouri,* 920 S.W.2d 895 (Mo. banc 1996). In *Batek,* this Court considered whether the statutory exclusion of medical malpractice claims from the tolling provisions of Section 516.170, RSMo, constituted a special law. *See id.* at 897, 899. This Court held that the statute was not a special law because it excluded all persons who asserted actions against health care providers, and did not treat members of ***46** that group differently. *See id.* at 899. Opining that "[t]here are valid reasons for the general assembly to have provided for a different time for the commencement of the limitations period for plaintiffs in medical malpractice cases," this Court concluded that the statute was constitutional. *See id.*

Like Section 516.170, RSMo, Section 510.265, RSMo, excludes certain classes of persons from its coverage. Section 510.265, RSMo does not single out members of those subclasses for different treatment. Thus, under the analysis of *Batek,* this Court should conclude that the statute meets constitutional muster with regard to the prohibition against special laws under Article III, Section 40 of the Missouri Constitution. Appellant's Fourth Point on Appeal should, therefore, be denied.

***47 RESPONSE TO APPELLANTS' POINT V**

V. The trial court did not err in reducing the Overbeys' punitive damages award against Franklin under Section 510.265, RSMo 2005, because that statute does not violate the Overbeys' right to due process under Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the U.S. Constitution, in that the statute did not divest the Overbeys of any vested property rights.

A. Standard of Review.

The standard of review applicable to this point on appeal is identical to that discussed above with regard to Appellant/Cross-Respondent's First Point on Appeal. *See City of Arnold,* 249 S.W.3d at 204.

B. Section 510.265, RSMo 2005, does not violate due process as it does not divest the Overbeys of any vested property right.

The last argument the Overbeys raise with regard to the constitutionality of the punitive damages caps within Section 510.265, RSMo 2005, is that these caps are unconstitutional because they violate due process. Specifically, the Overbeys contend that the statute deprives them of a property right in their punitive damages claim. This argument is logically flawed, as the legislature has the power to change or abolish existing statutory or common law remedies and not offend constitutional due process protections, except where such changes would infringe upon vested rights. *Felling v.* ***48** *Wire Rope Corp. of America, Inc.,* 854 S.W.2d 458, 462 (Mo. App. 1993). "Missouri recognizes that a litigant does not have a vested property right in a cause of action before it accrues." *Id.* (citing *Blaske v. Smith & Entzeroth, Inc.,* 821 S.W.2d 822, 834 (Mo.1991)). Thus, unless the Overbeys' claims accrued *before* the effective date of the statute, the enactment of the statute did not impinge upon violate any of the Overbeys' property rights or otherwise violate due process as to the Overbeys.

Numerous courts have concluded that a plaintiff has no vested right in a punitive damages award until judgment. *See, e.g., Cheatham v. Pohle,* 789 N.E.2d 467, 475 (Ind. 2003) (statute allowing the state to recover part of a punitive damages award was not an unconstitutional taking under either the state or federal constitution); *DeMendoza v. Huffman,* 51 P.3d 1232, 1246 (Or. 2002) (statute was not a taking because "plaintiffs do not have a vested prejudgment property right in punitive damages"); *Fust v. Attorney Gen.,* 947 S.W.2d 424, 431 (Mo. 1997) (same); *Gordon v. State,* 608 So.2d 800, 801-02 (Fla. 1992) ("The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages.") (quoting *Ross v. Gore,* 48 So.2d 412, 414 (Fla. 1950)), *cert. denied,* 507 U.S. 1005 (1993); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.,* 473 N.W.2d 612, 619 (Iowa 1991) (holding that "a plaintiff is a fortuitous beneficiary of a punitive damage award simply

because there is no one else to receive it," and plaintiff "did not have a vested right to punitive damages prior to the entry of a ***49** judgment"); *Smith v. Hill,* 147 N.E.2d 321, 325 (Ill. 1958); Kelly v. Hall, 12 S.E.2d 881, 883 (Ga. 1941).

Here, the Overbeys' punitive damages claims accrued, at the earliest, when they purchased the subject vehicle in 2007, well after the August 28, 2005, effective date of Section 510.265, RSMo 2005. Thus, the Overbeys' interest in their punitive damages claim could not vest until well after those statutory caps became effective. *Fust,* 947 S.W.2d at 431. In *Fust,* the Missouri Supreme Court held that, as the plaintiff's claim for punitive damages had accrued after the Tort Victims' Compensation Fund statute had gone into effect, the plaintiff "acquired no more than a 50% interest in such judgment as would be entered for punitive damages." *Id.* Thus, the plaintiff in *Fust* had no property interest in the remainder of the potential punitive damages award. Similarly, here, since the Overbeys' claims accrued after the effective date of Section 510.265, RSMo 2005, they acquired an interest in their potential punitive damages claim only to the extent of the statutory caps. *See id.* The statute did not take away any vested rights away from the Overbeys. Rather, it merely prospectively limited the extent to which the Overbeys could obtain an interest in a punitive damages award. *See id.* This does not offend equal protection principles. *See id.*

As Section 510.265, RSMo 2005, did not deprive the Overbeys of any vested property rights, the statute does not unconstitutionally deprive the Overbeys of property ***50** without due process. Accordingly, the Overbeys' due process arguments should be found unpersuasive and disregarded by this Court.

*51 RESPONSE TO APPELLANTS' POINT VI

VI. The trial court did not err in reducing the Overbeys' punitive damages award against Franklin under Section 510.265, RSMo 2005, because the Overbeys claim did not fall within the statutory exception for claims brought by the State, in that the plain meaning of the statute does not admit a construction that would allow "private attorney general" claims to qualify for that exception.

A. Standard of Review.

The standard of review applicable to this point on appeal is identical to that discussed above with regard to Appellant/Cross-Respondent's First Point on Appeal. *See City of Arnold,* 249 S.W.3d at 204

B. The Overbeys Do Not Qualify For The Statutory Exception Under Section 510.265, RSMo 2005, For Claims Brought By The State.

The Overbeys contend that the punitive damages caps should not be applied to them in this matter, as they were acting as "private attorney generals" in bringing their Missouri Merchandising Practices Act ("MMPA") claim and should, they argue, qualify for an exception to the punitive damages caps under Section 510.265 RSMo 2005. The particular exception they seek to rely upon is the exception for claims in which the State of Missouri is the plaintiff, contained within subsection 1 of the statute. *See* § 510.265.1, RSMo 2005. This exception expressly applies only to cases in which "the state of Missouri is the plaintiff requesting the award of punitive damages." *Id.*

***52** To determine whether the Overbeys qualify for the "state claims" exception within 510.265, RSMo 2005, this Court must undertake an analysis of the statutory language to ascertain the legislature's intent. *See Utility Svc. Co. v. Department of Labor and Indus. Relations,* S.W.3d , 2011 WL 795867 at *3 (Mo. banc March 1, 2011). The legislative intent is ascertained via the words employed within the statute. *Id.* Those words are given their "plain and ordinary meaning" in that analysis. *Id.* In that process, "each word, clause, sentence, and section of a statute is given meaning." Id. A reviewing court can only turn to rules of statutory construction when the plain and ordinary meaning of the statutory language is ambiguous, rendering it impossible to ascertain the legislative intent from that language. *See id.*

The statute specifically states that "[s]uch limitations shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages...." § 510.265, RSMo 2005. This language is clear and unambiguous. This exception is only available when "the state of Missouri" is "the plaintiff" in the action at bar. The Overbeys' claim does not even colorably fall within this exception to the statutory punitive damages limitations. The Overbeys are not the State of Missouri. They are private citizens bringing a private civil claim. The State of Missouri has never been joined as a plaintiff in this action. [8]

[8] The Attorney General has filed a separate action against Defendants National Auto and Franklin. That action is *State of Missouri, ex rel. Nixon v. Chad Franklin National Auto Sales North, LLC, CFS Enterprises, Inc., and Chad Franklin,* Case No. 08CY-CV08140, currently pending in the Circuit Court of Clay County, Missouri. Jury trial in that matter is currently scheduled for December 5, 2011.

***53** The Overbeys do not advance any argument that Section 510.265, RSMo 2005, is ambiguous. Rather, they argue that they should be deemed to fall within the "state claims" exception to the punitive damages caps on the basis that their MMPA action is, in essence, a "private attorney general" action. The bringing of civil claims is authorized the MMPA which specifically describes such actions as "*private* civil actions." §407.025.1, RSMo 2000 (italics added). They cite and discuss a series of cases discussing the public policy reasons for "private attorney general" actions under the MMPA, and suggest that allowing them to take advantage of the exception to the punitive damages limits within Section 510.265, RSMo, would further those public policy goals. However, public policy does not permit this Court to disregard the plain and ordinary meaning of the statute, which is clear and unambiguous. *State ex rel. Ligett & Myers Tobacco Co. v. Gehner,* 292 S.W. 1028, 1030 (Mo. 1927) ("It is a very well-settled rule that so long as the language used is unambiguous, a departure from [a statute"] natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect.") "[T]he intent of the legislature as reflected in the plain and ordinary meaning of the text of the statute trumps ***54** our speculation as to the twists and turns of the public policy underlying the statute." *State ex rel. Lucas v. Wilson,* 963 S.W.2d 408, 411 (Mo. App. 1998).

