

APPENDIX

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App-1

Appendix A

Filed February 13, 2017

United States Court of Appeals

For the Eighth Circuit

No. 15-3191

Robert McKeage; Janet McKeage, on behalf of
themselves and all others similarly situated

Plaintiffs - Appellees

v.

TMBC, LLC

Defendant - Appellant

Tracker Marine Retail, LLC; Bass Pro Outdoor
World, LLC

Defendants

No. 15-3286

Robert McKeage; Janet McKeage, on behalf of
themselves and all others similarly situated

Plaintiffs - Appellants

v.

TMBC, LLC

Defendant - Appellee

App-2

Tracker Marine Retail, LLC; Bass Pro Outdoor
World, LLC

Defendants

Appeals from United States District Court for the
Western District of Missouri - Springfield

Submitted: September 22, 2016

Filed: February 13, 2017

[Published]

Before WOLLMAN, BRIGHT,¹ and KELLY, Circuit
Judges.

PER CURIAM.

Robert and Janet McKeage brought this class action lawsuit to challenge TMBC's² nationwide practice of charging a document fee when selling boats and trailers under form contracts governed by Missouri law. After approving class certification, the district court determined that TMBC prepared legal

¹ The Honorable Myron H. Bright died on December 12, 2016. This opinion is being filed by the remaining judges of the panel pursuant to 8th Cir. Rule 47E. It incorporates in large part the views expressed by Judge Bright during the pendency of this case.

² TMBC, LLC's parent company is Tracker Marine Retail, LLC. Tracker Marine Retail, LLC's parent company is Bass Pro Group, LLC.

documents attendant to its sales and that charging a fee for those documents constituted unauthorized law business in violation of Mo. Rev. Stat. §§ 484.010 and 484.020. The district court granted summary judgment in favor of the class and awarded treble damages in the amount of \$21,735,754. The district court also awarded attorneys' fees to class counsel in the amount of \$2,425,359, to be paid out of the common fund.

TMBC filed an appeal challenging the class certification, grant of summary judgment, and application of Missouri law to sales that occurred outside Missouri. The McKeages filed a cross appeal to enforce the fee-shifting provision in TMBC's contract and to challenge the district court's calculation of fees based on the amount of untrebled damages rather than the entire common fund. We affirm the district court on the main appeal. We reverse and remand for further proceedings on the cross appeal.

I

TMBC is a corporation headquartered in Springfield, Missouri. It sells boats and trailers through dealerships across the nation, most of which are located within Bass Pro Shops.³ On May 23, 2008, Robert and Janet McKeage purchased a boat from TMBC at the Tracker Boat Center located inside the Bass Pro Shop in St. Charles, Missouri. The purchase was memorialized in a standard form contract TMBC has

³ As of 2008, TMBC operated seventy-three dealerships nationwide. Fifty-two of those dealerships were located within Bass Pro Shops, and twenty-one were freestanding dealerships.

used since 2007, which has a choice-of-law provision that states, in relevant part:

GOVERNING LAW. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI. The venue for any action or proceeding arising from this Agreement . . . shall be in Greene County, Missouri. The prevailing party in any such action or proceeding shall be entitled to recover all litigation costs and expenses, including reasonable attorneys' fees at all levels of litigation

As part of the contract, TMBC charged the McKeages a \$75 “document fee.” TMBC charged the fee to cover the cost of preparing and/or completing documents such as the form contract itself (sometimes referred to by the parties as the Order Acknowledgment and Agreement of Sale, or OAAS form); a bill of sale; a power of attorney form; and title, license, and registration documents.

Unhappy with their purchase, the McKeages contacted an attorney to help them rescind the sale. After reviewing the contract, counsel for the McKeages filed suit against TMBC in the Circuit Court for St. Charles County, Missouri. Among other things, the McKeages alleged that TMBC’s practice of charging a document fee constituted unauthorized law business in violation of Mo. Rev. Stat. §§ 484.010 and 484.020.⁴ Pursuant to the contract’s choice-of-law

⁴ Section 484.010 states in relevant part:

The “law business” is hereby defined to be and is the advising or counseling for a valuable consideration of

provision, venue was thereafter transferred to Greene County, Missouri.

The McKeages asked the state court to certify a nationwide class action. The state court certified a class, but limited it to customers whose purchases occurred in Missouri. The McKeages sought review from the Missouri Supreme Court, contending that the district court should have certified a nationwide class. The Missouri Supreme Court agreed, noting that TMBC chose Missouri law for the standardized form contracts it used nationwide. *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 601 (Mo. banc 2012). Pursuant to the Missouri Supreme Court's decision, the state trial court then certified a nationwide class.

In March 2012, TMBC removed the action to federal district court pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(8). After remov-

any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights

Section 484.020 states in relevant part:

No person shall engage in the practice of law or do law business . . . unless he shall have been duly licensed therefor and while his license therefor is in full force and effect Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section . . . shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation

al, TMBC brought a motion to decertify the class. Extensive litigation followed over whether a class action was appropriate, and eventually the district court denied the motion to decertify. After TMBC unsuccessfully petitioned this court for permission to appeal the denial of its motion to decertify the class, TMBC asked the district court to reconsider. Ultimately, the district court required the McKeages' counsel to hire reviewers to manually inspect each of TMBC's customer files in order to determine which contracts contained a Missouri choice-of-law provision, the inclusion of which formed the basis for the nationwide class. After the document review, the class was determined to consist of approximately 100,000 members.

The parties filed cross motions for summary judgment. As relevant to the issues now on appeal, TMBC argued that charging a document fee did not amount to unauthorized law business because TMBC's employees did not exercise legal judgment when filling out documents for customers. TMBC also argued that some individuals had been improperly identified as customers who signed contracts governed by Missouri law. TMBC further argued that Missouri law should not be applied nationwide to customers who signed contracts with TMBC outside Missouri. Finally, TMBC argued that damages should not be calculated based on the entire document fee because portions of the fee went to services that did not constitute unauthorized law business.

The district court rejected TMBC's arguments and granted the McKeages' motion for summary judgment. The district court determined that the

class members were properly identified, TMBC's conduct in charging a document fee constituted unauthorized law business, Missouri law applied to transactions that occurred outside Missouri, and damages should be awarded based on the entire document fee. The district court then awarded treble damages pursuant to Mo. Rev. Stat. § 484.020. Based on the number of members in the class, the amount of damages was calculated at \$21,735,754.

After the district court's grant of summary judgment, the McKeages filed a motion for attorneys' fees. Although the parties' contract provided that "[t]he prevailing party in any [action or proceeding arising from the agreement] shall be entitled to recover . . . reasonable attorneys' fees at all levels of litigation," the district court determined that "even in cases where a fee shifting provision may be applicable, attorney's fees should come from the common fund." The district court used the percentage-of-the-benefit method to calculate the fees and determined that thirty-three percent was appropriate in this case. Finally, the district court noted that the common fund included \$7,349,574 in actual damages and \$14,386,180 in statutory interest and treble damages. Based on a trilogy of Eighth Circuit cases involving treble damages under Section 4 of the Clayton Act—*Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir. 1952); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980); and *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987)—the district court concluded that calculating the fee award "from the actual damages [rather than treble damages] . . . is preferable because it better re-

flects the policies behind a common fund recovery[.]” As a result, the district court awarded class counsel \$2,425,359.42 in attorneys’ fees to be paid from the common fund, representing thirty-three percent of the untrebled damages.

TMBC timely appealed, contending: (1) the class should not have been certified because individualized proof was required to determine whether each customer’s contract contained a Missouri choice-of-law provision; (2) the district court misinterpreted Missouri case law regarding unauthorized law business in granting summary judgment to the class; and (3) the district court erred in applying Missouri law to conduct which occurred outside Missouri. The McKeages filed a timely cross appeal contending that the district court should have enforced the feeshifting provision in TMBC’s standard form contract and that the fee award should have been based on the entire common fund rather than the untrebled damages.

II

A

TMBC first contends that the district court erred when it certified a class. We review the district court’s decision to certify a class for an abuse of discretion, but review de novo any issues of law involved in the class certification. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005).

TMBC argues that the McKeages failed to satisfy the commonality and predominance requirements of Federal Rules of Civil Procedure 23(a)(2) and (b)(3). *See* Fed. R. Civ. P. 23(a)(2) (setting forth the prerequisite to class certification that there be “questions of

law or fact common to the class”); Fed. R. Civ. P. 23(b)(3) (setting forth an additional requirement that there be “questions of law or fact common to class members [that] predominate over any questions affecting only individual members”). More specifically, TMBC argues individual issues predominated over common issues during the highly individualized process the district court used to identify class members.

TMBC’s complaints about an individualized inquiry relate to both the identification of the class members and the evidence necessary to establish liability once a class has been identified. TMBC’s argument thus implicates not only the commonality and predominance requirements, but also Rule 23’s implicit requirement that a class “must be adequately defined and clearly ascertainable.” *Sandusky Wellness Ctr. v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (quoting *Ihrke v. N. States Power Co.*, 459 F.2d 566, 573 n.3 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972)). Though ascertainability is an implicit requirement that our court enforces through “a rigorous analysis of the Rule 23 requirements,” *id.*, a dispute regarding the method for identifying class members calls for an independent discussion of whether a class is ascertainable.

A class may be ascertainable when its members may be identified by reference to objective criteria. *See id.* at 997–98. In *Sandusky*, the plaintiffs alleged Medtox Scientific violated the Telephone Consumer Protection Act (TCPA) by sending unsolicited faxes without the opt-out notice required by the TCPA. We identified the “fax logs showing the numbers that received each fax” as “objective criteria that make the

recipient clearly ascertainable.” *Id.* at 997. We concluded that the district court abused its discretion by denying class certification, despite the fact that the logs may have identified some fax recipients “who don’t have rights under the [TCPA],” noting that those class members “just wouldn’t be entitled to share in the damages awarded to the class by a judgment or settlement.” *Id.* at 998 (alteration in original) (quoting *Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 492 (7th Cir. 2014)).

Here, class members were identified by reviewing TMBC’s customer files according to objective criteria. The purpose of the review process was to identify for class membership the customers whose files contained an OAAS form or a terms-and-conditions sheet with a Missouri choice-of-law provision. The district court adopted an intensive file-by-file review process specifically for the purpose of excluding customers whose contracts did not contain the Missouri choice-of-law provision and who therefore did not have rights under Missouri law. Indeed, our examination of the record indicates that review process worked, and that most⁵ customers who may have been subject to TMBC’s individual defenses were excluded from the class during the review process.

⁵ The district court denied summary judgment as to 2,293 individuals who were initially included in the class after finding there was a genuine issue of material fact as to whether the transactions of 68 of those individuals were governed by Missouri law, and whether 2,225 of those individuals whose transactions were governed by Missouri law had actually paid a document fee.

