SC 99007

IN THE SUPREME COURT OF MISSOURI

ALL STAR AWARDS & AD SPECIALTIES, INC.,

Appellant/Respondent

v.

HALO BRANDED SOLUTIONS, INC.,

Respondent/Appellant

Appeal from the Circuit Court of Jackson County

16th Judicial Circuit

The Honorable John M. Torrence

Circuit Court No. 1816-CV06419

# SUBSTITUTE RESPONSE/REPLY BRIEF OF APPELLANT/RESPONDENT ALL STAR AWARDS & AD SPECIALTIES, INC.

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## STATEMENT OF THE ISSUE

HALO's calling this multi-million dollar verdict a "small-dollar business dispute" [Resp. Br. 8] misrepresents the record and is the very smug indifference and refusal to accept full responsibility that merited substantial punitive damages. The jury found that HALO's illegal tactics to take All Star's long-term and loyal customers, business worth up to $400,000-450,000 in profits *each year,* supported actual damages of $500,000 for HALO's tortious interference and merited punitive damages of $5.5 million to punish and deter HALO.

The Western District of the Court of Appeals correctly found only one error by the trial court: the reduction of the jury's punitive damage award. The Western District determined that All Star's claims were the kind tried by juries for money damages in 1820 and, therefore, not subject to the cap in Section 510.265 RSMo. HALO provides no relevant or persuasive argument in opposition. This case falls squarely within *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014), a unanimous decision of this Court, and HALO fails to distinguish it, let alone justify reversing it or an entire line of precedents. Like the claim in *Lewellen*, All Star's claims are civil actions for damages involving deceit, trespass and the violation of All Star's property rights. In short, HALO fails to demonstrate why application of Section 510.265 RSMo was proper. The Court should reverse the trial court's reduction of punitive damages and reinstate the jury's unanimous $5.5 million punitive damages verdict.

Regarding HALO's appeal, all of its points on appeal should be denied. Substantial evidence supported the trial court's submitting to the jury All Star's claims for tortious interference with business expectancy and punitive damages. HALO's single evidentiary point really goes to weight and not admissibility, and HALO cannot demonstrate how it was prejudiced by the use of a demonstrative exhibit by a lay witness, especially when the data in the exhibit was admitted without objection. The trial court's only error was reducing punitive damages. All other claims of error should be disregarded.

## ALL STAR'S REPLY BRIEF

### I. The trial court improperly applied the cap in Section 510.265 RSMo.

#### a. This case falls within this Court's prior, unanimous analysis in *Lewellen v. Franklin*.

The trial court's application of Section 510.265 RSMo was error. HALO argues that *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014) is to be strictly interpreted as inapplicable to anything other than a fraud claim. But *Lewellen* did not suggest any such restriction. *Lewellen*, 441 S.W.3d at 143. The *Lewellen* holding is based not on the specific claim for fraud, but on the general and broad statutory cap in Section 510.265. *Lewellen*'s analysis of when this unfocused statute violates the Constitution remains applicable.

*Lewellen* confirms that the nature of the claim, not its title or date of "recognition", is what governs. As *Lewellen* explained, fraud

> does not appear as a separate cause of action in Missouri cases until the mid-nineteenth century. Nonetheless, Missouri's common law is based on the common law of England as of 1607. Fraud claims were historically encompassed in trespass claims, as English common law recognized actions for trespass as a means to recover for deceit.

*Lewellen*, 441 S.W.3d at 143 n.10 (citations omitted). Like the fraud claim in *Lewellen*, All Star's claims spring from deceit and invasion of property ownership rights. HALO secretly hired All Star general sales manager Doug Ford while he was still in All Star's employ, accessed and copied All Star-made websites using confidential passwords, copied and retained All Star art work and customer lists, processed sales orders that belonged to All Star, lied to customers and vendors, and cautioned HALO employees not to phone All Star to prevent discovery of the scheme. All the while, HALO and Ford tricked All Star into believing Ford remained a loyal employee. These facts steeped in deceit and disparagement fit within *Lewellen*.

**b. All Star's claims fit squarely within the kinds of causes of action juries considered in 1820 regardless of any "changes" to the elements.**

HALO concedes that "a modern-day action need not be precisely the same, or have been known by the same name, or have found its way to the Missouri courts by 1820." [Resp. Br. 59] HALO argues that the claims brought by All Star have changed so much, they no long resemble those tried by juries in 1820. This has never been the test and is incorrect anyway. HALO concedes that "civil conspiracy claims have long been litigated to juries." [Resp. Br. 55] The jury awarded punitives against HALO for (1) conspiracy (to breach co-defendant Doug Ford's duty of loyalty) and (2) tortious interference with business expectancy.

The Court of Appeals did not find that these claims were merely "loosely analogous" to English common law claims. [Resp. Br. 24] The court looked to *Lewellen*, applied it, and held that "[c]onspiracy to breach the duty of loyalty and tortious interference with business expectancy would have been cognizable at English common law when our constitution was adopted in 1820." [Opinion 4]

Notably, HALO cites no authority when it proclaims "the conduct it accuses HALO of committing was not considered tortious in 1820." [Resp. Br. 57] This is wrong. The Court of Appeals, in a lengthy analysis, held that civil conspiracy "has been litigated in England since the early 1600s" and the "right to conduct one's business without the wrongful interference of others has been recognized since *at least* 1621." [Opinion 9] HALO presents no authority to the contrary.