Had the legislature intended to include "private attorney general" actions within the "state claims" exception, they clearly could have done so by providing an express exception for such actions within the statute. Thus, even if the statute was ambiguous, the maxim of statutory construction "*expresso unius est exclusio alterius*" (the expression of one thing is the exclusion of another) would apply. *See City of Springfield ex rel. Board of Pub. Utils. v. Brechbuhler,* 895 S.W.2d 583, 585 (Mo. banc 1995). Section 510.265 provides a closed-ended, finite list of exceptions to the punitive damages limitations. Thus, the maxim would apply, here, and bar this Court from inferring that private attorney general actions fell within the "state claims" exception of the statute. *See id.* at 585-86. Thus, as the legislature has declined to extend this exception to private attorney general actions, this Court should conclude that the legislature did not intend to allow such extension, and deny this point on appeal.

While the MMPA, in its current form, allows for civil enforcement of its provisions through lawsuits brought by private parties, which are sometimes referred to as "private attorney general" actions, such actions nevertheless remain private actions, and not actions brought by the State. See § 407.025.1, RSMo 2000. The State is not a plaintiff in such actions. There is no ambiguity in the statute which would permit this Court to construe "the state of Missouri is a plaintiff requesting the award of punitive ***55** damages" to include a private plaintiff pursuing a claim for civil damages under the MMPA. Thus, the Overbeys' argument that they qualify for the "state claims" exception of Section 510.265, RSMo 2005, lacks merit and should be denied.

***56 RESPONSE TO APPELLANTS' POINT VII**

VII. The trial court did not err in reducing the Overbeys' punitive damages award against Franklin under Section 510.265, RSMo 2005, because the Overbeys failed to preserve for appeal an argument that the statute violates the open courts doctrine under Article I, Section 14 of the Missouri Constitution, in that the Overbeys did

not raise any such argument in the proceedings before the trial court and therefore waived any constitutional issue in that regard and made no showing that the statute operates to bar any plaintiffs from bringing claims.

A. Standard of Review.

The Overbeys acknowledge that their argument in this point (that Section 510.265, RSMo 2005, should be found to be an unconstitutional restriction on their access to the courts) is raised for the first time on appeal. Accordingly, they ask that this court engage in "plain error" review of this point on appeal. It is well-settled, however, that "[c]onstitutional violations are waived if not raised at the earliest possible opportunity." *State ex rel. York v. Daugherty,* 969 S.W.2d 223, 224 (Mo. banc 1998) (citing *Adams,* 832 S.W.2d at 907). In order to request plain error review, the party seeking review must demonstrate *both* (1) an error affecting substantial rights and (2) a resulting miscarriage of justice or manifest injustice. *Eisel v. Midwest BankCentre,* 230 S.W.3d 335, 340 (Mo. banc 2007); Supreme Court Rule 84.13. Here, the Overbeys discuss only the second prong of the test in their briefing on appeal, asserting that a manifest injustice has occurred. Thus, they fail to make the necessary showing to request plain error review of ***57** this point on appeal. Moreover, plain error review is discretionary. *See In re Adoption of C.M.B.R.,*332S.W.3d793, 2011 WL 265325 (Mo. banc January 25, 2011). Indeed, rather than exercise that discretion, this Court more typically concludes that constitutional issues which were not raised in the proceedings below have been waived and are not preserved for appeal. *See, e.g., Eisel,* 230 S.W.3d at 340; *Adams,* 832 S.W.2d at 908; *Land Clearance for Redevelopment v. Kansas City,* 805 S.W.2d 173, 175-76 (Mo. banc 1991).

B. There Is No Support In The Record For A Determination That Section 510.265, RSMo 2005 Restricted The Overbeys' Access To The Courts, And Thus This Court Should Decline To Engage In Plain Error Review.

This Court has previously considered similar arguments with regard to the noneconomic damages caps under Chapter 538, RSMo. In analyzing such arguments, this Court has drawn a distinction between "statutes that impose procedural bars to access, and statutes that change the common law by the elimination (or limitation of) a cause of action." *Adams,* 832 S.W.2d at 905. Statutes that fall within the former classification are constitutionally impermissible, the remainder "are a valid exercise of legislative prerogative." *Id.* In Adams, this Court held that the noneconomic damages cap within Chapter 538, reasoning that "it does not erect a condition precedent or any other procedural barrier to access to the courts... [I]t simply redefines the substantive law by limiting the amount of noneconomic damages plaintiffs can recover." *Id.* at 905- ***58** 06. Based on its determination that the statute did not preclude the plaintiff from bringing a cause of action, this Court concluded that the statute did not offend the right of access to the courts provided by Article I, Section 14 of the Missouri Constitution. *Id.* at 905.

Similarly, here, the limitations on punitive damages do not preclude or bar a plaintiff from bringing a cause of action.

The Overbeys seek to draw an analogy between this matter and *Kilmer v. Mun,* 17 S.W.2d 545 (Mo. banc 2000). Kilmer concerned the constitutionality of Section 537.053, RSMo, which imposed a mandatory statutory precondition for the filing of a civil action seeking "dram shop" liability, by requiring the criminal conviction of the defending party before a civil action could be filed against that party. *See id.* at 546. If there was no criminal conviction, a civil action could not be maintained. *See id.* Thus, the absence of the precondition barred a plaintiff from bringing a claim altogether. *See id.*

In contrast, here, Section 510.265, RSMo 2005, does not prohibit the filing of any action or preclude the raising of any claims unless certain prerequisites are satisfied. *See generally,* § 510.265, RSMo 2005. Rather, it only specifies what punitive damages can be recovered in an action filed after the statute became effective. *See id.* The statute only impacts the range of punitive damages available under the statute, not whether a claim for punitive damages might be brought in the first instance. Thus, even if the statutory ***59** limit upon punitive damages available might differ depending on whether or not the defendant had been convicted of a felony offense related to circumstances giving rise to the civil

action, the existence of such a conviction is not a precondition to bringing such a claim. As such, *Kilmer* is inapposite, and the reasoning of *Adams* more closely hews to the circumstances before the Court in the case at bar.

Implicitly recognizing that the statute did not bar them from asserting any claims in this action, the Overbeys assert that the statutory limitations on punitive damages could make it difficult for "a plaintiff with small compensatory damages" to find counsel willing to take the case and prosecute it in the plaintiff's best interests. There was no evidence or other record presented in the proceedings below that would support such an empirical assertion. "[A]n attack on the constitutionality of a statute is of such dignity and importance that the record touching the issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance,* 805 S.W.2d at 175-76. Nor do the circumstances of this case demonstrate that the Overbeys' claims in this matter were of little value. Indeed, they asked for an actual damages award between $50,000 and $70,000 at trial. Tr. at 253:11-15. While the actual damages ultimately awarded to them on their claim against Franklin were only $4,500, they were awarded actual damages of $76,000 as to their claim against National Auto as well as $250,000 in punitive damages upon that claim. Moreover, the Overbeys submitted their claims to the jury under the MMPA, a claim that made available a claim of attorneys fees as a prevailing party. The Overbeys sought an award of attorneys fees of $67,000 under ***60** the statute. *See* L.F. at 218-220. The trial court granted the Overbey's motion for attorneys fees upon their MMPA claim, awarding $72,000 in fees, which was five thousand dollars *more* than the Overbeys requested in their briefing upon their attorneys' fee request. L.F. at 303-04.

Plaintiff's argument that Section 510.265, RSMo 2005, would make it difficult for Plaintiffs to find trial counsel is difficult to square with the statute, given that the statute permits a very significant punitive damages recovery. Specifically, the statute provides that the lowest cap on punitive damages is half of a million dollars, even if the underlying actual damages claim would result only in an award of nominal damages. *See* § 510.265, RSMo 2005. Thus, the Overbeys' argument, in essence, is that at least a half-million dollars of punitive damages must be in contention for a prospective plaintiff to find satisfactory legal counsel. This astonishing position lacks any support in the record, as there was no evidence presented in the proceedings below from which one could infer that the Overbeys encountered difficulty retaining counsel due to the statutory limitation on punitive damages. This Court can and should take judicial notice of the legion of cases that have reached this Court where the parties were represented by able counsel where far more modest sums were at issue. Those cases amply demonstrate that a punitive damages limitation of $500,000 in "small value" cases should not have any material impact upon a prospective plaintiff's ability to find and retain counsel to represent them.