In addition to the class being clearly ascertainable, the commonality and predominance requirements of Rule 23(b) are satisfied here. The class identified as a result of the intensive file-by-file review included TMBC customers that entered into a contract identical or substantially similar to the one entered into by the McKeages. In addition, evidence gleaned during discovery showed that it was TMBC's corporate policy to require all customers to sign the standard form contract governed by Missouri law. Thus, this case presented a "classic case for treatment as a class action." *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004) (internal quotation omitted); *see also Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 428 (N.D. Ill. 2007) ("Claims arising out of form contracts are particularly appropriate for class action treatment."); *Egge v. Healthspan Servs. Co.*, 208 F.R.D. 265, 269 (D. Minn. 2002) ("Claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action.") (alteration omitted) (quoting *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983)). As to the class members eventually identified, the common and predominant issue was whether TMBC's practice of charging a document fee in the standardized contract violated Missouri's prohibition on unauthorized law business. Although the documents TMBC prepared for individual customers varied at times, the district court correctly determined that the variety of services and the differences between contracts were not distinct enough to decertify the case as a class action. *See Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 510, 512 (W.D. Mo. 2010) (involving a claim of unauthor-

ized law business and finding that Rule 23's commonality and predominance requirements were met even when the defendant offered more than 200 separate legal forms, noting that variation in forms did not negate the overarching common legal question of "whether LegalZoom's preparation of legal documents violates Missouri law").

We conclude that the district court did not abuse its discretion in finding that the class as ultimately defined met the requirements of Rule 23 and certifying the case as a class action.

B

TMBC next contends that the district court erred in granting summary judgment to the class. We review the district court's grant of summary judgment de novo. *Green v. Dillard's, Inc.*, 483 F.3d 533, 538 (8th Cir. 2007).

TMBC contends that the district court misconstrued Missouri law when it concluded that TMBC's practice of charging a document fee constituted unauthorized law business under Mo. Rev. Stat. §§ 484.020 and 484.010. TMBC contends that the district court misunderstood that "an activity must first be the practice of law before charging for its performance by a non-lawyer can be unauthorized."

Under Missouri law, "charging a separate fee for the completion of legal forms by non-lawyers constitutes the unauthorized practice of law business." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 702 (Mo. banc 2008). Determining whether a particular form is legal in nature requires the court to "balance the protection of the public

against a desire to avoid unnecessary inconvenience and expense.” *Hargis v. JLB Corp.*, 357 S.W.3d 574, 584 (Mo. banc 2011) (quoting *In re First Escrow, Inc.*, 840 S.W.2d 839, 843 (Mo. banc 1992)). A key factor in this inquiry is the legal judgment or discretion required to prepare the form. *See Hargis*, 357 S.W.3d at 584; *In re First Escrow, Inc.*, 840 S.W.2d at 843; *Hulse v. Criger*, 247 S.W.2d 855, 861 (Mo. banc 1952). However, once it has been determined that a particular document is legal in nature, the act of charging a fee for the preparation or completion of that document constitutes unauthorized law business, even when a nonlawyer does not exercise any legal judgment in completing the form.

For example, in *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. Banc 2007), bank employees prepared a number of pre-printed documents when processing mortgage loans. The pre-printed forms included, among other things, a deed of trust and a promissory note. *Id.* at 337 n.3. The Missouri Supreme Court had previously determined that deeds of trust and promissory notes were legal documents because their preparation requires the exercise of legal judgment or discretion. *See id.* (citing *In re First Escrow*, 840 S.W.2d at 846). As a result, the court found it unnecessary to consider whether bank employees’ completing the pre-printed forms required the exercise of legal judgment or discretion. Rather, the court held the bank’s practice of charging a fee for completing the pre-printed forms was unauthorized law business prohibited by § 484.020, explaining that “charging of a separate additional charge tends to place emphasis on conveyancing and legal drafting as

a business rather than on the business of being a [banker].” *Id.* at 339.

The forms for which TMBC charged a fee included forms Missouri has determined to be legal documents—namely, power of attorney forms—as well as forms that have yet to be analyzed under Missouri law. *See id.* (companies and their non-lawyer agents prohibited “from drawing, preparing, or assisting in the preparation of trust workbooks, trusts, wills, and powers of attorney for valuable consideration”) (citing *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 871 (Mo. banc 1996)). As a consequence, TMBC’s practice of charging a separate fee for the completion of those forms was unauthorized law business under § 484.020 whether or not the act of completing the forms required the exercise of legal judgment or discretion. *See id.*

Relying on *Bray v. Brooks*, 41 S.W.3d 7 (Mo. Ct. App. 2001), TMBC further contends the district court misconstrued Missouri law when it calculated damages based upon the entire document fee, because some of the forms for which it charged a document fee were not legal documents. TMBC contends that the district court was required to parse the document fee to determine what portion should be allotted to the preparation of legal documents and to calculate damages only upon that amount. However, *Bray* does not mandate such a procedure. *Bray* involved a real estate broker who charged a single fee for all of his services, which included the unauthorized drafting of a number of legal documents as well as legitimate broker services, without making a defined separate charge for document preparation. In deciding wheth-

er damages for the violation of § 484.020 should be based upon the broker's entire fee, the Missouri Court of Appeals said a distinction must be made between the legitimate and unauthorized services the broker provided. *Id.* at 14.

As the district court correctly determined, the facts of *Bray* differ from those involved here. TMBC did not charge the McKeages a single contract price for the sale of the boat. Rather, the unauthorized fee for document preparation was charged separately from the legitimate portions of the contract. Thus, there was no need to address the dilemma the court faced in *Bray*. In situations where the unauthorized charge is separate from the legitimate portions of the parties' transaction, damages may be based upon the entire unauthorized fee, even if some of the documents are not legal in nature. *See Eisel*, 230 S.W.3d at 337 n.3.

Finally, TMBC contends it had no notice that the choice-of-law clause in its contract would subject it to treble damages. We disagree. *See Carpenter*, 250 S.W.3d at 702 ("Countrywide had clear and fair notice, both by statute and case law, that its activities constituted the unauthorized practice of law business and that this conduct would subject it to treble the amount of fees paid in exchange for those services."); *Janson v. LegalZoom, Inc.*, 802 F. Supp. 2d 1053, 1067 (W.D. Mo. 2011) (finding application of Missouri's unauthorized practice of law statute did not violate the defendant's constitutional due process rights where Missouri "cases such as *Hulse*, *First Escrow*, *Mid-America*, and *Eisel* put [the defendant] on

notice that it could not charge a fee for the preparation of legal documents”).

We conclude that the district court did not err in granting the class members’ motion for summary judgment or in calculating damages based upon the entire document fee.

C

Finally, TMBC contends the district court erred in applying Missouri law to sales that occurred outside Missouri. This issue involves the interpretation and application of the choice-of-law provision in TMBC’s standard form contract, and thus is an issue of law reviewed de novo. *See Schwan’s Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 595–96 (8th Cir. 2007).

TMBC characterizes this issue as an unconstitutional extra-territorial application of Missouri penal law, arguing that “[t]o allow Missouri to control the regulation of law licenses and decide what constitutes the practice of law in other states is unprecedented” and violative of the Commerce and Full Faith and Credit Clauses of the United States Constitution. In making this argument, TMBC relies on the fact that § 484.020(2) makes it a misdemeanor to engage in unauthorized law business and that the Missouri attorney general has the right to sue for treble damages in the event the parties granted a private cause of action under the statute “neglect and fail to sue for or recover such treble amount.” Mo. Rev. Stat. § 484.020(2).

The fundamental flaw in TMBC’s argument is that Missouri is not a party to this action. Missouri

has not charged TMBC with any crimes, nor has the Missouri attorney general pursued an action against TMBC for treble damages arising out of its contracts with class members. Missouri makes no attempt to enforce its law extraterritorially. Thus, whether Missouri can control the regulation of law licenses extraterritorially and whether the Missouri attorney general can enforce § 484.020 extraterritorially are issues not before us.

Instead, the question here is whether a corporation headquartered in Missouri can choose that Missouri law govern its conduct in standard form contracts it used nationwide. There is nothing inherently unconstitutional about enforcing a corporation's choice to have its contractual duties governed by the law of a particular state. On the contrary, "[t]he general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931); *State ex rel. McKeage*, 357 S.W.3d at 600 ("Generally, parties may choose the state whose law will govern the interpretation of their contractual rights and duties. A valid choice of law provision in a contract binds the parties." (internal citation omitted)). Aside from its argument that application of § 484.020 in this case constitutes the unconstitutional extra-territorial application of Missouri penal law, TMBC does not otherwise challenge the validity or enforceability of the choice-of-law clause. We thus conclude that the district court did not err in applying Missouri law to sales that occurred outside Missouri.

D

In their cross appeal, the McKeages challenge the district court’s award of attorneys’ fees. We review the district court’s award of attorneys’ fees for an abuse of discretion, but review de novo any rulings of law related to the award of fees. *Roemmich v. Eagle Eye Dev., LLC*, 526 F.3d 343, 354–55 (8th Cir. 2008).

We first address the McKeages’ contention that the district court erred when it held that the attorneys’ fees should be paid from the common fund rather than paid by TMBC pursuant to the contractual fee-shifting provision.⁶ In concluding that attorneys’ fees should be paid by the class members out of the common fund even though there was a fee-shifting provision in TMBC’s contract, the district court cited three cases: *Entergy Arkansas, Inc. v. Nebraska*, 226 F. Supp. 2d 1174 (D. Neb. 2002); *In re Workers’ Compensation Insurance Antitrust Litigation*, 771 F. Supp. 284 (D. Minn. 1991); and *In re Chrysler Motors*

⁶ We reject TMBC’s contention, articulated in its reply brief, that the contractual fee-shifting provision does not apply because this suit is not an action or proceeding arising from its agreements. The \$75 document fee was part of the contracts, this class action was brought to challenge the lawfulness of that part of the contracts—a determination that relates to the interpretation of the contract—and thus this class action arises from those agreements and triggers the fee-shifting provision. See *Major v. McCallister*, 302 S.W.3d 227, 231–32 (Mo. Ct. App. 2009) (“Generally speaking, whether a forum selection clause that by its terms applies to contract actions also reaches non-contract claims ‘depends on whether the resolution of the claims relates to interpretation of the contract.’” (quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988))).

Corp. Overnight Evaluation Program Litigation, 736 F. Supp. 1007 (E.D. Mo. 1990). However, none of these cases involved a common fund in a class action in which a contractual fee-shifting provision played a part. See *Entergy Ark.*, 226 F. Supp. 2d at 1182 (noting the common fund doctrine exists “independently of the various fee-shifting statutes,” and not addressing whether the presence of a common fund necessarily precludes the enforcement of a contractual fee-shifting provision); *In re Workers’ Comp.*, 771 F. Supp. at 286 (honoring class counsel’s request that fees be paid out of common fund rather than under applicable statutory fee-shifting provisions because “the settlement agreements contain an explicit term creating a common fund”); *In re Chrysler Motors Corp.*, 736 F. Supp. at 1012–13 (discussing other cases initiated pursuant to fee-shifting statutes in which common fund principles were applied to determine fees). These cases, while informative, are not dispositive.