**c. Civil conspiracy to breach the duty of loyalty would have been tried to juries in 1820.**

HALO likewise concedes that common law recognized the right of an employer to recover against a disloyal employee. [Resp. Br. 54] HALO argues, however, that All Star could not have brought suit against HALO in 1820 because Missouri supposedly modified the standards for a claim of breach of the duty of loyalty below what it was in 1820. This is wrong, but is a nuance that is immaterial given the conduct at issue here.

To the extent the Court seeks to delve into how much a claim for breach of the duty of loyalty has evolved, HALO cannot support this argument. *Cox v. Bryant*, 347 S.W.2d 861, 864 (Mo. 1961) does not state or suggest that it changed prior law. *Cox* makes no reference to the requirements for duty of loyalty claims at common law. The *Cox* court merely cited the Restatement. *Id.* at 864. Regardless, HALO acknowledges that an employer had a right to recover when the employee "stole the employer's property, or engaged in some other common-law tort." [Resp. Br. 54] That fits the facts of Ford's and HALO's conspiracy, which included stealing All Star's property and lying to customers, vendors, and All Star itself.

**d. Tortious interference as alleged and proven by All Star would have been tried to juries in 1820.**

Tortious interference with business expectancy also long has been recognized as an actionable trespass. "[I]n 1410 it was said that '*if the comers to my market are disturbed or beaten, by which I lose my toll, I shall have a good action of trespass on the case*.'" RESTATEMENT (SECOND) OF TORTS, Section 766B, cmt. b (quoting 11 Hen. IV 47).

As All Star understands HALO's argument, it is that All Star could not have brought a tortious interference with business expectancy claim in 1820 because HALO's and Ford's conduct was too unoffensive for the standards at common law. HALO seemingly acknowledges that All Star could have brought actions against it and Ford in trespass in 1820 so long as All Star could show "violence, fraud or defamation" [Resp. Br. 58] or "fraud, deceit or coercion" [Resp. Br. 53, citing *Downey v. United Weatherproofing, Inc.,* 253 S.W.2d 976 (Mo. 1953)]. First, this question is irrelevant. The only inquiry is whether the common law claims made by All Star were the kind tried by juries in 1820 – and they were. Second, the Court need not split hairs over what level of conduct was required in 1820 because the facts here are rife with fraud, defamation, and deceit.

To the extent the Court looks to historic standards, no authority suggests that historically All Star had to *also* bring a separate claim for a completely separate tort in order to have a jury decide its case. The umbrella of "malice" has been sufficient for at least 300 years. *See Keeble v. Hickeringill*, 11 Mod. 130, 88 Eng. Rep. 945 (K.B. 1707).

In *Keeble*, a duck seller sued his neighbor, who scared off ducks from the plaintiff's land. Finding for the plaintiff, the King's Bench reasoned "where a violent or *malicious* act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases." *Id.* (emphasis added). HALO can cite no authority that fraud, deceit, or coercion (clearly present here) were *required*, even at common law. *See* RESTATEMENT (SECOND) OF TORTS, § 766B, cmt. b (noting that historically "liability was imposed for loss of business caused by defamation of another in his business or profession or by disparagement of his goods"). In other words, in 1820, All Star could have brought a claim for tortious interference based on HALO's and Ford's disparagement of All Star to its clients and vendors or their efforts to wrongfully access and copy All Star's websites, or their false representation to an All Star customer that All Star was "now powered by HALO," among other wrongdoing.

*Glencoe Sand & Gravel Co. v. Hudson Bros. Commssion Co*., 138 Mo. 439, 40 S.W. 93 (1897) and *Downey v. United Weatherproofing, Inc*., 253 S.W.2d 976 (Mo. 1953) do not suggest anything different. While *Downey* noted *Glencoe* could be read to require fraud, deceit, or coercion, *Downey* did not suggest *Glencoe* was so clear as to need "overturning," and noted *Glencoe* did not follow the majority (and common law) view. *Id.* at 980-81; *see also McCann v. Wolff*, 28 Mo. App. 447, 449 (1888). Even if it had, *Glencoe* was an 1897 case, so it certainly does not answer the question of what All Star could have done in 1820. HALO cites no authority suggesting *Downey* was contrary to common law or that this Court tries to parse between "majority" and "minority" views of the common law of England. But even if it did, *Downey* adopted the majority view.

HALO's reliance on *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. banc 2016), is also misplaced. *Dodson* dealt with a statutory wrongful death claim, and this Court reiterated that a claim for wrongful death neither existed nor was analogous to any common law claim in 1820. *Id*. at 557. The opposite is true here. To paraphrase this Court's unanimous holding in *Lewellen*, "a party seeking punitive damages for [tortious interference with business expectancy or conspiracy to breach the duty of loyalty] in 1820 would have had the right to have a jury try the issue of punitive damages." *Lewellen*, 441 S.W.3d at 145.