***61** Simply put, the Overbeys waived this constitutional issue by failing to raise that issue in the proceedings before the trial court. However, if the Court decides to take up their argument, it should be rejected. There has been no demonstration that prospective plaintiffs would be barred from bringing any claims due to Section 510.265, RSMo 2005. As the statute merely limits the punitive damages available upon claims, it does not violate Article I, Section 14 of the Missouri Constitution and is, instead, a proper exercise of the legislature's power to modify and limit the common law. Thus, the Overbeys' Seventh Point on Appeal should be denied.

***62 CROSS-APPELLANT CHAD FRANKLIN'S CROSS-APPEAL.**

I. The trial court erred in denying Franklin's motions for directed verdict and judgment notwithstanding the verdict because the Overbeys failed to adduce sufficient evidence to support a finding that Franklin had violated the Missouri Merchandising Practices Act with regard to the Overbey transaction, in that the Overbeys failed to offer any evidence that Franklin had personally engaged in any conduct that violated the Missouri Merchandising Practices Act as to the Overbeys' transaction and the Overbeys did not seek to impose individual liability upon Franklin through submission of a claim seeking to pierce the corporate veil of Chad Franklin National Auto Sales North, LLC.

A. Standard of Review.

The standards applied in reviewing the denial of a Motion for Judgment Notwithstanding the Verdict are essentially the same as review of the denial of a motion for directed verdict. *See All American Painting, LLC v. Financial Solutions and Associates, Inc.,* 315 S.W.3d 719, 723 (Mo. banc 2010) (citing *Clevenger v. Oliver Ins. Agency, Inc.,* 237 S.W.3d 588, 590 (Mo. banc 2007)). The underlying inquiry is whether the plaintiff made a submissible case at trial. *See Livingston v. Baxter Health Care Corp.,* 313 S.W.3d 717, 724 (Mo. App. 2010). In order for a plaintiff to make a submissible ***63** case, the plaintiff must present substantial evidence sufficient to support each element of his or her claim. *Id.* "Substantial evidence is competent evidence from which the trier of fact can reasonably decide the case." *Scott v. Blue Springs Ford Sales, Inc.,* 215 S.W.3d 145, 184 (Mo. App. 2006).

"Under the general standard of review for denial of a motion for judgment notwithstanding the verdict, the evidence is viewed in the light most favorable to the jury's verdict." *All American Painting,* 315 S.W.3d at 721 (citing *Dhyne v. State Farm Fire and Cas. Co.,* 188 S.W.3d 454, 456-57 (Mo. banc 2006)). This Court must also view the reasonable inferences that may be drawn from the evidence in the light most favorable to the jury's verdict, disregarding unfavorable evidence. *Livingston,* 313 S.W.3d at 724. Thus, viewing the evidence presented below in that light, if this Court concludes that there was an absence of substantial evidence to support an element of the claim against Franklin that was submitted to the jury, then this court must reverse the judgment below as to Franklin and remand with directions to enter judgment in Franklin's favor.

***64 B. The Overbeys' Claim Against Franklin Sought Liability Arising From His Individual Conduct, And There Was Insufficient Evidence For A Jury To Find Him Liable On Such A Claim.**

In the proceedings below, the Overbeys sought to hold Franklin individually liable for violation of the MMPA, hypothesizing that Franklin had made "use of misrepresentation or the omission of any material fact in connection with the sale of the 2007 Suzuki motor vehicle" to the Overbeys. L.F. at 206. Thus, in order to submit this claim to the jury, the Overbeys were obligated to adduce evidence that Franklin had misrepresented or omitted a material fact in connection with the sale of that vehicle. *See Bolt v. Giordano,* 310 S.W.3d 237, 247 (Mo. App. 2010). In this section, Franklin will demonstrate that the Overbeys failed to adduce any evidence of this nature.

Nowhere in the evidence adduced at trial was there any testimony or exhibit establishing that Franklin made any statements to the Overbeys with regard to their motor vehicle transaction with National Auto. Michael Overbey expressly denied meeting or having any conversation with Franklin regarding the purchase of the vehicle. Tr. at 65:17-18; 88:7-12. This denial was echoed by Mashele, Glenna, and Max Overbey. Tr. at 125:14-126:16; 188:2-11; 238:24-239:11. Indeed, the only evidence of any statements made personally by Franklin adduced at trial concerns (1) a television advertisement and (2) a telephone conversation that occurred in Michael Overbey's presence, in which Ben, ***65** a National Auto employee, claimed to be speaking over the telephone to Franklin.

With regard to the advertisement, Mashele Overbey testified that she recalled a television ad in which Franklin appeared and said, "You're going to be another satisfied customer." Tr. at 126:23-127:7. At best, this statement is mere puffery that cannot be considered a *material* misrepresentation or omission of fact. There was no evidence that any other statements within the advertising by National Auto or other dealerships owned by Franklin were, in fact, made by Franklin. Michael Overbey admitted that he had no knowledge as to whether Franklin had any direct involvement in crafting the advertisements that prompted the Overbeys to visit National Auto. Tr. at 86:4-11. As to the evidence of the telephone conversation in which Ben purportedly was speaking to Franklin, Michael Overbey testified that the only information relayed by Franklin concerned where certain former employees were now working and that Franklin did not have any knowledge of the terms of the Overbey transaction. *See* Tr. at 98:22-99:12. There was no evidence that any of that information was false, misleading, or otherwise violative of the MMPA (let alone whether such statements were material misrepresentations or omissions of fact regarding the Overbeys' transaction). Indeed, Michael Overbey expressly disavowed having any knowledge that Franklin was aware of any of the representations employees of National Auto made to the Overbeys. Tr. at 86:20-88:6.

***66** In short, there was no evidence adduced at trial that Franklin, personally, engaged in any conduct that violated the MMPA in the manner submitted to the jury for determination. There was no evidence that Franklin made a false or misleading statement of material fact or omitted a material fact in a statement to the Overbeys that resulted in damage to them. There was no evidence that he had *any* role in approving or crafting the advertisements that brought the Overbeys to the dealership. Nor does his brief appearance in one of those advertisements provide a basis to reasonably infer that he had approved or created any of National Auto's advertising.

Nor was there any evidence that Franklin had any personal knowledge of the Overbeys' transaction or of any of the representations National Auto employees made to the Overbeys. Thus, there was no evidentiary basis from which a fact-finder could reasonably infer that Franklin ratified or sanctioned the conduction of National Auto's employees. As it was the Overbeys' burden to adduce such evidence, their failure to do so entitled Franklin to relief upon his motions for directed verdict and for judgment notwithstanding the verdict.

At the conclusion of trial, the jury entered a verdict against Defendant Franklin, awarding the Overbeys actual damages in the amount of $4,500.00 and punitive damages ***67** of $1 Million.[9] There was no evidentiary basis for this jury's actual damages award, as there was no proof that any conduct of Defendant Franklin was the cause of any damage to the Overbeys. Nor did the evidence yield any basis to support the particular amount of actual damages awarded by the jury. At trial, the Overbeys argued that Franklin personally received profits of approximately $4,000.00, at minimum. Tr. at 266:14-25. However, that argument was not supported by any evidence. Rather, the evidence adduced showed that *National Auto,* realized that profit from the sale of the vehicle. *See* Tr. at 41:13-17, 43:15-20 (discussing National Auto's responses to Requests for Admissions). There was no showing of how much of that profit (if any) flowed to Defendant Franklin, personally.

9 Overbeys' sought damages against Defendant Franklin solely upon his alleged status as "owner" of National Auto. As discussed above, this is nothing more than an attempt to pierce the corporate veil, and to treat Defendant Franklin as the "alter ego" of National Auto. As such, the damages ultimately awarded by the jury are inconsistent, as it awarded differing damages against each defendant, rather than the same amount of damages that would have been logically consistent under an "alter ego" analysis. The inconsistency between the damages awarded in the verdicts against Defendant Franklin and National Auto cannot be resolved post-trial, and require granting a new trial, at least with regard to the issue of damages. *Compare, Massey v. Rusche,* 594 S.W.2d 334, 339 (Mo. App. 1980) (reversing for new trial on damages, where jury awarded no damages to injured minor, but awarded damages to father for payment of medical expenses).

***68** Despite asserting that they were not seeking to pierce the corporate veil of National Auto, the Overbeys' arguments to the jury clearly sought to hold Franklin liable not based upon his individual conduct, but rather his mere status as "owner" of the company. Tr. at 247:3-19; 264:3-265:25. Put another way, this argument was little more than an attempt to pierce the corporate veil of National Auto. In the next section, Franklin will demonstrate that there was no evidentiary basis upon which would permit such veil-piercing, and that the judgment against Franklin cannot be affirmed under the veil-piercing doctrine.