The question here is whether, in a case in which both a common fund and a *contractual* fee-shifting provision exist, attorneys’ fees should be awarded from the common fund or paid under the contract’s terms. Our court has yet to address this question. In deciding this issue, we first note that the presence of a fee-shifting *statute* does not necessarily preclude awarding attorneys’ fees out of a common fund. See 5 William B. Rubenstein, *Newberg on Class Actions* § 15:61 (5th ed. 2016) (“[C]ounsel may in some cases be able to seek both statutory fee-shifting and common fund fee-spreading.”). Instead, the presence of a fee-shifting statute precludes a common fund award only when that result is required by the statutory

scheme involved. See Alan Hirsch et al., Fed. Judicial Ctr., *Awarding Attorneys' Fees and Managing Fee Litig.*, 78 & n.447 (3d ed. 2015) (“The Second, Third, and Seventh Circuits have held that, absent . . . a showing of legislative intent [to preclude a common fund award], the fact that a fee-shifting statute applies to a particular case does not preclude recovery from a common fund.”) (citing *Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1327 (2d Cir. 1990); *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 255 (7th Cir. 1988); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984)); see also *Haggart v. Woodley*, 809 F.3d 1336, 1357 (Fed. Cir.), *cert. denied*, 136 S. Ct. 2509 (2016) (holding that fee-shifting provision under section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act precluded a common fund award because the statutory scheme “expressly allows landowners to retain the full compensation of the value of their property by mandating the Government to assume the litigation expenses of counsel”). But when a particular statutory scheme does not manifest congressional intent to preclude equitable fee-shifting under the common fund doctrine, courts are afforded greater discretion in determining the appropriate source of attorneys’ fees. See *Haggart*, 809 F.3d at 1359 (“We do not foreclose the application of the common fund doctrine in *all* instances in which a fee-shifting statute is present. Equity may sometimes deem it appropriate to give counsel a piece of either the final judgment or settlement agreement.”).

In cases involving *contractual* fee-shifting provisions, there is no relevant underlying congressional intent that might preclude a common fund award.

Instead, the court must weigh the equitable principles underlying the creation of the common fund doctrine against the fee-shifting provision agreed upon by the parties. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (explaining that the common fund doctrine is grounded in equity).

There is a distinction between the amount a losing party may be required to pay under an agreed-upon contractual fee-shifting provision and the amount a class member should equitably be required to pay his or her own lawyer under the common fund doctrine. *Cf. Gisbrecht v. Barnhart*, 535 U.S. 789, 806 (2002) (emphasizing that the lodestar method of awarding fees under a fee-shifting provision “was designed to govern imposition of fees on the losing party [but] nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client.” (citation omitted)); *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) (explaining that the relevant statutory fee-shifting provision “controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer”). In *Nilsen v. York County*, the court discussed *Venegas* and *Gisbrecht* in the context of a class action common fund case and concluded that “[t]hese cases, read together, uncouple the fee analysis in determining an award *against* the losing defendant . . . from the fee analysis for determining an award *to* the lawyer from the amount that he or she has recovered.” 400 F. Supp. 2d 266, 272 (D. Me. 2005).

“The fact that a common fund has been created is not sufficient to establish a finding that the common fund doctrine must be applied when awarding attor-

ney fees” *Haggart*, 809 F.3d at 1356. The common fund doctrine is intended to ensure that class counsel receives a fee similar to what would have been received had a retainer agreement been in place with all class members, as well as to prevent “persons who obtain the benefit of a lawsuit without contributing to its cost”—e.g., passive class members—from being “unjustly enriched at the successful litigant’s expense.” *Boeing Co.*, 444 U.S. at 478. Payment of attorneys’ fees under the feeshifting provision accommodates both concerns underlying the common fund doctrine: First, lawyers are able to recoup reasonable compensation. Second, there is no risk that named plaintiffs alone will be required to pay the class’s lawyers, thereby unjustly enriching passive class members by providing them the benefit of a portion of the award without the burden of litigation costs. Furthermore, the McKeages’ counsel successfully obtained a judgment on behalf of the class against a defendant who freely entered into a contract containing a fee-shifting provision. Requiring the class to pay the entire attorneys’ fee award from the common fund in this case is inequitable because it nullifies the class’s contractual right, as the prevailing party, “to recover all litigation costs and expenses, including reasonable attorneys’ fees at all levels of litigation” from its opponent. Enforcement of the feeshifting provision honors both the contract and the principles underlying the common fund doctrine.

However, should the district court determine that counsel for the class is entitled to additional fees from the common fund, apart from those reasonable expenses covered by the fee-shifting provision, it is not prohibited from awarding additional fees. *See*

Nilsen, 400 F. Supp. 2d at 272–73 (fee analysis for determining an award against the losing defendant is distinct from the fee analysis for determining an award to the lawyer from the amount that a plaintiff has recovered). We make no comment with respect to whether fees beyond those resulting from the contractual fee-shifting provision should be awarded in this case, and we leave that determination to the district court’s sound discretion. Should it determine that an additional award out of the common fund is justified in this case, the district court should look to “the fund as a whole,” including the trebled damages, *Boeing Co.*, 444 U.S. at 478, but is free to award any portion of the fund that it deems appropriate.

III

For the reasons stated, we affirm on all issues raised in the primary appeal. We reverse and remand for further proceedings consistent with this opinion on the issues raised in the cross appeal.

App-24

Appendix B

Filed January 17, 2012

Supreme Court of Missouri

STATE ex rel. Robert McKEAGE and Janet
McKeage, and Those Similarly Situated,

Relators,

v.

The Honorable Michael J. CORDONNIER,

Respondent.

No. SC 91658.

Jan. 17, 2012 (En Banc)

[List of Counsel Omitted]

Introduction

Robert and Janet McKeage (hereinafter, “Relators”) sued Bass Pro Outdoor World, LLC (hereinafter, “Bass Pro”) in a five-count petition for charging a document preparation fee for purchasing a boat. After the circuit court overruled Relators’ motion to certify a nationwide class, they sought relief by way of a writ of prohibition. This Court issued a preliminary writ, which is made permanent.

Facts and Procedural History

Relators purchased a boat and boat trailer from a Bass Pro store in St. Charles County. Bass Pro’s purchase agreement required Relators to pay a \$75 document preparation fee. Relators filed suit in St. Charles County challenging the document preparation fee and seeking rescission of the sale.

Bass Pro filed a motion to transfer venue based upon the forum selection clause in the purchase agreement. The purchase agreement contained a forum selection clause requiring “the parties to litigate any claim arising from the Agreement in Greene County, Missouri.” The circuit court sustained Bass Pro’s venue motion and ordered the cause transferred to Greene County.

Relators then sought class certification of both in-state and out-of-state customers, based upon the purchase agreement’s choice of law provision. The choice of law provision required the application of Missouri law to all transactions. Relators requested the class to be defined as:

All persons charged a document fee by [Bass Pro] for the five (5) years preceding [Relators’] filing suit to present, on the sale, lease and/or financing of boats, boat trailers, boating accessories, and/or recreational vehicles, which fees stem from contracts containing Missouri choice of law provisions.

The circuit court certified a class that was limited to contracts entered into within the State of Missouri.

Relators filed a petition pursuant to Rule 84.035 to review the class definition. This Court issued a preliminary writ.

Discussion

A. Standard of Review

This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, sec. 4. A writ of prohibition is available: (1) to prevent a usurpation of

judicial power when the circuit court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 32 (Mo. banc 2010).

Whether an action should proceed pursuant to Rule 52.08 as a class action rests within the sound discretion of the circuit court. *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008). An abuse of discretion occurs if the circuit court's decision "is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration." *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 880 (Mo. banc 2008) (quoting *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002)). "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 491 (Mo. App. W.D. 2010). Certification of a class action requires: (1) the class be so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class exist; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will protect fairly and adequately the interests of the class. Rule 52.08(a); *State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003). "Although the class certification decision lies in the circuit court's discretion, the courts should err in close cases in favor of certification because the class can be

modified as the case progresses.” *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. banc 2007).

B. Choice of Law Provision

Bass Pro asserts the circuit court properly refused to certify a nationwide class because there are no common issues that predominate in that there are putative class members who did not enter into a purchase agreement in Missouri. Bass Pro argues a nationwide class would be contrary to fundamental policies of the other states where putative class members executed purchase agreement documents and would require the Missouri court to apply many states’ law.

“The ‘predominance’ requirement . . . does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which ‘predominate’ over the individual issues.” *Clark*, 106 S.W.3d at 488 (*quoting South Carolina Nat’l Bank v. Stone*, 139 F.R.D. 325, 331 (D.S.C. 1991)). “The predominant issue need not be ‘dispositive of the controversy or even be determinative of the liability issues involved.’ “ *Id.* (*quoting Alba Conte & Herbert Newberg, Newberg on Class Actions*, Section 4:25 at 169 (4th ed. 2002)). Further, predominance is not precluded when there needs to be an inquiry as to individual damages. *Clark*, 106 S.W.3d at 488.

In this case, Bass Pro drafted all of the purchase agreements. Bass Pro required any litigation arising from the purchase agreement to be litigated in Greene County and that Missouri law would apply to all of those claims. Bass Pro chose to have its litiga-

tion resolved in Missouri, by Missouri courts, applying Missouri law. Bass Pro now attempts to disavow the contract it drafted in order to limit the class of plaintiffs to those who executed the purchase agreements within Missouri.

Bass Pro claims that the putative members of the class who executed the purchase agreement documents outside Missouri should not be subjected to Missouri law because the state where the documents were executed may have a contrary fundamental policy which would supersede the explicit choice of law provision. Bass Pro seeks to engage in a state by state choice of law analysis to invalidate the nationwide class; it does not.

In this case, there will be no need to engage in a state by state choice of law analysis because Bass Pro conditioned every sale to each putative class member upon acceptance of the Missouri choice of law provision. Each of the purchase agreement documents also contained a forum selection clause indicating that any claim would be litigated in Greene County. Each putative member paid a fee for the document preparation that is the underlying fact supporting the litigation. All of the claims against Bass Pro arise out of the same purchase agreement documents and are by the contract terms to be litigated in Greene County pursuant to the forum selection clause.

Generally, parties may choose the state whose law will govern the interpretation of their contractual rights and duties. *Sturgeon v. Allied Professionals Ins. Co.*, 344 S.W.3d 205, 210 (Mo. App. E.D. 2011). A valid choice of law provision in a contract binds the

parties. *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810, 812 (Mo. App. W.D. 2005).

Section 507.070.1(3), RSMo 2000 does not require all questions of law or fact to be common. Moreover, the “mere existence of state law variations is not alone sufficient to preclude class certification.” *Newberg on Class Actions*, section 4:25 at 163. The members of the putative class all have common issues which would be best resolved by certification of the nationwide class.

As Bass Pro notes, there may be situations where a party can demonstrate that another state has a fundamental policy and greater interest than Missouri. This might be the case, for instance, where the law being applied would deny the citizens of other jurisdictions fundamental rights or privileges which they would enjoy under their own states’ laws. In such cases, the circuit court could consider this as it engaged in a choice of law analysis and determined whether a class action was appropriate. But, here, Bass Pro is a Missouri citizen. Bass Pro’s objection to the application of Missouri law is that it benefits some non-Missouri plaintiffs by allowing them to sue Bass Pro for the unauthorized practice of law when they might not be able to do so in their home states because of a different definition of unauthorized practice in those states. Bass Pro has not identified any state that has a fundamental policy of denying its citizens relief from the unauthorized practice of law in another state. Bass Pro’s policy argument is without merit.