The Western District correctly applied this Court's precedents to conclude that Section 510.265 RSMo cannot constitutionally be applied to these claims. The claims were cognizable at English common law and were the kinds of cases tried to juries in 1820.

**e. Overturning this Court's precedents is neither required nor appropriate here.**

The facts and posture of this case present no need or appropriate opportunity to reverse this Court's precedents and impose a new test on whether the statutory cap in Section 510.265 RSMo is constitutional. While HALO suggests that *Lewellen* somehow changed a system that had been in place for "decades," [Resp. Br. 49] this is incorrect. Section 510.265 was not even adopted until 2005.

HALO only cites *Adams by and through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992). *Adams* never discussed how its holding squared with the "shall remain inviolate" language of article I, section 22(a) – noting that this "guarantee . . . has remained the same through four Missouri constitutions commending with the Constitution of 1820." *Adams*, 832 S.W.2d at 907. *Watts*, on the other hand, did analyze and interpret the constitutional language and found *Adams* flawed in four respects. 376 S.W.3d at 642.

Additionally, the cap in *Adams* was specific to noneconomic damages in medical negligence—a partial remedy for a specific cause of action. It was not a one-size-fits-all blanket cap on punitive damages with no regard to the underlying cause of action. This is the difference between a surgical airstrike and carpetbombing. Nor is Missouri somehow unique—neighboring Kansas has likewise found a statutory cap on damages in personal injury actions to be unconstitutional. *See Hilburn v. Enerpipe*, 309 Kan. 1127, 1150, 442 P.3d 509, 524 (2019). Regardless, state-to-state comparisons offer limited help. *Adams* relied on the Virginia Constitution, but it "merely states that 'trial by jury is preferable to any other, and ought to be held sacred.'" *Watts*, 376 S.W.3d at 644. In contrast, Missouri's Constitution "guarantees that the right to trial by jury shall 'remain inviolate.'" *Id.* Indeed HALO's own brief acknowledges that this issue is far more

nuanced and case-specific than simply *Adams* versus *Watts*. As HALO notes, in *Lewellen*, this Court unanimously "declined to read *Watts* as rendering statutory limits on damages unconstitutional across the board." [Resp. Br. 50] Put simply, if this Court wants to venture back into the issues analyzed by *Adams* and *Watts*, this is not the appropriate opportunity.

HALO cites *Ordinola v. University Physician Associates*, 625 S.W.3d 445 (Mo. banc. 2021), but that case is irrelevant. It dealt specifically with the abolished common law cause of action for medical negligence that was replaced with a statutory cause of action including injury-specific noneconomic damages caps. This Court upheld the statute, explaining that "[b]ecause a medical negligence action is a statutorily created cause of action, the General Assembly had the legislative authority to enact statutory non-economic damage caps." *Id.* at 450 (*citing Sanders v. Ahmed*, 364 S.W.3d. 195, 204 (Mo. banc 2012). The instant case does not involve an abolished or statutorily-created cause of action or fact-specific noneconomic damages caps for a single cause of action. It is about the vague, purportedly-one-size-fits-all punitive damages cap that applies across the board. HALO's reading *Ordinola* as broadly supporting the notion that the legislature "still retains broad authority to impose reasonable limits on punitive and noneconomic damages under *Watts* and *Lewellen*" [Resp. Br. 53] is not supported by *Ordinola's* narrow holding.[1]

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[1] An amicus brief repeats this error and incorrectly suggests that *Lewellen* is wrong and must be overturned. *See* Brief for Missouri Organization of Defense Lawyers, as Amicus Curiae In Support of Respondent-Appellant HALO ("MODL") at 9. MODL relies heavily on *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992), *overruled by Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 636 (Mo. 2012), which failed to take into account the inviolate nature of the right to trial by jury and did not address Section 510.265. *Lewellen* unanimously held that the generic punitive damages cap, that makes no allowance for the type of case or conduct at issue, violates the right to trial by jury when applied to cases such as the instant case. MODL is also incorrect that *Lewellen* and *Ordinola* are at odds. These cases dealt with vastly different caps, causes of action, and circumstances. *Ordinola* said nothing about punitive damages, but confirmed through its holding that if a cause of action existed and was tried to juries in 1820, the right to trial by jury attaches. *Ordinola* could have broadly affirmed legislative

Under *Lewellen*, All Star's constitutional right to trial by jury prohibits the application of Section 510.265 RSMo to reduce the jury's unanimous award of punitive damages. The trial court erred, warranting reinstatement of the full punitive damages award of $5.5 million.

## II. The jury's punitive damages award does not violate due process and is warranted to punish and deter HALO based on HALO's reprehensible conduct.