C. The Overbeys Failed To Prove At Trial That The Corporate Veil Of National Auto Should Be Pierced To Impose Personal Liability On Franklin.

As discussed above, the claim submitted to the jury for determination at trial sought to hold Franklin individually liable based upon his own conduct. During their post-trial briefing, the Overbeys acknowledged that they did not intend to submit to the jury any claim seeking to hold Franklin individually liable for the alleged wrongdoing of National Auto via piercing of the corporate veil. L.F. at 269. Despite the Overbeys' decision to forego an attempt to pierce the corporate veil through proper submission of ***69** that issue to the jury, they nevertheless invited the jury in their closing argument to hold Franklin individually liable merely due to his status as "owner" of National Auto:

> Chad Franklin admitted in those court documents... that he was the owner of Chad Franklin National Auto Sales. [...] He was the sole owner of it. That's why there is a claim against both Chad Franklin and the limited liability company that is under the name of Chad Franklin National Auto Sales.

Tr. at 247:12-18.

> Chad Franklin dug this pit, ladies and gentlemen. He has to get down in it to be responsible. An owner of a business can't hide, shouldn't be able to hide, should be able to come in and be responsible when it's his name that's on the bottom line. That's what it was in this case here.

Tr. at 264:2-7

> Ladies and gentlemen, an owner is captain of the ship. When you're the sole owner of a business, it's you. It's nobody else. You can't hide behind anybody else. He may ***70** be able to not come into court. He may not be able to live up to his responsibility, but he can't escape the responsibility that he is the owner of that business and he is responsible for what he does.

Tr. at 264:24-265:6. Clearly, in contrast to the instructions submitted to the jury, the Overbeys' argued that Franklin should be held liable not for his own conduct, but rather that the conduct of the company should be imputed to him.

The Overbeys' argument that Defendant Franklin should be held personally liable as the "owner" of National Auto is essentially an argument that the status of the limited liability company should be disregarded and pierced in order to allow assertion of individual liability against its owner. Thus, there was an inconsistency between the claims submitted via the instructions and the Overbeys' arguments to the jury as to the basis for Franklin's individual liability (if any). Their argument undoubtedly resulted in confusion of the jury, given the inconsistency with the submitted claims, as discussed below. This confusion was far from harmless, as well, inviting the jury to hold Franklin liable as the "owner" of National Auto, even though the Overbeys had failed to make the predicate showing to allow such veil-piercing.

Missouri law is clear that such piercing is allowed only after a very specific evidentiary showing has been made. Generally, veil-piercing arguments are typically ***71** framed in the context that the business entity to be pierced is merely an "alter ego" of the individual defendant, or where the business was undercapitalized. To successfully pierce the corporate veil, a three-part showing must be made. First, the party seeking to pierce the veil must demonstrate that "the person from whom it seeks to recover... is the alter ego of the [corporate] defendant." *Mobius Mgmnt. Sys., Inc. v. West Physician Search, LLC,* 178 S.W.3d 186, 188 (Mo. App. 2005). Second, a plaintiff must demonstrate that the individual defendant has exercised his control over the corporate entity to commit fraud or wrong, or to violate a statutory or other legal duty. *Id.* at 188-89. Third, a plaintiff must prove that the individual defendant's control and breach of duty proximately caused the plaintiff's injury. *See Mobius Mgmnt.,* 178 S.W.3d at 188-89. "Missouri law recognizes narrow circumstances for piercing the corporate veil, and courts do not take this action lightly." *Bank of Belton v. Bogar Farms, Inc.,* 154 S.W.3d 513, 520 (Mo. App. 2005) (citing *Patrick V. Koepke Constr., Inc. v. Paletta,* 118 S.W.3d 611, 614 (Mo.App.2003)).

Turning to the first element of the veil-piercing theory, this element entails a showing of control over the business by the individual defendant amounting to complete domination of the finances, business practices, and policies of the company, such that the company did not have a "separate mind, will, or existence of its own." *Mobius Mgmnt.,* 178 S.W.3d at 188. In *Mobius Management,* for example, this demonstration was sufficiently made by presenting evidence that a person with an eighty-percent ownership of a limited liability company had paid employees with his own personal funds, exerted ***72** essentially complete control over the company during the relevant timeframe, and had personally agreed to a consent judgment on behalf of the company. *See id.*

Here, the Overbeys did not present any substantial evidence regarding the extent, if any, to which Franklin exerted control over the dealership's operations, beyond merely identifying him as the "owner" of National Auto. The Overbeys' counsel read a number of their Requests for Admissions, including admissions that Franklin was the owner of National Auto on September 15, 2007. Tr. at 43:25-44:1, 44:7-13. The sum total of the other evidence regarding Franklin's relationship to National Auto consisted of a photo taken from an advertisement for another dealership (Chad Franklin Suzuki) describing him as "owner," and the mere fact that Franklin's name is also part of the dealership name. Tr. at 15:9-18, 65:19-24. This evidence falls far short of the required showing, as it does not demonstrate that Defendant Franklin exerted control over the dealership *to the extent that it had no separate will or existence of its own* that would establish that National Auto was truly an "alter ego" of Franklin. *See Mobius Mgmnt.,* 178 S.W.3d at 188. Nor does the evidence adduced at trial admit a reasonable inference that Franklin exerted such control. Again, the evidence is only that Franklin was an "owner" of the dealership. If that evidence is sufficient to allow piercing of the corporate veil, here, then it is difficult to see how any the status of any corporate entity or limited liability company, especially those with a small number of shareholders or members, would avoid veil-piercing.

***73** With regard to the second element, a plaintiff must demonstrate that the individual defendant has exercised his control over the corporate entity to commit fraud or wrong, or to violate a statutory or other legal duty. *Mobius Mgmnt.,* 178 S.W.3d at 188-89. The Overbeys fail to establish this element for the same reason as the first element. They made no evidentiary showing that Defendant Franklin exerted any control over the dealership for the purpose of committing any fraud, wrongdoing, or violation of duty. Even assuming, for purposes of argument, that wrongdoing was committed by the dealership, there was no evidence offered that would reasonably support a conclusion that the wrongdoing was performed at Defendant Franklin's direction or that he exerted any control that resulted in the wrongdoing.

Instead, as discussed above, the Overbeys' evidence was directed solely at the conduct of National Auto and its employees and not at Defendant Franklin, individually. There was no evidence that Defendant Franklin was involved in the approval of the advertising campaign underlying the Overbeys' claims. No evidence was adduced that Defendant Franklin had any personal participation in the Overbeys' transaction, nor was there any evidence that the wrongful conduct allegedly committed by the dealership was at the direction or control of Defendant Franklin. His mere status of "owner" of the company does not provide sufficient grounds to reasonably infer such control existed or was exercised to commit any wrongdoing. *See Pfitzinger Morturary, Inc. v. Dill,* 319 S.W.3d 575, 581 (Mo. 1959).

***74** The third element that must be proven in order to pierce the corporate veil requires presenting evidence that the individual defendant's control and breach of duty proximately caused the plaintiff's injury. *See Mobius Mgmnt.,* 178 S.W.3d at 188-89. Put another way, in order to hold a person with an ownership interest in a company individually liable under a veil-piercing theory, there must be a demonstration that the person engaged in conduct that proximately caused the plaintiff's injury. *See Bank of Belton,* 154 S.W.3d at 521. Again, the Overbeys failed to come forward with evidence that would admit a conclusion that Defendant Franklin's exercise of control over the dealership was the proximate cause of any injury to them. Even assuming, for purposes of argument, that the dealership engaged in wrongdoing that proximately caused injury to the Overbeys, they have failed to present sufficient evidence to connect that wrongdoing to the exercise of control by Defendant Franklin.

In summary, there was a complete failure of proof upon the three essential elements that must be proven in order to pierce National Auto's corporate veil and to hold separate Defendant Franklin individually liable for the company's conduct. The Overbeys offered no evidence that Franklin was an "alter ego" of National Auto. Nor did they prove that Defendant Franklin exercised control to commit a fraud or wrongdoing, or to violate a legal duty. Nor did the Overbeys present proof that their alleged injury was proximately caused by wrongdoing or breach of duty resulting from Defendant Franklin's exercise of control. Simply put, the Overbeys failed to offer any evidence upon any of the necessary elements that would permit the corporate veil of National Auto ***75** to be pierced. As such, a veil-piercing analysis cannot provide a basis for affirming the judgment against Franklin.