In this case, the circuit court correctly identified that a class action is “an ‘economical means for dis-

posing of similar lawsuits' while simultaneously protecting defendants from inconsistent obligations and the due process rights of absentee class members." *Coca-Cola*, 249 S.W.3d at 860. Due to the forum selection clause, all claims arising from the documents drafted by Bass Pro must be litigated in Greene County. The allegation of potential differences in state law is insufficient to defeat the class; there are sufficient common issues of fact that favor class certification, and all of the purchase agreement documents required the application of Missouri law to any claim. At this preliminary stage of the litigation, courts favor certification as the class may be refined as the case progresses. *See Fluor Corp.*, 220 S.W.3d at 715.

Conclusion

The circuit court abused its discretion by limiting the putative class members to only those whose transactions occurred in Missouri. Relators merely request the circuit court certify the class based upon the language of the contract drafted by Bass Pro. The class of plaintiffs that Relators seek to certify is limited to those who were charged a document preparation fee and whose contracts contained the Missouri choice of law provision. Accordingly, the preliminary writ of prohibition is made permanent.

GEORGE W. DRAPER III, Judge.

All concur.

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Appendix C

Filed August 1, 2017

**United States Court of Appeals
For the Eighth Circuit**

No: 15-3191

Robert McKeage and Janet McKeage, on behalf of
themselves and all others similarly situated

Appellees

v.

TMBC, LLC

Appellant

Tracker Marine Retail, LLC and Bass Pro Outdoor
World, LLC

No: 15-3286

Robert McKeage and Janet McKeage, on behalf of
themselves and all others similarly situated

Appellants

v.

TMBC, LLC

Appellee

Tracker Marine Retail, LLC and Bass Pro Outdoor
World, LLC

Appeal from U.S. District Court for the Western
District of Missouri - Springfield
(6:12-cv-03157-GAF)

ORDER

The panel requests briefing on the following issues: Does the contractual choice-of-law clause at issue in this class action encompass a statutory tort claim under Mo. Rev. Stat. §§ 484.010 and 484.020? If so, can such a choice-of-law clause overcome any implied geographical limitation Missouri may impose on the application of §§ 484.010 and 484.020.

Briefing is due within 15 days and should be limited to 15 pages or less.

August 01, 2017

Order Entered at the Direction of the Court: Clerk,
U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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Appendix D

Filed November 8, 2017

**United States Court of Appeals
For the Eighth Circuit**

No: 15-3191

Robert McKeage and Janet McKeage, on behalf of
themselves and all others similarly situated

Appellees

v.

TMBC, LLC

Appellant

Tracker Marine Retail, LLC and Bass Pro Outdoor
World, LLC

No: 15-3286

Robert McKeage and Janet McKeage, on behalf of
themselves and all others similarly situated

Appellants

v.

TMBC, LLC

Appellee

Tracker Marine Retail, LLC and Bass Pro Outdoor
World, LLC

Appeal from U.S. District Court for the Western
District of Missouri - Springfield
(6:12-cv-03157-GAF)

App-34

ORDER

The petition for rehearing en banc is denied.

November 8, 2017

Order Entered at the Direction of the Court: Clerk,
U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix E
Filed May 5, 2015

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

ROBERT MCKEAGE and	)	
JANET MCKEAGE, on	)	
behalf of themselves and	)	
all others similarly	)	
situated,	)	
	)	
Plaintiffs	)	Case No. 12-03157-
	)	CV-S-GAF
vs.	)	
	)	
BASS PRO OUTDOOR	)	
WORLD, L.L.C., et al.,	)	
	)	
	)	
Defendants	)	

ORDER

Presently before the Court is Plaintiffs' Robert McKeage and Janet McKeage's (collectively "Plaintiffs") Motion for Summary Judgment (Doc. # 193) and Defendants' Bass Pro Outdoor World, L.L.C. ("Bass Pro"); TMBC, LLC ("TMBC"); Tracker Marine Retail, LCC's ("Tracker Marine Retail"); and Travis Boats and Motors Baton Rouge, LLC ("Travis Boats") (collectively "Defendants") Motion for Summary Judgment (Doc. # 309), both pursuant to Federal

Rule of Civil Procedure 56.¹ Plaintiffs and Defendants each oppose the others' motion.

(Docs. ## 319, 333). For the reasons stated below, Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part and Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part.

DISCUSSION

I. FACTS

On May 23, 2008, Plaintiffs purchased a boat from the Tracker Boat Center located within Bass Pro. (Doc. # 194-1 ("Plaintiffs' Contract"), 1). Plaintiffs purchased their boat directly from TMBC. (Declaration of Heidi Zinnert ("Zinnert Decl.")). In addition to the price of the boat, Plaintiffs were charged a \$75 "Document Fee" on what was titled an "Order Acknowledgment and Agreement of Sale" form (the "OAAS Form"). (Plaintiffs' Contract, 1). This Document Fee was paid to TMBC. (Zinnert Decl.

¹ Also before the Court is Defendants' Motion for Leave to File a Motion to Decertify the Class. (Doc. # 334). Plaintiffs oppose. (Doc. # 339). This Court recognizes a court has a "continuing duty to scrutinize class representation and compliance with Fed. R. Civ. P. 23." *Briggs v. Anderson*, 796 F.2d 1009, 1017 n.2 (8th Cir. 1986). However, this Court has upheld that duty and entertained Defendants repeated requests for decertification. (See Docs. ## 167, 174, 265, 290). This Court held a hearing on the certification issue. (Doc. # 157). Each time Defendants raise the same arguments and this Court comes to the same conclusion, that this case meets the requirements of Fed. R. Civ. P. 23 and will continue as a class action. (See Docs. ## 167, 174, 265, 290). As explained more fully below, this Court again finds Defendants arguments without merit and therefore Defendants' Motion for Leave to file is DENIED.

¶¶ 9-10). Accompanying Plaintiffs' OAAS Form was a "TERMS AND CONDITIONS" sheet (the "Terms and Conditions Sheet"). (Plaintiffs' Contract, 2). Provision 15 on the Terms and Conditions Sheet provided that "THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI" ("Missouri Choice-of-Law Provision"). (*Id.*).

A. The Forms

Defendants began using the OAAS Form in their stores in mid-2007. (Doc. # 212-2, 1). It was emphasized that the OAAS Form was created in an "ongoing effort to develop consistent business practices throughout [Defendants'] growing family of dealerships." (*Id.*). It was also stated that stores were to "[d]iscontinue the use of all form versions of the [older forms] at [that] time." (*Id.*). Prior to October 2013, Defendants identified the OAAS Form as the form to be used in all their sales transactions. (Affidavit of Robert Fouche ("Fouche Aff.") ¶ 7). Defendants also instructed its stores, through its "Policies and Procedures Manual," that a sales transaction could be made by hand with the OAAS form or by using the Electronic OAAS Form (the "eOAAS Form"). (September 30, 2009 Retail Policies and Procedures Manual ("Manual"), 1; Docs. ## 212-11, 212-12). Both the OAAS Form and the eOAAS Form were accompanied with the Terms and Condition Sheet, which states that the agreement is governed by Missouri law. (Exhibit 500²; Doc. # 212-

² The exhibits numbers assigned to exhibits by the parties are retained.

12). In the fall of 2013, Defendants changed their standard sales form; the updated standard form has a terms and conditions sheet that states Delaware law is to apply. (See Declaration of Riley Daniels ¶¶ 3-8; Exhibits 2, 3).

Despite the policy regarding the use of the OAAS and eOAAS Forms, there is evidence that the OAAS Form was not used in all of Defendants' stores: some stores never used the OAAS Form and some stores did not use it during the entirety of the class period. (Deposition of Wayne Stokes ("Stokes Depo.") 7:8-15; see Docs. ## 201-1 to 201-9; January 13, 2013 Declaration of Wayne Stokes ¶ 9; Declaration of Ron Miles ¶¶ 8-10; Declaration of Laura Clancy ¶¶ 9-10; Declaration of Andrew Bower ¶¶ 9-15; Declaration of Christopher Conrad ¶¶ 19-23; Declaration of Jeff Howerton ¶¶ 4-12; Declaration of Karen Marsh ¶¶ 10-13; Declaration of Mike Schum ¶¶ 4-7; Declaration of Amy Anderson ¶¶ 8-9; Declaration of Denise Wagoner ¶¶ 8-10; Declaration of Gayle Wilfong ¶¶ 21-23; Declaration of Kristi Nance-Taylor ¶¶ 17-18; Declaration of Collin Hughes ¶¶ 17-22; Declaration of Linda Kraatz ("Kraatz Decl.") ¶ 16). As a result, this Court previously ordered that Plaintiffs were required to manually sift through each customer's file to determine whether the OAAS Form or the eOAAS Form was used in the transaction to discern whether a customer could be a member of the class. (Doc. # 265, p. 27).

B. The Document Fee

Defendants began charging customers a document fee around 1998. (Stokes Depo. 64:20-24). The amount charged to the customer as a document

fee varied with the size of the purchase. (Deposition of Laura Clancy 29:3-8). The average document fee was \$69.99 per customer. (Declaration of Michael Buchanan (“Buchanan Decl.”) ¶ 8). The document fee was a fee charged for completing certain documents such as the bill of sale, the OAAS Form, a power of attorney, and title, license, and registration documents. (Deposition of Denise Wagner (“Wagner Depo.”) 22:6-23:4; Kraatz Decl. ¶¶ 8, 13; Exhibits 529-34; Deposition of Tim Eisenhower (“Eisenhower Depo.”) 47:2-9). Often, completing the documents required only filling in blanks on pre-printed forms. (Zinnert Decl. ¶¶ 11, 19). The document fee was also used for other services such as to obtain loan pay-off information, explain the registration and titling process, and register warranties. (Kraatz Decl. ¶ 8). Defendants stopped charging document fees in mid-2009. (Stokes Depo. 20:22-21:10).

C. Corporate Structure

The four Defendants in this case are separately organized limited liability companies. (Declaration of Tim Eisenhower (“Eisenhower Decl.”) ¶¶ 7-10). Bass Pro Group, LLC is a parent company that owns one hundred percent of both Bass Pro, LLC and Tracker Marine Retail. (Eisenhower Depo. 4:21-5:5). Bass Pro, LLC owns one hundred percent of Bass Pro. (Eisenhower Decl. ¶ 10). Tracker Marine Retail is a holding company that owns one hundred percent of TMBC who owns one hundred percent of Travis Boats. (*Id.* ¶¶ 7-9).

Bass Pro is a retail seller of fishing and hunting equipment, outdoor clothing, camping and hiking supplies, firearms, and outdoor goods. (*Id.* ¶ 10).

TMBC is a retail seller of boats, trailers, motors, and ATVs. (*Id.* ¶ 7). As of 2008, there were seventy-three TMBC dealerships, twenty-one were freestanding and fifty-two were located inside Bass Pro stores. (*Id.* ¶¶ 15-16). The TMBC dealerships located within Bass Pro stores paid rent to Bass Pro pursuant to a lease or sublease agreement. (*Id.* ¶ 16). Travis Boats is a single dealership located in Louisiana which sells boats, trailers, motors, and ATVs. (*Id.* ¶ 8).

