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IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. FOGLE ENTERPRISES, INC., and NOLAN FOGLE,	)
Relators,	)
v.	)
HON. LAURA JOHNSON,	)
Respondent.	)

PETITION FOR WRIT OF PROHIBITION

Relators Fogle Enterprises, Inc. ("Fogle Enterprises"), and Nolan D. Fogle ("Fogle") (collectively, "Relators") respectfully request the Court issue a preliminary and permanent writ prohibiting Respondent, the Honorable Laura Johnson, from continuing to conduct certain litigation to which this Petition relates as a class action.

As grounds for this relief, Relators state:

STATEMENT OF FACTS

1. This Petition relates to certain underlying litigation currently pending in the Circuit Court of Christian County, Missouri, styled as *Richard McMillin v. Fogle Enterprises, Inc., et al.*, Case No. 14AF-CC00154-01 (the "Underlying Litigation").

2. In the Underlying Litigation, Plaintiff Richard McMillin ("McMillin") brought individual and class action claims for unjust enrichment, money had and received, and violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.* ("MMPA"), arising from Relators' alleged improper collection of

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contributions to a Community Development Fund ("CDF") from its customers during the period of 2009 to 2013. *See* Exhibit 3 (007-016).

3. On February 29, 2016, McMillin filed his Motion for Class Certification, requesting that Respondent certify a class on each of his claims, with the class being defined as "Defendants' customers within five year of the filing of this action whom Defendants charged a CDF." *See* Exhibit 6 at 2 (032).

4. On March 28, 2016, Relators filed their Suggestions in Opposition to McMillin's Motion for Class Certification. *See* Exhibit 7.

5. On June 7, 2016, a hearing was held before Respondent on McMillin's Motion for Class Certification. *See* Exhibit 2.

6. On August 12, 2016, Respondent entered her Order certifying McMillin's MMPA claim as a class action.[1] *See id.*

7. Respondent certified a class under Rule 52.08(a) and Rule 52.08(b)(3) defined as follows:

> Defendants' customers within five years of the filing of this action who paid a CDF.

See Exhibit 11 (289).

[1] Respondent's Order does not specifically address McMillin's claims for unjust enrichment and money had and received, and it is unclear whether Respondent intends the action to proceed as a class action with respect to those common law claims.

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8. On August 22, 2016, Relators filed their Petition for Permission to Appeal Interlocutory Order Granting Class Certification ("Petition for Permission to Appeal") in the Missouri Court of Appeals, Southern District. *See* Exhibit 12 (290).

9. Relators' Petition for Permission to Appeal was denied on September 6, 2016. *See id.*

10. Fogle Enterprises' customers during the proposed class period included Branson area residents as well as out of town, out of state, and out of country visitors. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 15 (164).

11. Conservatively, for the 2009-2013 time period at issue, Fogle Enterprises served between 750,000 and 1,000,000 customers per year. *See id.*

12. The uncontroverted evidence presented to Respondent established that customers at Fogle Enterprises' restaurants included a wide variety of persons and entities, including a variety of businesses. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 20-22 (165). For example, and without limitation, a large portion of Fogle Enterprises' business is comprised of tour bus groups, business meetings, and other groups (e.g., church conferences). *See id.* When a group such as a tour bus came to one of Fogle Enterprises' restaurants, the members of the group did not pay for their own meals or have any financial transaction with Fogle Enterprises. *See id.* Instead, their meals were paid for by the tour company as part of that company's business operations. *See id.* Similarly, many business meetings, both large and small, were not paid for by individuals, but were instead paid for by the businesses to further their business purposes. *See id.*

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13. It is undisputed that a significant number of Fogle Enterprises customers did not contribute to the CDF. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 11-13 (164). In fact, the evidence before Respondent demonstrated that more than 1 out of every 20 customers during the relevant time period did **not** contribute to the CDF – up to 250,000 customers. *See id.* Of those that did contribute, many were aware of the CDF prior to their transaction with Fogle Enterprises and expressly agreed to voluntarily contribute. *See id.*

14. It is further undisputed that the majority of Fogle Enterprises' customers paid for their meals with cash. *See* Exhibit 7, *Exhibit A (Affidavit of Nolan Fogle)* at ¶ 16-17 (164). Naturally, there are no records from which to identify cash-paying customers. *See id.* The records of credit card transactions, similarly, often do not reflect the identity of customers (other than by the customer's signature, which is regularly illegible), and do not show whether any individual customer actually contributed to the CDF. *See id.* at ¶ 19 (165).

15. The uncontroverted evidence before Respondent demonstrated that from the available records, it is not possible to (1) identify the majority of Fogle Enterprises' customers, (2) determine or verify whether the majority of customers that could be identified had, in fact, contributed to the CDF, or (3) determine the purpose of customers' transactions.

16. Relators, in opposition to McMillin's Motion for Class Certification, argued that the class definition was overly broad because it included a significant number of members that lack standing to maintain a claim under the MMPA because their

transactions were not entered into primarily for personal, family, or household purposes, and were instead entered into for business purposes. *See* Exhibit 7 at 12-14 (137-139).