Accordingly, this Court should conclude that the trial court erred in refusing to grant judgment in Franklin's favor notwithstanding the jury's verdict. Thus, this Court should reverse the trial court's judgment against Franklin and remand with instructions to enter judgment in Franklin's favor on all issues.

***76 D. As There Was Insufficient Evidence To Hold Franklin Individually Liable, Franklin Was Entitled To Entry Of Judgment In His Favor, Notwithstanding The Jury's Verdict.**

For the reasons discussed above, the judgment against Franklin must be reversd. The jury's finding of liability against Franklin was not supported by substantial evidence that Franklin had personally engaged in conduct that violated the Missouri Merchandising Practices Act. As such, there was no basis upon which the jury could find that Franklin had violated the Act. It follows that the trial court erred in denying Franklin's motions for directed verdict and subsequent motion for judgment notwithstanding the verdict. The jury's award of actual damages against Franklin was also unsupported by substantial competent evidence.

As the judgment's findings of liability and award of actual damages award must be reversed, the award of punitive damages award must also be vacated and reversed. A court cannot award punitive damages in the absence of an award of actual damages. *Linkogel v. Baker Protective Services, Inc.,* 659 S.W.2d 300, 305 (Mo. App. 1983). Accordingly, because the jury's actual damages verdict was not supported by substantial evidence, the punitive damages must also be set aside.

***77 II. The trial court erred in failing to reduce the punitive damages award against Franklin to a single-digit multiple of the actual damages assessed against Franklin, because the reduced punitive damages award of $500,000 was still far in excess of the amount permitted under the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 10, of the Missouri Constitution, in that the evidence adduced at trial does not support an award of punitive damages of an amount over 111 times the amount of actual damages based upon (1) the reprehensibility of Franklin's conduct, (2) the disparity between the harm actually or potentially suffered by the Overbeys and the punitive damage awarded, and (3) the difference between the punitive damages awarded and comparable civil penalties that could be imposed in similar cases.**

A. Standard of Review.

The U.S. Supreme Court has held that the assessment of punitive damages by the jury serves a different function than their role as finder of fact in assessing actual, compensatory damages. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 434 (2001). In *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.,* the U.S. Supreme Court analogized the review of punitive damages awards for excessiveness to the review of punishments for criminal offenses and civil fines and similar penalties. *Id.* at 434-35. While Cooper recognized that this Court must accept any factual findings ***78** made by the trial court unless they are clearly erroneous, "the question [of] whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate." *Id.* at 435.

B. This Cour's Determination As To Franklin's First Point On Cross-Appeal Could Moot The Need For Review Of The Punitive Damages Award Against Franklin.

As a preliminary matter, Franklin notes that this Court's disposition of his first point in this cross-appeal could render it unnecessary for this Court to take up his second point on appeal. Franklin maintained in the proceedings before the trial court and continues to contend on appeal that a punitive damages award in excess of a single-digit multiplier violated his constitutional rights to due process as articulated in the State Farm v. Campbell and BMW v. Gore decisions from the U.S. Supreme Court. However, it would be unnecessary for this court to review the propriety of the punitive

damages assessed against Franklin if this Court determines, in regard to Franklin's first point on his cross-appeal, that the Overbeys failed to present a submissible claim against Franklin at trial. If the verdict and judgment against Franklin is reversed, this would, by necessity, vacate the punitive damages assessed against Franklin, mooting the need for this Court to undertake a constitutional review of that punitive damages award.

***79 C. Constitutional Due Process Limits The Amount Of Punitive Damages That Can Be Awarded By A Jury.**

"[I]t is well established that there are procedural and substantive limitations [on punitive damages awards]... The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the imposition of grossly excessive or arbitrary punishments upon a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003). The Missouri Constitution also provides similar due process protections within Article I, Section 10. As punitive damages "serve the same purposes as criminal penalties," and because parties defending against such damages "have not been accorded the protections applicable in a criminal proceeding," they "pose an acute danger of arbitrary deprivation of property." *State Farm v. Campbell,* 538 U.S. at 416. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America v. Gore,* 517 U.S. 559, 576 (1996).

In order to provide that notice, and to reduce the arbitrariness of punitive damages awards, the U.S Supreme Court has set forth three primary principals that must be considered in assessing punitive damages awards for excessiveness. Specifically, in *BMW v. Gore,* the U.S. Supreme Court announced three principal guideposts for assessing such awards: (1) the reprehensibility of the defendant's conduct, (2) the disparity between the ***80** harm actually or potentially suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damages awarded and comparable civil penalties that could be imposed in similar cases. *Id.* at 575. These factors do not support an award of punitive damages of $500,000. Rather, the evidence presented at trial demonstrates that such an award is still grossly excessive and violates Franklin's constitutional due process rights as set forth in the *BMW* and *State Farm v. Campbell* decisions.

In 2005, the Missouri General Assembly enacted Section 510.265, RSMo 2005, which places statutory limitations upon punitive damages awards. Specifically, that statute limits punitive damages awards to the greater of two amounts: (1) five times the amount of actual damages awarded by the jury or (2) $500,000. *See* § 510.265, RSMo 2005. While not expressly adopted to codify the principles of *State Farm v. Campbell or BMW v. Gore,* the limits it imposes bear striking resemblance to the guidance supplied in those decisions, in that it limits punitive damages, generally, to a single-digit multiplier. [10] It also allows for a larger ratio of punitive damages where less than $100,000 in actual damages is awarded. This is consistent with the reasoning in *State Farm v. Campbell* that where the actual damages are small, a higher ratio of punitive damages might not offend due process. *State Farm v. Campbell,* 538 U.S. at 425.

10 This statutory limit is also higher than the four-times multiplier the U.S. Supreme Court has suggested is the typical maximum that would comply with due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. at 425.

***81** Here, the circuit court apparently reduced the jury's $1,000,000 punitive damages award to $500,000 to conform to the statutory limit within Section 510.265, RSMo 2005. However, it does not follow that the reduced award of $500,000 in punitive damages is constitutionally proper, even if it conforms to statutory limitations. As discussed in the next section, the circumstances of the particular case must be considered to determine if the award remains excessive under the U.S. Supreme Court's due process cases, which make it clear that deviations from a single-digit ratio must be reserved for *exceptional* cases, rather than the norm. *See State Farm v. Campbell,* 528 U.S. at 425 ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages... will satisfy due process").

As discussed below, the evidence adduced at trial, viewed in the light most favorable to the judgment below, cannot support the grossly excessive punitive damages award entered against Franklin, here.

1. The Ratio Of Punitive To Actual Damages Is Impermissibly High.

Turning first to the second of the three *BMW v. Gore factors,* requires a comparison between the harm sustained by Overbeys and the amount of the punitive damages awarded. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general ***82** damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 426 (2003). While there is no "bright-line ratio" above which a punitive damages award automatically violates due process, as a practical matter *"few* awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. Indeed, punitive damages in excess of "four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* [11] The Missouri Court of Appeals, Eastern District has opined that an award involving a triple-digit ratio of actual to punitive damages "raises a presumption of unconstitutionality per the holding in Campbell." *Kelly v. Bass Pro Outdoor World, LLC,* 245 S.W.3d 841, 851 (Mo. App. 2007).

11 The Court's reasoning in setting a 4:1 boundary with regard to the permissible ratio of punitive to actual damages is based, in significant part, upon the long history of statutory penalties allowing awards of double, triple, or quadruple damages. *See BMW V. Gore,* 517 U.S. at 580-81.

Here, the actual damages awarded by the jury against Defendant Franklin was $4,500 it is unclear how the jury reached that amount. However, assuming, for purposes of discussion, that this amount of actual damages is a correct reflection of the harm sustained by the Overbeys, an award of $500,000 is more than 111 times that amount of actual harm, under the trial court's Amended Judgment. Viewed in this light, the amount of punitive damages is far in excess of what is permissible under the United States and ***83** Missouri Constitutions, and gives rise to a presumption that the punitive damages awarded against Franklin are unconstitutional.

The Overbeys argued in the proceedings below that a higher ratio is appropriate in this instance because this case falls into a recognized exception for situations where a small award of actual damages is rendered by the jury. This exception applies when "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm v. Campbell,* 538 U.S. at 425. Thus, a two-prong test must be met to qualify for this exception. It is not enough that the economic damages arising from the defendant's conduct be low in value. There also must be evidence that the defendant's conduct constituted a "particularly egregious act." *Id.* Thus, there must be a demonstration that the defendant's conduct was especially reprehensible. The importance of the reprehensibility prong cannot be disregarded. As the Texas Supreme Court recently observed:

> If courts fail to diligently police the 'particularly egregious' exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.