Bass Pro, LLC and Tracker Marine Retail have separate financial statements, business licenses, and general ledgers. (*Id.* ¶ 12). TMBC and Bass Pro each have their own employees and assets. (*Id.*). However, Bass Pro and TMBC issue joint program guidelines and have some joint training programs. (Bass Pro/TMBC Professional Accessory Installation Program Guidelines; Bass Pro/TMBC Base Camp Training Meeting Power Point Presentation). TMBC has the authority to cash checks made out to Bass Pro. (Stokes Depo. 215:10-13). After a customer purchases a boat from TMBC, TMBC sends the customer a letter thanking the customer for their purchase “here at Bass Pro Shops” and TMBC sales associates have business cards with Bass Pro logos. (See, e.g. TMBC March 13, 2007 Letter to Matthew Baumgartner; Business Card of Winston Shepherd). TMBC managers sit in on Bass Pro’s annual manager meetings. (Deposition of Riley Daniels 61:14-22)

D. Procedural History

On January 21, 2009, Plaintiffs filed suit in the Circuit Court for St. Charles County, Missouri alleging, among other things, that Defendants

violated Missouri law by engaging in the unauthorized practice of law when Defendants charged document fees for the preparation of legal documents. (Petition, Count D).³ Venue was, thereafter, transferred to Greene County. (See April 6, 2009 Order). Plaintiffs requested the state court certify a nationwide class. (See January 24, 2011 Order Granting Certification of Class Action; Preliminary Writ of Prohibition). The state court certified a class that was limited to individuals who entered into contracts within Missouri. (January 24, 2011 Order Granting Certification of Class Action).

On appeal, the Missouri Supreme Court concluded that the state court abused its discretion in limiting the certification. *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 601 (Mo. 2012) (en banc). The Missouri Supreme Court stated that Defendants drafted the OAAS Forms with its Missouri Choice-of-Law Provision and forum-selection clause with the vision that all litigation arising from the OAAS Forms be “resolved in Missouri, by Missouri courts, applying Missouri law.” *Id.* at 600. The court would not permit Defendants to “disavow the [OAAS Forms] it drafted in order to limit the class of plaintiffs” to only those in Missouri when Defendants intended the OAAS Forms to apply to all transactions and all litigation. *Id.* The court also stated that Defendants “conditioned every sale

³ Plaintiffs’ Petition; the April 6, 2009, Order; the April 15, 2009, Order; Plaintiffs’ Second Amended Petition; Plaintiffs’ Third Amended Petition; January 24, 2011, Order Granting Certification of Class Action; Preliminary Writ of Prohibition; and February 28, 2012, Order can all be found in Document Number 1-4, which also contains many other state court filings.

to each putative class member upon acceptance of the Missouri [C]hoice[-]of[-L]aw [P]rovision,” that Plaintiffs’ “claims against [Defendants] arise out of the same [OAAS Forms],” and that “all of the [OAAS Forms] required the application of Missouri law to any claim.” *Id.* at 600-01. Thus, the court reasoned the class claims are necessarily nationwide and need not be limited to transactions in Missouri. See *id.* at 601. Pursuant to the Missouri Supreme Court’s decision, the state court certified a nationwide class of persons. (February 28, 2012 Order).

On March 21, 2012, Plaintiffs’ action was removed to this Court. (Notice of Removal). Defendants moved to decertify the class action on January 15, 2013. (Doc. # 108). After a hearing and extended briefing, this Court denied Defendants’ Motion to Decertify. (Doc. # 167). This Court concluded certification was proper under Federal Rule of Civil Procedure 23(a) and (b)(3). (*Id.*). Defendants petitioned the Eighth Circuit for review of this Court’s denial of their Motion to Decertify. (Exhibit 540). The Eighth Circuit denied Defendants’ petition. (Exhibits 544, 545). After several clarifications and amendments to the class definition (see Docs. ## 167, 174, 259), the class is presently defined as follows:

All persons charged a document fee by [Defendants] for the five (5) years preceding [Plaintiffs’] filing suit to present, on the sale, lease, and/or financing of boats, boat trailers, boating accessories, and/or recreational vehicles, which fees stem from in-store purchases in Missouri or from contracts

containing Missouri choice of law provisions, and who either: (A) was subject to any of the following terms and conditions or terms and conditions substantially similar to the legal nature thereof: (1) a disclaimer of warranties providing that in all cases, Seller shall not be liable for any consequential damages arising from the breach of this agreement, any express or implied warranty or otherwise, to the maximum extent permitted by applicable law; (2) a liquidated damages provision which references the Uniform Commercial Code; (3) a provision either limiting liability for personal injuries or death arising out of the use or operation of the relevant equipment to the buyer or manufacturer, not Defendants, or indicating that the buyer would have to indemnify Defendants for any claim or action brought against Defendants; (4) a waiver of the right to trial by jury; (5) a provision stating that except as specifically set forth in this Agreement, Seller disclaims any representations or statement by any agents, employees or representatives, whether verbal or in writing, and that Buyer has not relied upon any such representations or statements; (6) a provision stating that in the event it is necessary for Seller to employ an attorney to enforce any of the terms of this Agreement or to defend any lawsuit arising out of this Agreement, then Buyer shall pay all of Seller's costs, including reasonable attorney fees, whether incurred in trial, appellate or bankruptcy court proceedings, plus court costs,

deposition, investigation and travel expense and any other necessary expenses unless a judgment is entered against Seller for the complete relief sought in any complaint or pleading; (7) a provision indicating Missouri law governs the agreement; or (8) a provision indicating that the venue for any action or claim is Greene County, Missouri; or (B) during the relevant sale, lease and/or financing transaction had Defendants fill out an application for title, in a state which requires a boat to be titled, or a power of attorney which is governed by Missouri law.

(Doc. # 259, p. 4) (alterations in original).

Pursuant to the Court's previous Order, Plaintiffs hired seventy-seven reviewers to manually inspect each customer's file and determine whether the individual met the class definition by discerning whether the file contained the OAAS Form, the eOAAS Form, or the Terms and Conditions Sheet. (Doc. # 270). As a result of their manual review, Plaintiffs identified 103,357 potential class members. (*Id.*). On November 6, 2014, after removing some individuals from the potential class member list, Plaintiffs sent notice to 92,097 class members. (Doc. # 301 ¶ 1). On January 5, 2015, the Court allowed Plaintiffs to send notice to another 2225 class members over Defendants' objection. (Doc. # 303). The class members were broken down into three categories: (1) individuals whose customer files were reviewed and reflected that the customer met the

class definition;⁴ (2) individuals whose files were reviewed and reflected that the customer met the class definition even though the individual was not shown to meet the class definition under the IDS system;⁵⁶ and (3) individuals who were listed as meeting the class definition on the IDS system but whose files were not provided for inspection.⁷ (Doc. # 70, ¶¶ 2-6).

II. LEGAL STANDARD

Summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Summary judgment is appropriate if the evidence, viewed in the light most favorable to the [nonmovant] and giving [the nonmovant] the benefit of all reasonable inferences, shows there are no genuine issues of material fact and [the movant] is entitled to judgment as a matter of law.” *Price v. N. States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011). “Once the moving party has made and supported their motion, the nonmoving party must proffer admissible evidence demonstrating a genuine dispute as to a material fact.” *Holden v. Hirner*, 663 F.3d 336, 340 (8th Cir. 2011). Summary judgment should not be granted if a reasonable jury could find for the nonmoving party. *Woodsmith Publ’g Co. v. Meredith*

⁴ This group will be referred to as “Category One” individuals.

⁵ The IDS system is a computer system that TMBC uses to record information about inventory and sales transactions. (Declaration of Wayne Stokes (“Stokes Decl.”) ¶ 3).

⁶ This group will be referred to as “Category Two” individuals.

⁷ This group will be referred to as “Category Three” individuals.

Corp., 904 F.2d 1244, 1247 (8th Cir. 1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. ANALYSIS

A. Whether Plaintiffs' Motion for Summary Judgment is Outdated

Defendants first allege that Plaintiffs' Motion for Summary Judgment should be denied outright because it is "outdated." (Doc. # 333, p. 89). Plaintiffs' Motion for Summary Judgment was filed on September 16, 2013. (Doc. # 194). The original dispositive motion deadline was September 15, 2013. (Doc. # 38). At that point, this case had been in progress for a year and a half and the discovery deadline had passed. (*Id.*). The Court decided to stay disposition of Plaintiffs' Motion for Summary Judgment, per Defendants' request, because it believed it was the "best practice to afford class members notice and an opportunity to opt out prior to determining the merits of Plaintiff's Motion for Summary Judgment." (Doc. # 265, p. 28). The Court then extended the deadline for dispositive motions, again per Defendants' request, allowing Defendants to file their present Motion for Summary Judgment and giving Plaintiffs the opportunity to file a renewed Motion for Summary Judgment if they so desired. (Doc. # 292, pp. 3-4). After twice postponing disposition of Plaintiffs' Motion for Summary Judgment at the request of Defendants, this Court declines to punish Plaintiffs for Defendants' requests by now declaring that Plaintiffs' Motion is outdated.

Defendants also allege that Plaintiffs' Motion is problematic because, since the Motion was filed, the Court has dismissed one of Plaintiffs' claims, amended the class definition and the members of the class, and excluded testimony from one of Plaintiffs' experts. (Doc. # 333, p. 89). However, the Court gave Defendants the opportunity to file updated briefing on Plaintiffs' Motion for just this reason. (Doc. # 324). Additionally, the excluded expert's testimony was only cited in one place in Plaintiffs' Suggestions in Support of their Motion for Summary Judgment. (See Doc. # 194, p. 25). The contention the expert's testimony was used to support is also supported by three separate cases. (See *id.*). Further, this Court does not believe that amending the members of the class changes the legal analysis upon which the class members' claims are based. Finally, Plaintiffs' Motion for Summary Judgment contained one page discussing their now dismissed claim and Plaintiffs readily admit in their Reply Brief that argument is now moot.⁸ (Doc. # 338, p. 22 n.14). Accordingly, the Court sees no issue in addressing the merits of Plaintiffs' Motion for Summary Judgment.

B. Whether This Case May Continue Against Non-TMBC Defendants

Plaintiffs assert their claims against four defendants: Bass Pro, TMBC, Tracker Marine Retail, and Travis Boats. (Doc. # 71). However, Plaintiffs directly purchased their boat from TMBC. (Zinnert Decl.). Defendants argue that summary judgment

⁸ As such, Plaintiffs' Motion for Summary Judgment on this claim is DENIED as moot.

should be granted to Bass Pro, Tracker Marine Retail, and Travis Boats because they were not parties to the contract. (Doc. # 310, p. 21). Plaintiffs allege that Bass Pro, Tracker Marine Retail, and Travis Boats may be held liable under an agency theory. (Doc. # 319, p. 64).

As an initial matter, Plaintiffs have put forth no facts to suggest that Travis Boats meets any of the elements necessary to establish an agency relationship. (See *id.*). Neither have Plaintiffs alleged any other theory of liability against Travis Boats. (See *id.*). In fact, in the section of their brief devoted to arguments regarding agency, Plaintiffs fail to even mention Travis Boats. (See *id.* at 65). Instead, they only argue that “TMBC is acting as the authorized or apparent agent of [Bass Pro] (and Tracker Marine Retail).” (*Id.*). This Court also sees no facts in the record upon which a reasonable jury could conclude that TMBC was an agent of Travis Boats. Thus, Defendants’ Motion for Summary Judgment is GRANTED in favor of Travis Boats

“Whether an agency relationship exists is generally a factual question for the jury.” *West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 11 (Mo. Ct. App. 2010). “However, this relationship is a question of law for the court to determine when the material facts are not in dispute, and ‘only one reasonable conclusion can be drawn from the material facts.’” *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 384 (Mo. Ct. App. 1999) (quoting *Johnson v. Bi-State Dev. Agency*, 793 S.W.2d 864, 867 (Mo. 1990) (en banc)). There are three elements needed to create an actual agency

relationship: “(1) the agent holds the power to alter legal relations between the principal and third parties; (2) the agent is a fiduciary with respect to matters within the scope of agency; and (3) the principal has the right to control the conduct of the agent with respect to matters entrusted to the agent.” *West*, 327 S.W.3d at 12.