HALO claims "no need to address All Star's third or fourth points relied on," [Resp. Br. 60] but those points demonstrate why any reduction in the punitive damages award was unwarranted both under a due process or remittitur analysis. In particular, HALO leaves unchallenged two important facts:

1) the trial court's Order indicates it considered "the relevant factors set out in *Lewellen v. Franklin*, 441 S.W.3d 136, 144 (Mo. banc 2014), with regard to both statutory and due process considerations." [D116, App. 1], and
2) the trial court held that "the Jury verdict is not against the weight of the evidence presented during trial." [D116, App. 1]

These two rulings indicate the trial court considered and rejected the issue of "excessiveness" of the damages as part of its duty to review the jury's verdict to ensure that it is reasonable." *See Call v. Heard*, 925 S.W.2d 840, 847–48 (Mo. 1996). Thus, the trial court agreed with All Star that the jury's verdict was appropriate under the facts and did not violate due process. HALO does not challenge these findings by the trial court.

### a. The punitive damages award does not violate due process and is warranted based on HALO's reprehensible conduct.

This Court should defer to the findings of the trial court that the jury's verdict was not against the weight of the evidence. The reviewing court views the evidence in the

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power to enact all kinds of caps, but it did not. There is no conflict or error to be corrected in the instant case.

light most favorable to the verdict. *Blanks v. Fluor*, 450 S.W.3d at 408. HALO does not show how the verdict was manifestly unjust. *Id.*

As explained in All Star's opening brief and in HALO's, courts consider the three-prong test in *Diaz v. Autozoners, LLC,* 484 S.W. 3d 64 (Mo. App. W.D. 2015) when evaluating if an award is grossly excessive. And while HALO agrees that "reprehensibility is the most important factor," [Resp. Br. 42], HALO is wrong that none of the factors supporting reprehensibility were proven.

This case cried out for punitive damages. Reading HALO's brief, one would think HALO is describing a different trial. HALO concocts an inflated ratio between actual and punitive damages using the wrong actual damage award numbers because the real ratio, 10:1, is not noteworthy. HALO ignores the double standard between how it treats its own employees versus what it encouraged and allowed Ford to do to All Star so that HALO could benefit. HALO asserts, incredibly, that this case did not "involve any deceit or trickery on HALO's part" [Resp. Br. 44] and it had expressed "regret" regarding its behavior "in this small-dollar financial dispute." [Resp. Br. 43] That does not describe what the jury heard.

Defendants knew their conduct was improper as shown by their secrecy, which extended over several weeks and months and was marked by sneaking, lying, and theft. [*See, e.g.,* Tr. 325-326, 351, 369, 378, 384, 546; Ex. 5, App. 189; Ex. 19, App. 200; Ex. 41, 79, App. 347; Ex. 104, App. 363] Even after being caught, HALO continued doing business with customers who had been taken illegally and wants to do more. [*Id.*] As Bill Vogt testified: "HALO is not remorseful. They are not – well, maybe a little bit of a mistake, but not really. So screw you." [Tr. 136] Indeed, after Defendants were caught, Jim Stutz, who pushed for and approved this conspiracy, felt sorry for *Ford*. [Tr. 376; Ex. 91, App. 357]

HALO's contention that its conduct was an "isolated incident" not involving any "deceit or trickery" is particularly distasteful and misrepresents the record. It was not isolated – part of the reason HALO engaged in the conspiracy was to avoid Ford's changing his mind, because a prior recruit had done exactly this. [Tr. 358-361] HALO

hid its conduct from All Star. [Tr. 327-328; Ex. 19, App. 200] HALO and Ford lied to All Star customers and vendors, even writing on an invoice to an All Star client that All Star was "now powered by HALO." [Tr. 369, 472; Ex. 5, App. 189] Telling All Star customers that HALO *is* All Star is the epitome of deceit and trickery.

Thankfully All Star checked Ford's work email account after Ford made his tearful farewell speech to stunned, trusting teammates (some of whom Ford tricked and used to perpetrate his theft). [Tr. 125-130] All Star was shell-shocked to uncover Defendants' conspiracy– done in hopes of securing up to $800,000-$900,000 in All Star business per year. [Tr. 125-130; 312, 354; Ex. 2, App. 187; Ex. 26, 76, App. 345; Ex. 77, App. 346; Ex. 79, App. 347; Ex. 275, App. 426] HALO's representations that it was essentially in the dark about Ford's actions and took the initiative to contact All Star to make things right [Resp. Br. 40-41] are untrue and fail to even acknowledge the copious evidence to the contrary. The deception continues even in this Court.

HALO wants to keep its head start on All Star. [Tr. 315, 545-546, 626; Ex. 237, App. 376] HALO presented no evidence of disgorging funds or other remediation to All Star. HALO did not fire or discipline Ford other than impose a supposed "moratorium" that still allowed HALO to sell to All Star clients even after this lawsuit was filed. [Ex. 275, App. 526-527] CEO Simon's alleged "moratorium" was only as rigid as HALO wanted it to be: Simon personally kept expanding Ford's ability to do more and more work with All Star customers. [Tr. 378, 384, 546; Ex. 106, App. 365; Ex. 107, App. 367] Even after All Star told HALO to stop, Haddox asked that Christy Tucker, Ford's All Star coworker, send a list of her All Star customers. [Tr. 381-382, 387; Ex. 98] HALO did not discipline Haddox and in fact gave Haddox a good review and a raise. [Tr. 310; Ex. 275, App. 462] HALO hopes to keep going after All Star's business despite its unjust and illegal head start and theft. [Tr. 315, 546]

Here we are in the Missouri Supreme Court, after unanimous jury verdicts, post-trial motions, and a Court of Appeals opinion all rejecting HALO's self-serving characterizations of its behavior. HALO knew what it was doing was wrong but did it anyway. HALO still hides the despicable nature of its conduct and the wide-ranging

damage it caused All Star. This is precisely the unrepentant, deceptive, profit-driven behavior that drove the jury to award punitive damages in the first place.