***84** *Bennett v. Reynolds,* 315 S.W.3d 867, 879 (Tex. 2010). In *Bennett,* the Texas Supreme Court reversed a punitive damages award of $55,000, as excessive, based upon a 4.33:1 ratio with the actual damages awarded. *See id.* at 879. The reprehensibility showing entailed to trigger this prong of the exception must be significantly greater than that required to merely support an award of punitive damages in the first instance, otherwise this exception would engulf the rule altogether, rendering the rule meaningless.

Given the Overbeys' failure to make any showing of reprehensibility as to Franklin's personal conduct, they cannot qualify for the "small economic damages" exception to the general principal that punitive damages awards exceeding a single-digit multiplier (or indeed exceeding a ratio of 4:1) violate constitutional due process principles. *See State Farm v. Campbell,* 538 U.S. at 425. Accordingly, this step of the *BMW v. Gore* analysis weighs soundly in favor of reduction of the punitive damages award as to Franklin.

In the proceedings below, the Overbeys also relied upon two cases, Kemp v. AT&T, 393 F.3d 1354 (11th Cir. 2004), and *Mathias v. Accor Economy Lodging, Inc.,* 347 F.3d 672 (7th Cir. 2003) to argue that a departure from a single-digit ratio was proper in this case. In *Kemp,* the departure from single-digit ratios was largely premised upon AT&T's status as a multibillion dollar corporation, requiring a higher punitive damages amount to yield sufficient deterrence. 393 F.3d at 1364 (discussing deterrence of "a ***85** company as large as AT&T"). *See also generally* AT&T Annual Report 2005, at 18 (reflecting net revenues ranging from $4.7 Billion to $8.5 Billion from 2001 through 2005) (available at http://www.att.com/Investor/ATT_Annual/2005/pdf/ 05ATTar_ Complete.pdf). Similarly, in *Mathias,* the defendant was a company with a net worth of **$1.6 Billion.** *See Mathias,* 347 F.3d at 677. Moreover, the reprehensibility in *Mathias* was elevated because of the health and safety issues presented by the bedbug infestation at issue in that matter, in contrast to the absence of any health or safety issue in the case at bar. *See id.* at 678. Here, Franklin is an individual, not a large multinational corporation with a multimillion (or multibillion in the case of AT&T) net worth. Indeed, there was no evidence offered at trial as to Franklin's assets. There is no argument, here that an increased punitive damages ratio is needed to provide sufficient deterrent to an individual defendant, in contrast to a large, extremely well-funded corporation.

The Overbeys also relied in the trial court upon two cases in which misrepresentations were made by motor vehicle dealerships with regard to the sale of rebuilt or previously-wrecked vehicles. In *Parrott v. Carr Chevrolet,* 17 P.3d 473 (S.Ct. Ore. 2001), the court found that a 87:1 ratio of punitive to actual damages was appropriate in light of the fact that the vehicle presented significant safety issues. *See id.* at 488, 489. Similarly, in *Krysa v. Payne,* 176 S.W.2d 150 (Mo. App. 2005), the Missouri Court of Appeals upheld a punitive damages award with a ratio of approximately 27:1 with regard to a claim that a motor vehicle dealership had failed to ***86** disclose that a used vehicle had sustained prior collision damage. The high multiplier in Krysa (which is nearly 1/10th the multiplier at issue in the case at bar) was justified, in large part, due to the fact that the undisclosed damage presented "significant safety risks to occupants of the vehicle." *See id.* at 158. Again, here, there is no contention that Franklin was involved in conduct that caused bodily injury or even gave rise to a risk of serious injury. Rather, the damages at issue in this matter are purely economic. Thus, neither *Parrott* nor *Krysa* provide a basis to support the punitive damages ratio, here. Given the significantly more reprehensible nature of the misconduct in *Parrott* and *Krysa,* which led to an award of significantly lower ratios of punitive to actual damages than were awarded in the case at bar, those cases amply demonstrate that the 111:1 ratio of punitive to actual damages in the present matter are clearly excessive.

In summary, the absence of any physical harm or injury to the Overbeys, or even any risk of such harm, clearly weighs against exceeding a single-digit ratio of punitive to actual damages, in conformance with the due process considerations set forth in *BMV v. Gore.* Accordingly, this Court should conclude that the trial court erred in failing to reduce the punitive damages assessed against Franklin to a single-digit ratio of the actual damages assessed against him.

***87 2. Comparable Civil Penalties Do Not Lend Support To The Jury's Punitive Damages Award.**

The third *BMW v. Gore* factor consists of a comparison between the punitive damages award and comparable civil penalties. The significance of this factor is to assess whether "a lesser deterrent would have adequately protected the interests of [Missouri] consumers." *BMW of N. America v. Gore,* 517 U.S. at 584. Where there is "an absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance." *Id.* at 585. Here, civil penalties are available under the Missouri Merchandising Practices Act through suits brought by the Missouri Attorney General. *See* § 407.100.5, RSMo 2000.

This penalty cannot exceed $1,000.00 per violation. *See id.* The range of other remedies available in an Attorney General action is roughly equivalent to those brought by a private litigant under the MMPA (such as restitution and injunctive relief). *See* §§ 407.100.2, 407.100.4, RSMo 2000. Thus, this guidepost would appear to support a conclusion that the punitive damages assessed against Franklin, here, are excessive, and should be reduced to a single digit ratio. [12]

12 The Missouri Court of Appeals has held that this factor "is accorded less weight in the reasonableness analysis" than the other two *BMW V. Gore factors. Krysa v. Payne,* 176 S.W.3d 150, 163 n.7 (Mo. App. 2005). Thus, while this factor weighs in favor of reduction of the punitive damages award, this factor is not as significant as the other guideposts discussed in *BMW V. Gore and State Farm.*

***88 3. There Was No Evidence To Support A Conclusion That Defendant Franklin Engaged In Any Reprehensible Conduct That Would Support A Punitive Damages Award, Let Alone An Award Over One Hundred Times The Amount Of Actual Damages Awarded.**

Moving back to the first guidepost of the *BMW v. Gore analysis,* the Court must consider the reprehensibility of Franklin's individual conduct in assessing whether the punitive damages award was excessive. It is not uncommon for Missouri appellate courts to look to the reprehensibility guidepost to approve punitive damages awards in excess of a single-digit ratio. *See, e.g., Krysa v. Payne,* 176 S.W.3d 150, 157 (Mo. App. 2005) (27:1 ratio). As discussed above, unless this guidepost is reserved for especially egregious misconduct, there is a significant risk that *any* case where the threshold showing of reprehensible conduct necessary to support a punitive damages in the first instance would also trigger this guidepost. *C.f. Bennett,* 315 S.W.3d at 879. Put another way, unless a substantially higher degree of reprehensibility is required under this guidepost, it would render this guidepost meaningless in evaluating whether a punitive damages award was constitutionally excessive.

***89** The U.S Supreme Court has set forth a number of factors [13] that this Court must consider in evaluating reprehensibility for the purpose of determining the propriety of the punitive damages award in this matter:

13 In addition to the reprehensibility factors discussed in the State Farm decision, Missouri appellate courts have also considered a number of other factors in determining whether a punitive damages award is excessive:
(1) aggravating and mitigating circumstances surrounding the defendant's conduct; (2) the degree of malice or outrageousness of the defendant's conduct; (3) the defendant's character, financial worth, and affluence; (4) the age, health and character of the injured party; (5) the nature of the injury; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and trial court to appraise the plaintiffs injuries and other damages.
Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 177-78 (Mo. App. 1997). The Overbeys did not raise any argument in the proceedings below that any of these factors were pertinent to determining whether the punitive damages award, here, was excessive.

***90** We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm v. Campbell, at 419 (citations omitted). None of these considerations would admit a conclusion that a punitive damages award greater than a single-digit multiplier would be appropriate under the evidence adduced.

Turning first to the nature of the underlying injury, it is beyond dispute that the injury to the Overbeys was purely economic. They sustained no bodily injury as the result of Franklin's conduct, nor any physical assault or trauma (or even any risk of such injury). This weighs heavily in favor of a smaller ratio of punitive damages to actual damages. In

comparison, courts applying the *State Farm v. Campbell and BMW V. Gore* analysis routinely reduce punitive damages to single-digit ratios, even in cases where bodily injury is at issue. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.,* 394 F.3d 594, 603 (8th Cir. 2005) (reducing punitive damages in wrongful death action from 4:1 ratio to 1:1 ratio); ***91** *Stogsdill v. Healthmark Partners, LLC,* 377 F.3d 827, 830-31, 834 (8th Cir. 2004) (reducing punitive damages ratio from 10:1 to 4:1 despite showing that health care provider was grossly negligent in failing to diagnose constipation that ultimately resulted in bowel perforation and fatal septic shock). *Compare, Morse v. Southern Union Co.,* 174 F.3d 917, 925-26 (8th Cir.1999) (affirming trial court's reduction of punitive damages from 13.8:1 ratio to 6:1 ratio in age-discrimination employment action). The simple fact that punitive damages in injury cases are regularly reduced to single-digit ratios weighs heavily in favor of a similar, if not more significant reduction in the punitive damages ratio, here.