17. Relators further argued – supported by substantial, uncontroverted evidence – that the class was not ascertainable because there is no administratively feasible method of identifying the members of the proposed class, including (1) a complete inability to identify cash-paying customers, (2) the inability to identify a significant number of customers that used credit cards, and (3) that it is impossible to determine whether any customers that could be identified actually contributed to the CDF. *See id.* at 15-22 (140-147).

18. Relators additionally argued that the overly broad class definition and inability to ascertain the class deprived Respondent of the ability to meaningfully analyze McMillin's compliance with the prerequisites for class certification under Rule 52.08(a) and Rule 52.08(b)(3), consisting of numerosity, commonality, typicality, adequacy of representation, predominance, and superiority. *See id.* at 22-34 (147-159).

19. In his Reply, McMillin conceded that the class could not be ascertained from records available to the parties or Respondent, but he proposed a procedure he claimed would address the inability to identify proper class members – which he termed a "fluid recovery" procedure. *See* Exhibit 8 at 12-14 (227-229).

20. Recognizing it would be impossible to identify the class members prior to trial, McMillin conceded that the only way to maintain this suit as a class action would be to "first try the case to the court to determine the exact amount of damages available to the entire class" to create an "aggregate judgment fund." *See* Exhibit 8 at 12-14 (225-

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227). Then putative class members would be permitted to "self-identify by way of questionnaires" in making a claim for payment against the "aggregate judgment fund," which would require the putative class members to state "(1) the Fogle [Enterprises] restaurant location at which the individual dined, (2) the approximate date the individual dined at one of the restaurants, and (3) whether or not the individual recalls expressly opting-out of [the CDF contribution]." *See id.* McMillin asserted that this process would obviate the necessity of "individual trials on damages." *See id.*

21. Despite having undisputed evidence – and McMillin's concessions – before it that the class could not be ascertained prior to trial, Respondent certified a class under Rule 52.08(a) and Rule 52.08(b)(3) defined as follows:

> Defendants' customers within five years of the filing of this action who paid a CDF.

See Exhibit 11 (289).

22. Respondent acknowledged that the class members could not be identified prior to trial, and adopted the self-identification and "fluid recovery" procedure proposed by McMillin, in stating that "the total amount of CDF collected during the relevant period was $374,570.84, so Defendants' liability is limited regardless of the ultimate number of **claimants**." *See id.* (emphasis added).

RELIEF SOUGHT

23. Relators respectfully request the Court enter its preliminary and permanent writ prohibiting Respondent from conducting the Underlying Litigation as a class action.

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REASONS WHY THE WRIT SHOULD ISSUE

24. Respondent's certification of the Underlying Litigation as a class action was a clear abuse of discretion, because (1) the class is not ascertainable, i.e., there is no administratively feasible method to identify the class, (2) the class definition is impermissibly overbroad, as it includes countless businesses and other customers that contributed to the CDF in connection with a transaction that was made for business purposes and who, therefore, may not maintain a private right of action under the MMPA, and (3) the lack of ascertainability and overbreadth of the class definition deprived Respondent of the ability to appropriately determine whether the requirements of Rule 52.08 and Fed. R. Civ. P. 23 were met, as required to maintain a class action under the MMPA.

25. Accordingly, the issuance of writ prohibiting Respondent from conducting the Underlying Litigation as a class action is necessary to prevent unnecessary, inconvenient and expensive litigation.

26. Respondent's certification of the Underlying Litigation as a class action on the basis of McMillin's proposed "fluid recovery" procedure violates Relators' Due Process right to present all available defenses at the liability phase of the proceedings, and, in so doing, violates Article V of the Missouri Constitution by applying Rule 52.08 in a manner that alters the substantive rights of the parties.

27. Accordingly, the issuance of a writ prohibiting Respondent from conducting the Underlying Litigation as a class action is necessary to remedy an excess of authority, jurisdiction or abuse of discretion where Respondent lacks the power to act

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as intended in proceeding with the "fluid recovery" procedure for determining liability and aggregate damages prior to permitting Relators the opportunity to challenge the class member's individual standing to maintain a private right of action under the MMPA and to raise affirmative defenses to the claims of those individual class members.

28. Relators hereby incorporate their contemporaneous filed Suggestions in Support of Petition for Writ of Prohibition as though set forth fully herein, along with all exhibits identified in and attached to the Index of Exhibits accompanying this Petition.

WHEREFORE, Relators/Defendants Fogle Enterprises, Inc., and Nolan Fogle respectfully request the Court issue its preliminary and permanent writ prohibiting Respondent, the Honorable Laura J. Johnson, from continuing to conduct the underlying litigation, styled *Richard McMillin v. Fogle Enterprises, Inc., et al.*, Case No. 14AF-CC00154-01 (Christian County, Mo.), as a class action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ *Jason C. Smith*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing instrument, along with all exhibits thereto, was delivered, to the following this 19th day of September, 2016, by the manner indicated:

Hand Delivery:

Hon. Laura Johnson
PRESIDING JUDGE, 38TH JUDICIAL CIRCUIT
110 W Elm, Room 205
Ozark, Mo. 65721
Judge / Respondent

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