HALO's conduct is arguably worse than that in *Lewellen v. Franklin*, where the defendant deceived Ms. Lewellen, took her money, and dealt dishonestly with her. 441 S.W.3d at 141. Here, HALO deceived All Star, took its orders, money and property, employed All Star's general manager, and acted dishonestly toward All Star – but in secret and without All Star's knowledge – until All Star stumbled upon the conspiracy and demanded HALO stop – *which HALO still refuses to do*.

There is no support for the notion that the $5.5 million in punitive damages awarded to punish this nearly-billion-dollar company for its deceit and theft is grossly excessive or arbitrary. [Ex. 244, App. 381; Ex. 275, App. 426] The harm inflicted on All Star was not "purely economic in nature." [Resp. Br. 42] HALO seemingly suggests that plaintiff companies should be treated differently than individuals, but this finds no basis in Missouri law. HALO likewise implies that all companies are purely driven by economics and that it is somehow improper to consider the "mom and pop" nature of a small business who treats its employees like a family rather than simply as gears in a profit machine. HALO cannot seriously suggest "[t]his was simply a small-dollar financial dispute between two long-time business competitors." [Resp. Br. 43] Just because they are competitors does not mean that the perspective of (and harm to) a small family-owned business is the same as a billion-dollar company owned by private equity venture capitalists.

HALO's further assertion on appeal that All Star was not "financially vulnerable" misrepresents the record and is the exact opposite of the position HALO took at trial. [Tr. 189, 552-554, 563-571] HALO argued that it allowed Ford to do what he did because All Star was having financial difficulties. HALO still makes much of the fact that All Star (as a small business) has "cash flow issues" from time to time. [Resp. Br. 13-14] As the Court of Appeals recognized:

> Taking business from a small mom-and-pop awards and promotions shop with supposed cash-flow issues *while its sales manager was still in its employ* is the definition of evil motive and reckless indifference.

[Opinion 14] (emphasis in original). The evidence adequately established All Star's financial vulnerability to HALO.

**b. HALO's argument on ratios lacks merit.**

HALO next argues the $5.5 million award is grossly excessive due to a "lopsided" ratio. This argument is meritless. *Diaz v. Autozoners, LLC,* 484 S.W.3d 64, 91 (Mo. App. W.D. 2015) is instructive. "[W]here the defendant's conduct was economically motivated and the defendant is a large corporation, or where the defendant is particularly recalcitrant, it very well may be that a large award is the only means by which to sufficiently ensure that its illegal conduct will be deterred." *Diaz,* 484 S.W.3d at 91. The Court of Appeals affirmed the 13:1 ratio. *Id.* at 92; *see also Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 442 (Mo. App. W.D. 2015) (affirming 10:1 ratio in part due to the size and assets of the defendant corporation). Such is the case here with respect to HALO. *See also Poage v. Crane Co.*, 523 S.W.3d 496 (Mo. App. E.D. 2017) (affirming a $10 million punitive damages award against a large corporation (a ratio of either 7:1 or 12:1)); *Envt'l Energy Partners, Inc. v. Siemens Bldg. Tech., Inc*., 178 S.W.3d 691, 708 (Mo. App. S.D. 2005) (affirming 20:1 ratio of punitive damages in a tortious interference case based in part on reprehensibility of conduct).

A 10:1 ratio here is similarly constitutional. HALO suggests All Star misstates *Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc.*, 178 S.W.3d 691 (Mo. App. S.D. 2005), and asserts that the ratio in that case is actually 4:1, rather than roughly 20:1. [Resp. Br. 47] HALO omits that the jury awarded only $26,100 in actual damages on a tortious interference claim (the only claim on which $500,000 punitive damages also survived post-trial motions). While the Court of Appeals also looked at the total compensatory damages award (combining two awards against two defendants), the defendant raising the issue on appeal wound up paying a ratio of roughly 20:1, and HALO cannot obfuscate that fact. HALO applies this same self-serving

combination as to the "*total* ratio of damages" [Resp. Br. 47] in *Rusk Farms, Inc. v. Ralston Purina Co.*, 689 S.W.2d 671 (Mo. App. E.D. 1985) to water down the ratio to something HALO finds more palatable. And all HALO can do to challenge *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135 (8th Cir. 1986) is to say that it predates *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996). But if these cases were out of line with Missouri law, HALO would not need to resort to citing cases from *outside* Missouri. Even then, HALO cites no remotely comparable case finding due process violations on a similar award.