Second, with regard to the question of whether there was indifference or reckless disregard for the safety of others, here, there is no issue with regard to safety. There was no evidence offered at trial that would admit any conclusion that Defendant Franklin's conduct created any danger to the Overbeys or otherwise exhibited any such indifference or reckless disregard for their safety. For example, there was no evidence from which the factfinder could conclude that the condition of the vehicle at the time it was sold to the the Overbeys presented any health or safety concerns. Again, there is no claim that the Overbeys sustained any bodily injury. Simply put, this factor is utterly absent in this matter, and does not support a conclusion that this case is exceptional such that it would permit an award of punitive damages beyond a single-digit multiplier.

Third, there was no evidence that the Overbeys were financially vulnerable or that their finances were materially impaired by the consequences of Defendant's conduct. ***92** While Plaintiff Glenna Overbey testified that she delayed her retirement, to ensure that the payments for the vehicle would be met, there was no evidence that the Overbeys were placed in a financially untenable position or that there was any adverse impact on their financial status. Indeed, the Overbeys acknowledged that they were able to successfully refinance the loan on the vehicle, and there was no evidence that they had been denied credit or that there was any negative impact upon their credit rating as a result of Defendant's alleged conduct. Therefore, this factor does not support an award of punitive damages in excess of a single-digit multiplier.

The fourth consideration under *State Farm v. Campbell* concerns the question of repeated conduct, sometimes referred to as "recidivism." Here, the Overbeys' failure to adduce sufficient evidence of Franklin's individual involvement with this transaction, discussed at length with regard to Franklin's first point on cross-appeal, above, also completely undermines their attempt to demonstrate that Franklin had engaged in recidivistic misconduct in regard to the Overbey transaction. Again, there was no evidence that *Franklin* engaged in any misconduct with regard to the Overbey transaction, let alone misconduct that had occurred on prior occasions. The only evidence adduced at trial was with regard to employees of National Auto or the company in general. Thus, there is no evidence of recidivism as to Franklin, personally. Thus, this factor also weighs against departing from a single-digit ratio, as contemplated under the *State Farm v. Campbell* decision. (Indeed, as discussed above, it weighs against the award of *any* damages, actual or punitive against Franklin.)

***93** Defendant Franklin acknowledges that the Overbeys offered examples of other transactions in which customers claimed that employees of National Auto had misrepresented the terms of their motor vehicle transactions. However, even if the evidence of other similar incidents demonstrates recidivism on the part of National Auto, such recidivism, standing alone, would not support an award of punitive damages against Defendant Franklin, let alone an award that was *over 111 times* the amount of actual damages awarded by the jury. Indeed, even if National Auto's misconduct was attributable to Franklin (a premise Franklin vigorously disputes), this could not be squared with the jury's verdict. The jury awarded punitive damages against National Auto of $250,000, based upon its misconduct, approximately 3.3 times the $76,000 actual damages awarded against that defendant. With regard to Franklin, however, the punitive damages awarded were $500,000, twice the punitive damages entered against National Auto. This result cannot be squared with the record, which contained no evidence that Franklin had any involvement or participation in the Overbeys' transaction with National Auto or otherwise engaged in conduct that proximately caused the alleged damages to the Overbeys. Rather, if National Auto's conduct can somehow be imputed to Defendant Franklin for purposes of the punitive damages

analysis, it would stand to reason that the punitive damages assessed against him should not exceed those assessed against National Auto.

***94** The last of the reprehensibility factors is whether the harm resulted from "intentional malice, trickery, or deceit, or mere accident." *State Farm v. Campbell,* 538 U.S. at 419. Again, there was no showing that Franklin personally engaged in any misconduct, let alone conduct that could be characterized as intentional malice, trickery, or deceit. Rather, the only evidence of misconduct adduced at trial related to other employees of National Auto, and neither the conduct of those employees nor National Auto, generally, can be imputed to Franklin, individually. Thus, this factor does not support an award of any punitive damages, let alone an award of punitive damages that exceeds a single-digit ratio.

D. The Award Of Punitive Damages Against Franklin Must Be Reduced To A Single-Digit Multiple Of The Actual Damages Assessed Against Him.

For the reasons discussed above, the assessment of punitive damages against Franklin exceeds the amount permissible under the due process provisions of the U.S. and Missouri Constitutions, even after the trial court's reduction of the original $1 Million punitive damages award to $500,000. Pursuant to the holdings of *State Farm v. Campbell and BMW v. Gore,* that award must be reduced to a single digit multiple of the actual damages assessed against Franklin. The question, then, is what single-digit ratio is the most appropriate under the circumstances. A reduction to the highest single-digit ***95** ratio (9:1) would result in a punitive damages award of $40,500. However, there are a number of reasons why a lower ratio would be more appropriate, here.

For example, Section 510.265, RSMo 2005, suggests that a five-to-one multiplier should represent the ceiling on a typical punitive damages award, yielding punitive damages of no more than $22,500 in the case at bar. However, reducing the award to a 4:1 ratio (yielding punitive damages of $18,000) would be more appropriate under the express reasoning of the *BMW* decision, which suggested that a ratio of 4:1 represented the typical limit of punitive damages under due process considerations. *See BMW v. Gore,* 517 U.S. at 581.

The evidence adduced at trial and the findings of the jury with regard to National Auto suggest that an even lower ratio would be appropriate. Specifically, in the jury verdict as to National Auto, it awarded punitive damages of $250,000 and actual damages of $76,000. L.F. at 209. This results in a 3.289:1 ratio of punitive to actual damages. Given that the Overbeys made no showing that Franklin engaged in any personal misconduct related to the Overbeys' transaction and merely sought to infer his liability based upon the conduct of National Auto and its employees, it would stand to reason that a similar ratio of actual to punitive damages should be applied to Franklin, here. If so, this would result in a reduction of the punitive damages award to $14,802.63. Thus, if the Court determines that the Overbeys made a submissible case against Franklin at trial, ***96** affirming the liability finding against him, the award of punitive damages should be reduced to an amount not to exceed $14,802.63.

For the reasons discussed above, Franklin's second point on his cross-appeal should be granted. The amended judgment should be reversed, with directions to amend the punitive damages assessed against Franklin to a single-digit multiple of the actual damages awarded against him. Alternatively, this Court may also amend the judgment under Supreme Court Rule 84.14, in order to reduce the punitive damages award to a single-digit ratio compliant with constitutional due process in accordance with the State Farm v. Campbell and BMW v. Gore.

***97 III. The trial court erred in awarding the Overbeys attorneys fees in the amount of $72,000, because that award was not supported by competent evidence, in that the Overbeys' counsel presented evidence of incurring attorneys fees of only $67,000 and there was no evidentiary basis for the trial court's award of an additional $5,000 in attorneys fees, indicating that the award was arbitrary and lacked careful consideration.**

A. Standard of Review.

The setting of an award of attorneys fees is within the sound discretion of the trial court. *Nelson v. Hotchkiss,* 601 S.W.2d 14, 21 (Mo. banc 1980). As such, an attorneys fee award can be reversed if the award constitutes an abuse of discretion. *See id.* An award constitutes an abuse of discretion if "the amount awarded is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration." *Id.*

B. The Trial Court Abused Its Discretion By Awarding Attorneys Fees In Excess Of The Amount Sought By The Overbeys.

The MMPA authorizes the award of attorneys fees to a prevailing party bringing claims under that Act. *See* § 407.025.1, RSMo 2000. Pursuant to that statute, after the entry of the original judgment in this matter the Overbe's filed a motion seeking an ***98** award of attorneys fees under the MMPA. L.F. at 215-228. In support of that Motion, the Overbeys submitted two charts as exhibits to that motion, summarizing the time spent by their attorneys during the pretrial and trial proceedings. L.F. at 221-228. Attorney Douglass F. Noland claimed to have expended 130.0 hours and that his customary hourly rate was $300.00 per hour, for attorneys fees of $39,000.00. L.F. at 219, 221-225. Attorney Thomas K. Mendel claimed to have expended 140.0 hours, at his customary rate of $200.00 per hour, representing fees of $28,000.00. L.F. at 219, 226-228. Thus, the Overbeys presented a total lodestar amount of $67,000.00, consistent with the fee amount sought in their Motion.