Plaintiffs argue that there is a factual dispute on the issue of whether Bass Pro or Tracker Marine Retail had the right to control TMBC that precludes summary judgment. (Doc. # 319, pp. 64-65). However, although the right to control is one element needed to create an actual agency relationship, “[t]he absence of any one of [the] three [elements] defeats the purported agency relationship.” *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002) (en banc). Thus, even if Plaintiffs are correct that there is a factual dispute on the issue of control, if there is no dispute of material fact regarding either of the other two elements, summary judgment may be granted on the issue of actual agency. For Plaintiffs to establish the first element, they must have established that the alleged agent, TMBC, had the ability to alter legal relationships between the alleged principal, Bass Pro or Tracker Marine Retail, and third parties. *See State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663, 665 (Mo. Ct. App. 1997). While Plaintiffs have put forth some evidence regarding the alleged principals’ abilities to control the alleged agent, no evidence or arguments have been made that TMBC in any way had the power to alter the legal relationships between Bass Pro or Tracker Marine Retail and their customers. (See Doc. # 319). Thus, as a matter of law, Plaintiffs have failed

to establish the existence of actual agency between TMBC and Bass Pro or Tracker Marine Retail.

Plaintiffs also attempt to establish the existence of apparent agency. (*Id.* at 66). To establish apparent agency, Plaintiffs must show that:

(1) the principal manifested consent to the exercise of authority or knowingly permitted the agent to assume the exercise of such authority; (2) the person relying on this exercise of authority knew of the facts and, acting in good faith, had reason to believe, and actually did believe, the agent possessed such authority; and (3) the person relying on the appearance of authority changed his position and will be injured or suffer loss if the transaction executed by the agent does not bind the principal.

Gray v. Builders Square, Inc., 943 S.W.2d 858, 861 (Mo. Ct. App. 1997). There is some debate regarding whether an apparent agency theory may be used in a class action context because “[a]pparent authority exists only with regard to those who believe and have reason to believe that there is authority” which could undermine Fed. R. Civ. P. 23(b)(3). See *Bost v. Clark*, 116 S.W.3d 667, 677 (Mo. Ct. App. 2003) (quoting *United Mo. Bank v. Beard*, 877 S.W.2d 237, 240 (Mo. Ct. App. 1994)). However, even assuming such a theory is available, Plaintiffs have not established its existence in this case.

Plaintiffs fail to make any argument regarding the last element of apparent agency, that Plaintiffs would suffer injury or loss if Bass Pro or Tracker

Marine Retail were not part of the action. (See Doc. # 319). Apparent agency does not exist if a plaintiff does not change her position in detrimental reliance on the alleged apparent authority. *See Hefner v. Dausmann*, 996 S.W.2d 660, 667 (Mo. Ct. App. 1999) (finding that the plaintiffs failed to establish apparent agency because they did not show that they changed their position in reliance on the alleged authority). There is no evidence that TMBC is undercapitalized or would be unable to pay any damages in this case. (See Doc. # 319). Thus, apparent agency does not exist as a matter of law.

Plaintiffs final argument to support liability against Bass Pro or Tracker Marine Retail is that this Court should pierce the corporate veil. (See *id.* at 64-67). In order to pierce the corporate veil, a plaintiff must show:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Collet v. Am. Nat. Stores, Inc., 708 S.W.2d 273, 284 (Mo. Ct. App. 1986). A plaintiff has established its burden under the third element in situations such as when “the action of the dominant corporat[ion] renders the subservient corporation insolvent.” *Id.* at 287. Similar to its apparent agency argument, this argument fails because Plaintiffs have failed to establish the existence of the third element. Thus, this Court may not pierce the corporate veil. Accordingly, Defendants’ Motion for Summary Judgment is GRANTED in favor of Bass Pro and Tracker Marine Retail.

C. Whether TMBC Engaged in Unauthorized Practice of Law

1. *Whether there are Genuine Disputes of Material Fact Preventing Summary Judgment*

Summary judgment is improper if there is a genuine dispute of material fact. Price, 664 F.3d at 1191. This Court has previously determined that in order to have a viable claim for unauthorized practice of law under the Missouri statute, a plaintiff’s transaction must have been governed by Missouri law either because the transaction took place in Missouri or because the customer agreed to a Missouri choice-of-law provision. (Doc. # 265, pp. 21-22). TMBC argues that summary judgment is not appropriate in this case because there are genuine issues of material fact regarding whether all of the class members’ transactions were governed by Missouri law. (Doc. # 333, p. 90). However, while

[t]he movant has the burden of showing that there is no genuine issue of fact, [the non-moving party] is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Anderson, 477 U.S. at 256. That is, a “[non-moving party] c[an] not defeat [a] properly supported summary judgment motion . . . without offering ‘any significant probative evidence.’” *Id.* (quoting *First Nat’l. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

TMBC first argues that there are 8000 individuals improperly contained within Category One who did not agree to be bound by Missouri law. (Doc. # 333, p. 91). As support for that contention, TMBC reviewed 591 of the Category One class members’ files. (Buchanan Decl. ¶ 5). Of those 591 files, TMBC determined that sixty-eight were not governed by Missouri law. (*Id.* ¶ 6). Sixty-Eight out of 591 represents an error rate of eleven and a half percent, which TMBC used to extrapolate that 8000 individuals were misidentified. (Doc. # 333, pp. 4-5). However, TMBC has only presented concrete evidence that sixty-eight were misidentified. (*Id.*). Thus, for 7932 individuals, TMBC has failed to offer any specific facts or significant probative evidence to create a genuine issue for trial. Thus, there is no genuine issue of material fact which would prevent

summary judgment as to those individuals. As to the sixty-eight individuals, Defendant has raised a genuine issue of material fact regarding whether their transactions were governed by Missouri law. Thus, summary judgment for those sixty-eight specified individuals is DENIED.

TMBC next argues that summary judgment cannot proceed for the individuals in Category Three because Plaintiffs never reviewed their files and thus, cannot establish that their transactions were governed by Missouri law. (Doc. # 333, p. 92). Although Plaintiffs did not review the Category Three individuals' files, Plaintiffs have properly supported that those individuals are bound by Missouri law. While this Court has previously opined that "one cannot assume all customer files are subject to Missouri law," these specific individuals were identified as class members in the IDS data provided by Defendants. (Doc. # 265, p. 22; Doc. # 270, p. 4; IDS Database). Plaintiffs also provided evidence that the OAAS and eOAAS Forms were standard forms designed to be used in all transactions. (See Fouche Aff. ¶ 7; Manual, 1; Docs. ## 212-11, 212-12). On the other hand, TMBC has failed to offer any specific facts or significant proof that a genuine factual issue exists. Instead, TMBC offers mere allegations that these individuals may not actually meet the class definition. Accordingly, there is no genuine issue of material fact which would prevent summary judgment as to those individuals.

TMBC next argues that there are genuine disputes of material fact regarding whether

individuals whose files contain the OAAS Form or the eOAAS Form but not a signed terms and conditions sheet, agreed to be bound by Missouri law. (Doc. # 333, p. 6). However, this Court has already determined that if an individual's file contained the OAAS Form or the eOAAS Form, even if the form was not accompanied by a signed Terms and Conditions sheet, that individual is bound by Missouri law. (See Doc. # 265, pp. 24-26). The Court finds its previous rationale sound. Accordingly, there is no genuine issue of material fact which would prevent summary judgment as to those individuals.

TMBC additionally argues that there is a genuine dispute of material fact regarding whether out-of-state purchasers agreed to be bound by Missouri law. (Doc. # 333, p. 99). As this Court has previously determined, out-of-state purchasers who made telephone or internet orders from Missouri stores are not included in the class unless they made purchases pursuant to the OAAS or eOAAS Form. (Doc. # 259, p. 3). Defendants identified 323 out-of-state class members who made purchases before the OAAS or eOAAS Forms were in use. (Doc. # 333, p. 100). Thus, these individuals cannot be part of the class unless they made their purchases within a Missouri store. Plaintiffs thereafter provided evidence that these individuals met the class definition. (See Exs. 511; 512). In response, TMBC only offers mere speculation that because some sales were made remotely, some of these individuals may have made remote sales too. (Doc. # 333, p. 100). This is insufficient to prevent summary judgment.

Finally TMBC argues that of the 94,322 individuals who were sent class notice, there is a genuine dispute of material fact as to whether 2225 of them ever paid a document fee. (Doc. # 333, p. 101). Defendants previously raised this argument in an attempt to prevent Plaintiffs from sending notice to these individuals. (See Doc. # 295, p. 2). At that time, Defendants alleged that the 2225 individuals had not paid document fees but instead had their fees fully refunded or paid only registration fees. (*Id.*). This Court considered and rejected Defendants' argument on that basis, determining that individuals were still class members even if they paid only a registration fee or had their document fee refunded. (See Doc. # 303). Now TMBC alleges that this Court misunderstood its position and that actually these individuals never paid any fee whatsoever. (Doc. # 333, p. 101). This Court finds it highly suspicious that TMBC relies on the same evidence as it did previously but now alleges that no fee at all was paid. However, "[c]redibility determinations . . . are jury functions, not those of a judge, whe[n] he is ruling on a motion for summary judgment." Anderson, 477 U.S. at 255. TMBC cites to specific, individualized facts supporting its contention that no fee was paid by the disputed individuals. (Stokes Decl. ¶ 14). Thus, Plaintiffs' Motion for Summary Judgment is DENIED regarding the 2225 individuals allegedly identified in the IDS database as not having paid any type of fee.

2. *Whether TMBC Engaged in Unauthorized Practice of Law as a Matter of Law*

Missouri law prevents an unlicensed individual or business from engaging in the practice of law or law business. Mo. Rev. Stat. § 484.020(1). Law business is defined as

the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Mo. Rev. Stat. § 484.010(2). “[C]harging a separate fee for the completion of legal forms by non-lawyers constitutes the unauthorized practice of law business.” *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 702 (Mo. 2008) (en banc). At the certification stage, the Court found that TMBC’s actions constituted unauthorized practice of law. (Doc. # 167, p. 9). This Court recognizes that decisions at the certification stage often come before the close of discovery and “may therefore require revisiting upon completion of full discovery.” *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005). However, the Court’s determination came only a few weeks before discovery closed and was reaffirmed

just two weeks before the close of discovery. (See Docs. ## 38, 167, 174). This Court does not believe that there have been any factual discoveries since that point that would necessitate revisiting that determination.