HALO is a large corporation, is particularly recalcitrant, and was motivated by money in misappropriating All Star's business and confidential information. Marc Simon and Jim Stutz had Darryl Haddox under pressure because he was not bringing enough profitable salespeople to HALO. [Ex. 2, App. 187; Ex. 275, App. 426] Because there was too much risk in competing fairly with All Star for customers, HALO lied, cheated, and stole in secret to plant the proper seeds and get a jump before All Star even had a chance to get in the race.

HALO downplays its conduct and blames Ford, but HALO is an adjudged co-conspirator with Ford, who was also HALO's employee/agent. HALO benefitted from Ford's actions. Even though All Star found out and fired Ford, HALO still wants to keep its head start. It does not matter to HALO that All Star was a 41-year-old family business founded on the golden rule rather than profit. There is money to be made.

HALO attacked All Star at trial, claiming that All Star was losing customers because of production problems, was losing employees because of dysfunction, and was financially unstable. The jury rightfully rejected all of that and had every right to consider those aggressive defense tactics in awarding punitive damages. *See Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 813 (Mo. App. W.D. 2008) (*citing Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 73 (Mo. App. E.D. 2003), *opinion adopted and reinstated after retransfer* (Nov. 3, 2003) ("Likewise, "[a] defendant's aggressive defense at trial on either the issue of breach of duty or causation may supply, in the jurors' minds, the 'complete indifference' or 'conscious disregard' element.") (citation omitted)).

In short, the evidence of reprehensible skulduggery more than supports a 10:1 punitive damages ratio. The jury's award of $5.5 million dollars reflects the recalcitrant, profits-over-people philosophy that drives HALO. Nothing short of a substantial damages figure would get the attention of a company that focuses only on aggressive growth, measures success only by dollars, and is projected to soon be worth one billion dollars. [Ex. 275, App. 426]

The trial court's finding that the award was not against the weight of the evidence was not "clearly erroneous," and a reduction of the jury's full award on due process grounds is not warranted.

## III. The trial court had no legal basis for a remittitur because it found the verdict was not against the weight of the evidence.

Remittitur is reviewed "for an abuse of discretion. The trial court's determination will not be disturbed on appeal absent an abuse of discretion so grossly excessive that it shocks the conscience and convinces this court that both the trial judge and the jury have abused their discretion." *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 211 (Mo. App. W.D. 2013). Evidence and all inferences are viewed "in the light most favorable to the verdict" and all "contrary evidence and inferences" are disregarded. *Id*. at 212.

The trial court did not make any predicate findings that would support remittitur. The trial court denied HALO's "Motion for New Trial" and found "the Jury verdict is not against the weight of the evidence presented during trial." [D116, App. 1-2] Given this finding, the trial court had no legal basis for remitting the award. *See Badahman v. Catering St. Louis*, 395 S.W.3d 29, 38 (Mo. banc 2013) (citations omitted). To the extent the trial court cited remittitur or used remittitur as a basis for capping punitive damages, the trial court erred.

For that reason, even if HALO had not waived any argument on appeal for remittitur (*see infra*), any such argument fails on the merits. The trial court's finding that the verdict was not against the weight of the evidence, which HALO does not challenge on appeal, does not "shock the conscious" or convincingly show that the trial court and

jury "have abused their discretion" in any respect. *Peel*, 408 S.W.3d at 211. Remittitur was not warranted.

## STATEMENT OF FACTS IN RESPONSE TO HALO'S BRIEF

Every argument HALO raises requires that the evidence be viewed in the light most favorable to the verdict. *Blanks v. Fluor Corp.,* 450 S.W.3d 308, 408 (Mo. App. E.D. 2014); *Moran v. Hubbartt*, 178 S.W.3d 604, 609 (Mo. App. W.D. 2005). This is especially true because HALO's arguments attack the jury's damages awards. Missouri appellate courts "will not invade the trial court's province, as the trier of fact, to determine the weight and credibility of the evidence as to damages." *Stom v. St. Clair Corp.,* 153 S.W.3d 360, 365 (Mo. App. S.D. 2005).

HALO was required to state the facts in the light most favorable to the verdict, but did not.[2] Not only did HALO omit facts supporting the verdict, several sentences also contain no citation because they cannot be found in the record at all.[3] Some citations to the record are misleading or wrong. Most concerning is HALO's representation that Moira Vogt "concededly failed to subtract All Star's own costs from her measure of 'profit[].'" [Resp. Br. 20] Not only does this statement fail to view the evidence in the light most favorable to the verdict, it is false. Mrs. Vogt looked at All Star's lost revenue minus its avoided costs. [Tr. 712] Mrs. Vogt took out not only product costs, but also the commissions on sales. [Tr. 713-715, 789-790; Ex. 162]; *see also* [Tr. 733, 735-736, 766-767] Likewise, while HALO suggests it courageously rejected Ford's attempt to transfer an All Star website, [Resp. Br. 22], the truth is that several HALO employees were

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[2] HALO's statement of facts violates Rule 84.04(c). The rule requires a "fair, concise statement of the facts relevant to the questions presented for determination without argument." Mo. R. Civ. P. 84.04(c). A party's conclusory, argumentative statement of facts that "emphasize only facts favorable to them" while "omitting others essential to" the other side's argument "does not substantially comply with Rule 84.04(c)" and alone constitutes ground for dismissal of HALO's appeal. *Vodicka v. Upjohn Co*., 869 S.W.2d 258, 261, 263-64 (Mo. App. S.D. 1994) (dismissing appeal for violations of Rule 84.04).