At the hearing upon the post trial motions, there was no argument presented with regard to the Overbeys' motion for attorneys fees. Supp. Tr. at 13:10-20. [14] However, the trial court's First Amended Judgment awards the Overbeys attorneys fees in the amount of $72,000.00, five thousand dollars more than the lodestar amount the Overbeys presented during the post-trial motions. L.F. at 303-304. The trial court offered no explanation for why it was awarding more attorneys fees than the Overbeys requested at trial. *See id.*

14 All citations to the Supplemental Transcript on Appeal are in the form of "Supp. Tr. at ___."

***99** There is a strong presumption that the lodestar constitutes the reasonable amount of attorneys fees. *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992). Here, the Overbeys did not offer any argument that they were entitled to an amount of attorneys fees in excess of the lodestar amount they presented in their Motion. As such, this Court should conclude that the trial court's award of $72,000.00 in attorneys fees, rather than the $67,000.00 the Overbeys requested in the proceedings below, is arbitrary and indicates a lack of careful consideration by the trial court. *Compare, Watts v. Lane County,* 922 P.2d 686, 690 (Or.App. 1996) ("a party may not obtain an attorney fee award... greater than the amount of attorney fees incurred.")

This error does not necessitate remand of this matter to the trial court to amend the judgment. Under Supreme Court Rule 84.14, this court is authorized to "give such judgment as the court ought to give. Under that Rule, this Court can amend the judgment to reflect an attorney's fee award to the Overbeys in the amount of $67,000.00. *See, e.g., Franklin v. Franklin,* 213 S.W.3d 218, 230 (Mo. App. 2007).

***100 CONCLUSION**

For the reasons discussed above, this Court must reverse the First Amended Judgment entered by the circuit court, below. First and foremost, this Court must reverse the judgment against Franklin for the reason that there was insufficient evidence upon which a jury could find Franklin individually liable to the Overbeys for violation of the MMPA. Simply put, there was no evidence that Franklin, personally, violated the MMPA in any manner that resulted in damage to the

Overbeys. The Overbeys did not seek to pierce the corporate veil of National Auto. Thus, the judgment against Franklin cannot be upheld upon a veil-piercing theory. As such, both the finding of liability and the award of actual and punitive damages against Franklin must be reversed, with instructions to the circuit court to enter judgment in favor of Franklin upon that claim.

Second, even if this Court determines that the finding of individual liability against Franklin was supported by competent evidence, the punitive damages award against him must be reversed on the basis that it far exceeds the amount permissible under constitutional due process under the United States and Missouri Constitutions. The punitive damages award is well over 100 times the amount of actual damages awarded by the jury, far beyond the ratio of actual to punitive damages assessed against National Auto, despite the absence of any evidence that would support a conclusion that Franklin's conduct was more reprehensible than that of National Auto or that would otherwise support a higher punitive damages award (both in terms of ratio and absolute amount) than that entered against National Auto. Rather, the punitive damages should be reduced ***101** to a single-digit multiple of the actual damages awarded. This reduction in the punitive damages would not require a remand, but could instead be ordered by this Court under Supreme Court Rule 84.14.

If the Court declines Franklin's First and Second Points on Cross-Appeal, this Court should sustain his third point on appeal, as the attorneys fees awarded by the trial court are arbitrary and lack careful consideration. The fees awarded in the First Amended Judgment significantly exceed the amount of $67,000.00 that was sought by the Overbeys in the proceedings below. Pursuant to Supreme Court Rule 84.14, this Court should amend the judgment below, to reduce the award of attorneys fees to the Overbeys to the amount of $67,000.00.

If this Court sustains either of Franklin's first two points on cross-appeal and reverses the judgment below upon that basis, such a holding would moot the constitutional challenge to Section 510.265, RSMo 2005 asserted within the seven points the Overbeys assert in their appeal. As discussed above, a number of those issues were not properly preserved in the proceedings below. The remaining issues they seek to raise on appeal lack merit and present no basis upon which this Court should conclude that Section 510.265, RSMo 2005, is unconstitutional. Accordingly, if this Court denies Franklin's points raised in his cross-appeal, it should also deny the Overbeys' points on appeal either for failure to adequately preserve those issues for appeal or upon their merits.

Appendix not available.

End of Document

EXHIBIT D

IN THE UNITED STATE DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

JASON ALLEN, individually and on behalf of all other similarly-situated current citizens of Missouri, Plaintiff, vs. JELLY BELLY CANDY COMPANY, Defendant.	Case No: **DECLARATION OF ROB SWAIGEN IN SUPPORT OF NOTICE OF REMOVAL** Removed from the Circuit Court of the City of St. Louis, State of Missouri Case No. 1622-CC11517

I, Rob Swaigen, declare as follows:

1. I am Vice President, Global Marketing for Defendant Jelly Belly Candy Company ("Jelly Belly"). I have personal knowledge of the facts set forth herein, and I could and would testify competently thereto if called as a witness.

2. I have personal knowledge of the marketing of Jelly Belly's Superfruit Mix, Sport Beans, and Sports Beans Extreme products ("the Products").

3. I have read the Petition filed by the Plaintiff in this case. It is my understanding that the plaintiff seeks injunctive relief requiring Jelly Belly to discontinue its current packaging for the Products in Missouri. Jelly Belly does not have a Missouri-only production line for the Products. Rather, various Jelly Belly facilities produce and package the Products, which are then distributed in Missouri and other states. For this reason, Jelly Belly would have to change its entire packaging process for the Products in order to comply with the plaintiff's proposed injunction.

4. If the Court granted the plaintiff's proposed injunctive relief, Jelly Belly would incur significant costs in complying with such an order. Based on past experience with recalls, I estimate that such costs would exceed $75,000. For example:

a. Thousands of packages of the Products would be recalled and removed from the shelves of supermarkets and other stores - all at Jelly Belly's expense.

b. Specifically, Jelly Belly would have to hire an outside vendor or additional employees to visit every store that carries the Products and remove each package from the shelves. Alternatively, those stores that carry the Products would handle the removal of the Products from the shelves and would charge Jelly Belly for the cost of doing so. In either case, Jelly Belly would incur costs for labor, transportation, and other logistical aspects associated with repurchasing products from retailers, destroying product, and providing in-store notices regarding the recall.

c. Jelly Belly would also have to re-design and change its packaging for the Products to comply with the plaintiff's injunctive relief at Jelly Belly's expense. Jelly Belly would have to cease sales during the re-design, which would result in a significant loss of revenue and risk additional lost revenue due to cancelled orders.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8 day of February, 2017, in Fairfield, CA.

Rob Swaigen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JASON ALLEN , Plaintiff,	)	
v.	)	Case No.
JELLY BELLY CANDY COMPANY , Defendant,	)	

ORIGINAL FILING FORM

THIS FORM MUST BE COMPLETED AND VERIFIED BY THE FILING PARTY WHEN INITIATING A NEW CASE.

☐ THIS SAME CAUSE, OR A SUBSTANTIALLY EQUIVALENT COMPLAINT, WAS PREVIOUSLY FILED IN THIS COURT AS CASE NUMBER _____ AND ASSIGNED TO THE HONORABLE JUDGE _____.

☐ THIS CAUSE IS RELATED, BUT IS NOT SUBSTANTIALLY EQUIVALENT TO ANY PREVIOUSLY FILED COMPLAINT. THE RELATED CASE NUMBER IS _____ AND THAT CASE WAS ASSIGNED TO THE HONORABLE _____. THIS CASE MAY, THEREFORE, BE OPENED AS AN ORIGINAL PROCEEDING.

☒ NEITHER THIS SAME CAUSE, NOR A SUBSTANTIALLY EQUIVALENT COMPLAINT, HAS BEEN PREVIOUSLY FILED IN THIS COURT, AND THEREFORE MAY BE OPENED AS AN ORIGINAL PROCEEDING.

The undersigned affirms that the information provided above is true and correct.

Date: 02/10/2017

/s/ Paul A. Del Aguila
Signature of Filing Party

JS 44 (Rev. 07/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

JASON ALLEN, individually and on behalf of all other similarly-situated current citizens of Missouri

(b) County of Residence of First Listed Plaintiff City of St. Louis, MO
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Matthew H. Armstrong, Armstrong Law Firm LLC, 8816 Manchester Rd., No. 109, St. Louis, MO 63144 (314) 259-0212

DEFENDANTS

JELLY BELLY CANDY COMPANY

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Paul A. Del Aguila, Greenberg Traurig, LLC, 77 West Wacker Drive, Suite 3100, Chicago, IL 60601 (312) 456-8400

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. § 1332(a); 28 U.S.C. § 1391

Brief description of cause:
Removal of Class Action Petition for Violation of MO Merchandising Practice Act and Unjust Enrichment

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
02/10/2017

SIGNATURE OF ATTORNEY OF RECORD
/s/ Paul A. Del Aguila

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.