Regardless, TMBC's only argument on this issue is that it did not engage in unauthorized practice of law because it did not exercise legal judgment when it filled out forms necessary to secure title or power of attorney. (Doc. # 310, p. 31; Doc. # 333, p. 104). However, TMBC misunderstands the law. Whether preparing a document requires legal judgment or discretion is the standard to determine whether a document is legal in nature. *Hargis v. JLB Corp.*, 357 S.W.3d 574, 584 (Mo. 2011) (en banc) ("Determining whether a document is legal in nature requires this Court to 'balance the protection of the public against a desire to avoid unnecessary inconvenience and expense.' As *Hulse [v. Criger]*, 247 S.W.2d 855, 857, 862 (Mo. 1952) (en banc) noted, the key factor in making this determination is whether preparing the document requires legal judgment or discretion.") (quoting *In re First Escrow, Inc.*, 840 S.W.2d 839, 843 (Mo. 1992)) (internal citation omitted). Once it has been determined that a document is legal in nature, charging for merely filling in blanks on such a document constitutes unauthorized practice of law even if filling in the blanks does not require legal judgment. See *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 337-38 (Mo. 2007) (en banc) (finding that completing pre-printed legal documents for a fee constituted unauthorized practice of law); *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 865 (Mo. 1996) (en banc) (determining that non-attorneys

could only fill in blanks on legal documents if they did so without compensation); *Hulse*, 247 S.W.2d at 857, 862 (determining a person “may not make a separate charge for completing any standardized forms” and finding a party who had “fill[ed] in such form or forms” had violated the law). Missouri law has already determined that documents establishing power of attorney and obtaining title are legal in nature. *In re Mid-Am. Living Trust*, 927 S.W.2d at 856 (holding that legal documents include durable powers of attorneys); *State v. Hayes*, 597 S.W.2d 242, 249 (Mo. Ct. App. 1980). Thus, it is immaterial whether TMBC exercised legal judgment when it filled out the forms.

TMBC argues that *Klutho v. The Company Co.*, No. 12SL-01597, 2013 WL 4792878 (Mo. Cir. Ct. Feb. 27, 2013), establishes that filling in blanks on a document does not constitute unauthorized practice of law. (Doc. # 310, p. 31). TMBC is correct that in *Klutho*, the Missouri Circuit Court determined that the defendant had not engaged in unauthorized practice of law when it cut and pasted information into a standard form. 2013 WL 4792878, at p. 1. However, the defendant in *Klutho* “did not charge a separate fee for this administrative assistance” and “there was nothing that [the defendant] charged that was denominated a document preparation fee.” *Id.* at pp. 1-2. As the Missouri Supreme Court has previously established, “non-attorneys c[an] properly fill in blanks in standard . . . forms when they performed such a service without compensation.” *In re Mid-Am. Living Trust*, 927 S.W.2d at 865 (emphasis in original). However, the undisputed evidence in this case shows that TMBC charged a fee,

which included, at least in part, a fee for the completion of legal documents. (Wagner Depo. 22:6-23:24; Kraatz Decl. ¶¶ 8, 13; Exhibits 529-34; Eisenhower Depo. 47:2-9). Accordingly, TMBC engaged in unauthorized practice of law in violation of Mo. Rev. Stat. § 484.020(1) as a matter of law.

3. *Whether Extraterritoriality Concerns Prevent the Application of Mo. Rev. Stat. § 484.020(1)*

The class definition includes plaintiffs who made purchases and were charged document fees in states other than Missouri. (Doc. # 265, pp. 4-5). However, the unauthorized practice of law statute is a Missouri state statute. *See* Mo. Rev. Stat. § 484.020(1). TMBC argues that applying Mo. Rev. Stat. § 484.020(1) to transactions that took place outside of the state of Missouri is improper. (Doc. # 333, pp. 107-110). However, this argument has already been heard and rejected by three separate courts. First, the Supreme Court of Missouri granted a preliminary writ to determine whether this case should proceed as a class action. *State ex rel. McKeage*, 357 S.W.3d at 599. In their brief to the Missouri Supreme Court, Defendants argued that a class should not be certified because Missouri's unauthorized practice of law statute could not apply extraterritorially and doing so would undermine the policies of other states. Brief for Respondent *State ex rel. McKeage*, 357 S.W.3d 597 (No. SC91658), 2011 WL 5104259, 86. The Missouri Supreme Court rejected Defendants' argument stating, "[g]enerally, parties may choose the state whose law will govern the interpretation of their contractual rights and duties. A valid choice of

law provision in a contract binds the parties.” *State ex rel. McKeage*, 357 S.W.3d at 600-01 (internal citation omitted).

Next, Defendants argued before the Court that Mo. Rev. Stat. § 484.020(1) could not apply extraterritorially. (Doc. # 167, p. 16). The Court did not find the argument persuasive and declined to decertify the class on that basis. (*Id.*). Finally, Defendants appealed the certification decision of this Court to the Eighth Circuit. (Exhibit 540). In their Petition, Defendants argued that Mo. Rev. Stat. § 484.020(1) could not apply to transactions which took place outside the state of Missouri. (*Id.* at 17-19). The Eighth Circuit denied Defendants’ Petition. (Exhibits 544, 545). This Court declines to revisit what has already been argued, considered, and rejected by three separate courts. Accordingly, Plaintiffs’ Motion for Summary Judgment is GRANTED with the exception of the 2293 individual class members with whom there is a genuine dispute of material fact regarding whether they fall within the class definition.

D. Whether Damages are Available to Plaintiffs

1. *Whether Damages have been Sufficiently Established*

TMBC first argues that Plaintiffs are not entitled to recover any damages because they have failed to present precise evidence of their damages. (Doc. # 310, p. 32). Specifically, TMBC asserts that Plaintiffs may recover nothing unless they establish what portion of the charged document fee was paid for services constituting unauthorized practice of law.

(*Id.* at 33). TMBC relies on *Bray v. Brooks*, 41 S.W.3d 7 (Mo. Ct. App. 2001) to support its position. In *Bray*, the plaintiffs hired the defendant as their real estate broker for an eight percent commission. 41 S.W.3d at 9. In addition to his duties as a broker, the defendant drafted a number of legal documents for the plaintiffs that the court found violated Missouri's unauthorized practice of law statute. *Id.* at 13-14. In determining damages, the court stated:

The [plaintiffs] argue that they should not be required to prove a separate charge [The defendant] argues that there was no evidence of a separate charge for his drafting of documents in violation of § 484.010.1. Acceptance of the [plaintiffs'] argument could result in the application of severe penalties against a person based on the amounts that were legitimately charged for legitimate goods and services. However, acceptance of [the defendant's] argument would allow a person engaging in the unauthorized practice of law to avoid civil liability for damages under § 484.020.2 merely by not making a defined separate charge. Neither position would satisfy or fulfill the proper legislative intent underlying the statute. A more reasoned approach would be to impose civil damage liability under § 484.020.2 where not only is there a separate charge for the service, but also when there is a different charge for the goods or services that are illegal in nature.

Id. at 14. The court then determined that because the plaintiffs were charged only one fee for all of the

services provided by the defendant and because the plaintiffs presented no evidence as to “what customary charges might be for the legitimate services [the defendant] provided or any other measure by which the trial court could determine the amount ‘paid’ for the legal services[,] . . . there was no substantial evidence to support the damage calculation.” *Id.*

This case differs from the facts of *Bray*. Unlike in *Bray*, TMBC did not charge a single fee for all of its services. Instead, TMBC charged Plaintiffs approximately \$27,000 for their boat and a separate \$75 as a document fee. (Plaintiffs’ Contract, 1). That document fee was charged, at least in part, for services that violate Missouri’s unauthorized practice of law statute. (See Wagner Depo. 22:6-23:24; Kraatz Decl. ¶¶ 8, 13; Exhibits 529-34; Eisenhower Depo. 47:2-9). Thus, TMBC’s charge falls within the realm of damages envisioned in *Bray* because there was a defined, separate charge for the illegal services which was different than the charge for the legitimate goods. See *Bray*, 41 S.W.3d at 14.

It is even more apparent that Plaintiffs have sufficiently established damages when the basis of the *Bray* court’s decision is examined. The *Bray* court explicitly stated that the “[Missouri] Supreme Court implicitly recognized this middle ground in fashioning the injunctive relief in *In re First Escrow* . . . to hold that the escrow company may not charge a separate document preparation fee ‘or vary their customary charges for closing based upon whether documents are to be prepared in the transaction.’” *Bray*, 41 S.W.3d at 14 (quoting *In re First Escrow*,

840 S.W.2d at 849). TMBC violated the provision of In re First Escrow because it charged a separate document fee in addition to the price charged for the legitimate boat. (Plaintiffs' Contract, 1).

The fact that this separate document fee may have included charges for services in addition to the illegal services is immaterial. Once a separate charge for the illegal services is made, a defendant cannot avoid liability by claiming that the charge also encompasses other services. For example, in *Eisel*, the defendant charged a document fee for completing preprinted forms, including "a deed of trust and a promissory note, as well as various other documents, depending on the loan involved." 230 S.W.3d at 337 n.3. The Missouri Supreme Court stated "[t]here can be no question that the preparation of the deed of trust and the promissory note constitutes the practice of law. The Court does not address any other specific documents." *Id.* (internal citation omitted). The Missouri Supreme Court affirmed the lower court's award of treble damages based on the entire document fee even though the document included a charge for preparation of documents that were not found to be illegitimate. *Id.* at 340. Thus, it is immaterial whether the separately charged document fee included a charge for other services.

This same rationale applies to Plaintiffs' money had and received claim. When an entity violates Missouri's unauthorized practice of law statute, a plaintiff has "the option of pursuing recovery under both the statute and the common law action of money had and received." *Carpenter*, 250 S.W.3d at 703. However, a plaintiff "may only obtain a single

recovery.” *Id.* “Therefore, plaintiffs who paid the fee are entitled to one of the two actions for relief. Plaintiffs who meet the requirements of section 484.020.2 can recover treble damages. Those who do not meet the requirements of the statute can recover the fee paid on the theory of money had and received and interest.” *Id.* Accordingly, Plaintiffs have sufficiently established damages.

2. *Whether Plaintiffs are Entitled to Treble Damages*

Mo. Rev. Stat. § 484.020(2) states that any entity who violates Missouri’s unauthorized practice of law rule “shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation [of the statute].” TMBC argues that treble damages are permissive, not mandatory. (Doc. # 310, p. 44). However, the language of the statute itself indicates that treble damages are mandatory. “The use of shall in a statute is indicative of a mandate to act. The general rule is that use of shall is mandatory and not permissive.” *Neal v. Mo. Dir. of Revenue*, 312 S.W.3d 444, 447 (Mo. Ct. App. 2010) (quoting *Welch v. Eastwind Care Ctr.*, 890 S.W.2d 395, 397 (Mo. Ct. App. 1995)). TMBC correctly notes that the statute is not a model of clarity. (Doc. # 310, p. 44). The statute does not say that “the violator shall pay treble damages, or that the injured party shall recover treble damages.” (See *id.*). However, the statute does state that the violator “shall be subject to be sued for treble [damages].” Mo. Rev. Stat. § 484.020(2). Additionally, the statute goes on to state that if the injured party “fail[s] to sue for or recover such treble amount, then the state of

Missouri shall have the right to and shall sue for such treble amount and recover the same.” *Id.* Thus, it is clear from the language of the statute that the Missouri legislature envisioned that it would be mandatory for the violator to pay treble damages.