[3] For example, HALO can cite nothing in the record to support its oft-repeated assertion that it "promptly contacted All Star to determine how to remedy the situation and offered to remit the profits from the 20 orders Ford diverted to HALO while he was still employed by All Star." [Resp. Br. 16, 17] HALO can cite nothing in the record regarding anything it did to remediate All Star's harm.

*complicit* in Ford providing this information and that after HALO learned it could not simply "take" the website, HALO used ill-gotten information to *copy* the site to make the client comfortable leaving All Star for HALO. [Tr. 335, 337-339, 342; Ex. 32, App. 202; Ex. 87, App. 353; Ex. 89, App. 355] In short, HALO's version of the facts is unreliable, violates Rule 84.04(c), and should be disregarded.

**Facts Supporting Submissibility and the Verdict.**

Because they were omitted by HALO, All Star offers the following facts (in addition to those facts already stated in its Substitute Appellant's Brief).

**Multiple forms of evidence show losses to All Star.**

Although HALO claims as a matter of law damages were limited to $25,541.88 (orders processed by HALO before All Star fired Ford), customers diverted from All Star continued making purchases from HALO well after All Star fired Ford. [Ex. 237, App. 376] Other customers did less business with All Star. [Ex. 232-233; 235, App. 373] Even HALO's expert accountant, Matthew Barberich, acknowledged that All Star's financial statements supported about $178,000 in lost sales just in the year after Ford's termination. [Tr. 827]

According to HALO's own documents, the total sales Ford made on behalf of HALO to All Star clients through March 2019 (immediately before trial) was "approximately $188,000." [Tr. 626, 739; Ex. 237, App. 376] This meant that in a little over a year (while HALO's "moratorium" was in place), Ford and HALO had already made "$84,000 and change" in profit. [Tr. 740; Ex. 237, App. 376] Focusing just on the client group whose orders were misappropriated before All Star fired Ford (the group with the initial orders worth $25,541.88), HALO's data showed *continued* sales to these clients (after the initial orders) totaling "around $112,000" with profit to Ford and HALO of "approximately $53,000." [Tr. 741; Ex. 237, App. 376][4]

[4] One of those customers was Beauty Brands, which continued operating and did not go out of business even while in bankruptcy. [Tr. 159-160, 721-722, 862] HALO asserts that Beauty Brands "(unsurprisingly) ceased purchasing promotional products from either party," Resp. Br. 32], but this is demonstrable false. In fact, Beauty Brands continued to

All Star presented voluminous data (admitted without objection) showing the difference between what it would have anticipated making for each customer based on the customer's history versus what All Star actually made for those customers in the year and a quarter between when it uncovered the conspiracy and trial – $111,106.07. [Tr. 716-720; Ex. 232-234, 235, App. 373]

Moira Vogt explained this data. Mrs. Vogt has worked at All Star for 30 years. [Tr. 693] Mrs. Vogt is familiar with how the company works and with customer purchasing history from All Star. [Tr. 693, 723] Even though she was a lay witness, Mrs. Vogt testified that the numbers side of the business "is part of every day for me." [Tr. 693]

Mrs. Vogt took what she believed based on her experience to be a good sampling of Ford's sales patterns and his histories. [Tr. 757; Ex. 162, 232-234] Mrs. Vogt put that admitted evidence into a demonstrative summary – Exhibit 235. [Tr. 711] Mrs. Vogt testified that Exhibit 235 "is a summary of sales for the clients that [Ford] either took with him to HALO or started approaching after he joined HALO. And it's an average of 2015, '16 and '17, to determine what we would have lost from January 1st of '18 through the first quarter of 2019." [Tr. 711, 716, 725] HALO offered no calculation of its own, even though, as Barberich testified, "[h]ad [HALO] wanted me to do that, I could have done it." [Tr. 853-854]

**All Star's damages are expected to continue in the future.**

HALO expected to keep working with these customers and grow the amount of business it received from former All Star customers. [Tr. 349-350, 631-632] The customers' projects involve repeat business, such as yearly awards. [*E.g.*, Tr. 498, 511] HALO and Ford targeted repeat, profitable orders. [Tr. 126-127, 286, 287, 498] For example, while All Star continued some business with Garmin, HALO and Ford took Garmin's biggest annual order – an order All Star had done for roughly ten to fifteen

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doing business with HALO instead of All Star even after the initial sales HALO admitted were illegal. [Ex. 237]

years – and All Star did substantially less business with Garmin than it had done before. [Tr. 286-287, 294; Ex. 232-233, 235, App. 373; Ex. 237]