Additionally, the Missouri Supreme Court has interpreted the statute as mandating the payment of treble damages. In *Carpenter*, the Missouri Supreme Court found that the statute’s treble damages were a “statutory imposition of penal damages” which did “not require a finding of a culpable mental state.” 250 S.W.3d at 701-02. TMBC cites to *Hulse* to support its argument that treble damages are not mandatory. (Doc. # 310, p. 45). In *Hulse*, the Missouri Supreme Court determined that the defendant had engaged in unauthorized practice of law but found that “since the matter had not previously been decided in this State and [the defendant] had been frank and helpful to the Bar Administration, we think no substantial penalty should be imposed. It is, therefore, ordered and adjudged that [the defendant] pay a fine of one dollar.” 247 S.W.2d at 863. There are a number of issues with TMBC’s reliance on *Hulse*. First, *Carpenter* came over fifty years after *Hulse* and determined that treble damages were legislatively prescribed. Compare *Carpenter*, 250 S.W.3d at 701-02 with *Hulse*, 247 S.W.2d 855. Additionally, unlike in *Hulse*, this matter has been previously decided in Missouri. A number of cases in the years since *Hulse* have determined that filling in blanks on legal documents constitutes unauthorized practice of law. See *Carpenter*, 250 S.W.3d at 702; *Eisel*, 230 S.W.3d at 337-38; *In re Mid-Am. Living Trust*, 927 S.W.2d at 865. Even *Hulse* established this proposition. *Hulse*,

247 S.W.2d at 857, 862. Thus, *Hulse's* rationale for failing to impose a penalty does not apply in this case.

Under the statute, an injured party has two years from the date of paying an unauthorized document fee to file suit and receive treble damages. Mo. Rev. Stat. § 484.020(2). Thus, those Plaintiffs who paid document fees within two years of the date the suit was filed are entitled to treble damages as a matter of law.

3. *Whether Plaintiffs are Entitled to Punitive Damages*

In their Complaint, Plaintiffs request that the Court award them punitive damages. (Complaint, p. 12). TMBC moves for summary judgment determining that Plaintiffs are not entitled to punitive damages. (Doc. # 310, p. 47). As explained above, when an entity violates Missouri's unauthorized practice of law statute, the injured party may either bring a suit under the Missouri statute, if the violation occurred within the preceding two years, or may bring an action for money had and received. *Carpenter*, 250 S.W.3d at 703. Plaintiffs bring suit under both the unauthorized practice of law statute and the common law action of money had and received. (Complaint, pp. 8, 10). They assert their statutory cause of action for those class members who paid a document fee within the two years preceding this suit. (Doc. # 194, p. 24). Missouri's unauthorized practice of law statute "does not provide for attorney fees or punitive damages." *W.C. Motor Co. v. Talley*, Case No. 12 C 2307, 2014 WL 3882489, at *4 (N.D. Ill. Aug. 7, 2014) (applying

Missouri law). Plaintiffs agree that they are not entitled to punitive damages on their statutory claim. (Doc. # 319, p. 63). Accordingly, Plaintiffs are not entitled to any punitive damages on that claim beyond the treble damages previously discussed.

An action for money had and received is available to individuals “who paid the fee within three to five years of filing suit.” *Carpenter*, 250 S.W.3d at 703. Plaintiffs bring an action for money had and received for the class members who paid document fees within three to five years of the day this suit was filed. (Complaint, p. 10). Plaintiffs argue that these class members are entitled to punitive damages. (Doc. # 319, p. 63).

“An action for money had and received is . . . founded upon a contract implied in law.” *Pitman v. City of Columbia*, 309 S.W.3d 395, 402 (Mo. Ct. App. 2010). A “claim for money had and received sounds in contract rather than in tort.” *Kubley v. Brooks*, 141 S.W.3d 21, 31 (Mo. 2004) (en banc). “The general rule is that punitive damages may not be recovered in breach of contract actions.” *Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 902 (Mo. 1990) (en banc). The Missouri Supreme Court recognized that “[i]t has been said repeatedly that (excepting perhaps within certain narrow exceptions not here important) punitive damages are not recoverable in an action on contract, and this has been held specifically in an action for money had and received.” *Hilderbrand v. Anderson*, 270 S.W.2d 406, 410 (Mo. Ct. App. 1954). Accordingly, TMBC’s Motion for Summary Judgment denying punitive damages is GRANTED. However, these individuals are entitled to “recover the fee paid

on the theory of money had and received and interest upon that amount from the date of payment” as a matter of law. See *Carpenter*, 250 S.W.3d at 703.

4. *Whether Plaintiffs are Entitled to Rescission*

In their Complaint, Plaintiffs also move to rescind their individual contract. (Complaint, p. 11). TMBC moves for summary judgment against Plaintiffs’ rescission claim, alleging that it is inconsistent with Plaintiffs’ class claims. (Doc. # 310, p. 43). A plaintiff “may not pursue or attempt to intermingle” remedies which are “wholly inconsistent.” *Harper v. Barket*, 557 S.W.2d 455, 457 (Mo. Ct. App. 1977) (quoting *Auffenberg v. Hafley*, 457 S.W.2d 929, 935 (Mo. Ct. App. 1970)). TMBC alleges that rescission is wholly inconsistent with Plaintiffs’ statutory unauthorized practice of law claims because rescission extinguishes the contract. (Doc. # 327, p. 22). TMBC is correct that “[r]escission of a contract extinguishes it as effectually as if it had never been made.” See *Phillips v. Bradshaw*, 859 S.W.2d 232, 235 (Mo. Ct. App. 1993). However, success under the unauthorized practice of law statute is not dependent upon the existence of a valid contract. Instead, all that is required is that an entity charged a fee for engaging in unauthorized practice of law. *Carpenter*, 250 S.W.3d at 702. Thus, even if Plaintiffs’ boat contract is rescinded and treated as though it was never made, TMBC still charged them a \$75 document fee. (Plaintiffs’ Contract, 1). Accordingly, summary judgment on Plaintiffs’ rescission claim is DENIED.

5. *Whether Plaintiffs are Entitled to Injunctive Relief*

In their Complaint, Plaintiffs also seek injunctive relief “including a preliminary and permanent injunction enjoining defendants from continuing the unlawful practices.” (Plaintiffs’ Complaint, p. 12). However, TMBC stopped charging a document fee in 2009. (Stokes Depo. 20:22-21:10). Plaintiffs agree that this request is now moot. (Doc. # 319, p. 56). Accordingly, TMBC’s Motion for Summary Judgment against Plaintiffs’ request for an injunction is GRANTED.

CONCLUSION

Plaintiffs and Defendants both filed Motions for Summary Judgment. Plaintiffs only made purchases from TMBC and were only charged document fees by TMBC. For Plaintiffs’ claims to proceed against Tracker Marine Retail, Bass Pro, or Travis Boats, Plaintiffs must have shown that there was an agency relationship between TMBC and these other Defendants or established that this Court should pierce the corporate veil. However, Defendants proved that as a matter of law neither avenue was available because Plaintiffs failed to put forth any evidence upon which a reasonable jury could conclude that all necessary elements were present.

For Plaintiffs to be entitled to summary judgment, they must have established that there was no reasonable dispute of material fact regarding whether each class member’s transaction was governed by Missouri law. Defendants put forth significant probative evidence regarding whether

2293 specified class members' transactions were governed by Missouri law. Thus, as to these 2293 class members, reasonable disputes of material fact exist and Plaintiffs' Motion for Summary Judgment is DENIED. As to the other class members, no reasonable dispute of material fact exists. Additionally, Plaintiffs established as a matter of law that TMBC engaged in unauthorized practice of law. Therefore, as to the remaining class members, Plaintiffs' Motion for Summary Judgment is GRANTED.

Plaintiffs have also established that as a matter of law those individuals who meet the requirements of Missouri's unauthorized practice of law statute are entitled to treble damages and those individuals who fall within the common law action of money had and received are entitled to actual damages and interest. However, Defendants have established as a matter of law that punitive damages and injunctive relief are unavailable. Finally, Defendants failed to establish that Plaintiffs' claim for rescission failed as a matter of law. Accordingly, for these reasons and the reasons set forth above, it is

ORDERED that Defendants' Motion for Summary Judgment is GRANTED in favor of Tracker Marine Retail, Bass Pro, and Travis Boats.

IT IS FURTHER ORDERED that genuine disputes of material fact exist regarding the 2293 class members identified by Defendants. Accordingly, Plaintiffs' Motion for Summary Judgment is DENIED as it applies to those 2293 specified individuals.

IT IS ADDITIONALLY ORDERED that as to the rest of the class, Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS ALSO ORDERED that those class members who paid document fees within two years from the date this action was brought are entitled to treble damages as a matter of law and those that fall within the common law theory of money had and received are entitled to actual damages and interest as a matter of law.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment against punitive damages is GRANTED.

IT IS ADDITIONALLY ORDERED that Defendants' Motion for Summary Judgment against rescission is DENIED.

IT IS LASTLY ORDERED that Defendants' Motion for Summary Judgment against injunctive relief is GRANTED.

/s/ Gary A. Fenner
Gary A. Fenner, Judge
United States District Court

DATED: May 5, 2015

Appendix F

Filed September 9, 2015

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

ROBERT MCKEAGE and	)	
JANET MCKEAGE, on	)	
behalf of themselves and	)	
all others similarly	)	
situated,	)	
	)	
Plaintiffs	)	Case No. 12-03157-
	)	CV-S-GAF
vs.	)	
	)	
BASS PRO OUTDOOR	)	
WORLD, L.L.C., et al.,	)	
	)	
Defendants	)	
	)	

JUDGMENT IN A CIVIL ACTION

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action has been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED that:

By Court Order entered 7/12/13 (Doc. 167):

Defendant's Motion for Order to Decertify the Class (Doc. 108) is DENIED.

By Court Order entered 5/5/15 (Doc. 343):

Defendants' Motion for Leave to File a Motion to Decertify the Class (Doc. # 334) is DENIED.

Defendants' Motion for Summary Judgment (Doc. # 309) is GRANTED in favor of Tracker Marine Retail, Bass Pro, and Travis Boats.

Genuine disputes of material fact exist regarding the 2293 class members identified by Defendants. Accordingly, Plaintiffs' Motion for Summary Judgment (Doc. # 193) is DENIED as it applies to those 2293 specified individuals.

As to the rest of the class, Plaintiffs' Motion for Summary Judgment is GRANTED.

Those class members who paid document fees within two years from the date this action was brought are entitled to treble damages as a matter of law and those that fall within the common law theory of money had and received are entitled to actual damages and interest as a matter of law.

Defendants' Motion for Summary Judgment against punitive damages is GRANTED.

Defendants' Motion for Summary Judgment against rescission is DENIED.

Defendants' Motion for Summary Judgment against injunctive relief is GRANTED.

May 5, 2015
Dated

Paige Wymore-Wynn
Acting Clerk of Court

Sept. 9, 2015
Entered

/s/ Terri Moore
(by) Deputy Clerk

Appendix G

MO. REV. STAT. § 484.020

484.020. Who shall engage in the practice of law or do law business — penalty —

1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, a limited liability company organized and registered pursuant to the provisions of chapter 347, or* a limited liability partnership organized or registered pursuant to the provisions of chapter 358, engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for

such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association, partnership, limited liability company or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state.

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*Word “on” appears in original rolls.