HALO acknowledged that customers are long-term, and there is an expectation that those customers were likely to stick around. [Tr. 332] The jury heard from Ford that these customers had an average tenure of almost 13 years [Ex. 11, App. 190], and from All Star that those customers averaged a relationship of almost 18 years with All Star. [Tr. 725-30; Ex. 235, App. 373] In fact, the length of these relationships was even longer because some predated All Star's computer system. [Tr. 726]

**Unanimous verdicts for All Star.**

A bifurcated trial was held between April 29, 2019 and May 6, 2019. HALO told the jury in opening statement and throughout trial that it made a mistake, and All Star suffered damages. [*E.g.,* Tr. 46 ("Ford should not have sent those sales to HALO and HALO should not have processed those sales."); Tr. 51 ("[W]e will ask you to award All Star what is only fair, the $25,541.88"); Tr. 946 ("Mr. Ford admitted he made a mistake. Mr. Haddox admitted HALO made a mistake")] Nor did HALO object when All Star's counsel noted that HALO admitted it had tortiously interfered with business expectancies. [Tr. 910]

In closing argument, counsel for HALO stated:

> As I said from day one, HALO and Mr. Ford have admitted that $25,541.88 ought to be paid to All Star. And if you choose to do it under Verdict Form A or Verdict Form B, whichever one you do it under, that is your prerogative.

[Tr. 956-957] HALO attempted to justify its conduct in part by arguing that All Star was financially getting worse in 2017. [Tr. 189, 552-554, 563-571]

The jury was instructed that if it found in favor of All Star on its tortious interference with business expectancies claim, "in your verdict you must find defendant HALO responsible for the acts of defendant Doug Ford if you believe Doug Ford was acting within the course and scope of his employment by HALO," [D102, Instruction 18], and that acts were within the scope and course of agency if:

1. they were part of the work Doug Ford was employed to perform, and

2. they were done by Doug Ford to serve the business interests of HALO.

[D102, Instruction 19]

Regarding damages for tortious interference with business expectancies, the jury was instructed to "award All Star such sum as you believe will fairly and justly compensate All Star for damages you believe All Star sustained and is reasonably certain to sustain in the future as a direct result" of Defendants' tortious interference. [D102, Instruction 20]

The trial court recognized that All Star "put on ample evidence here of behavior which could be categorized by the jury as motived by an evil motive or reckless indifference for the rights of the plaintiff in this case. It is amply sufficient." [Tr. 815]

## ARGUMENT IN RESPONSE TO HALO'S APPEAL

### I. The trial court correctly submitted All Star's tortious interference with business expectancy claim, including future damages, because substantial evidence supported its submission.

In its multifarious point,[5] HALO has no complaint about how the jury was instructed in the verdict directing instruction or verdict form. Instead, HALO argues it was entitled to directed verdict or judgment notwithstanding the verdict because it argues there is *no* evidence to support a finding it caused damages beyond the initial group of orders HALO took. This argument should be summarily denied. First, this issue is not preserved as it was not raised in its motions for directed verdict. Second, the issue is waived as HALO admitted it had responsibility for its actions and invited the jury to determine the issue of damages. Third, sufficient evidence supported submission of the claim.

The jury was instructed to "award All Star such sum as you believe will fairly and justly compensate All Star for damages you believe All Star sustained and is reasonably certain to sustain in the future as a direct result" of Defendants' tortious interference. [D102, Instr. 20] HALO does not challenge the *amount* the jury awarded; HALO instead argues that there is *no evidence* to support a finding that HALO caused *any* damages beyond the initial group of orders HALO took. HALO is wrong.

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[5] As the Court of Appeals recognized, [Opinion 16], HALO's Point Relied On No. 1 violates Rule 84.04. While the Court of Appeals gratuitously considered the submissibility issues, "a multifarious point is subject to dismissal." *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017). HALO's point combines three separate errors (denial of directed verdict, submission of future damages, and denial of JNOV). The Court of Appeals properly refused to consider HALO's argument about instructing the jury regarding future damages. [Opinion 16]. HALO now modifies Point I to assert that the trial court erred "in submitting to the jury the question of future damages." [Resp. Br. 27] HALO cannot now insert an issue it failed to address before the Court of Appeals. *See* Rule 83.08(b) (parties are not permitted to "alter the basis of any claim that was raised in the court of appeals brief").

**a. HALO failed to raise or preserve the issue it now argues.**

The Court of Appeals correctly found that HALO "failed to preserve this point for appellate review." [Opinion 17] HALO's motion for directed verdict attacked the tortious interference with business expectancy claim only on the basis that All Star failed to show a business expectancy. [D99, p.5-6] HALO did not argue that the tortious interference claim failed because All Star could not show damages as to that claim, let alone submission of future damages for such interference. [Tr. 801, 876] As the Court of Appeals put it, HALO's "lost-profits argument was completely unmoored from the tortious-interference-with-business-expectancy argument." [Opinion n.14] A motion for directed verdict must state the specific grounds for the relief sought. *Mansfield v. Horner*, 443 S.W.3d 627, 638 (Mo. App. W.D. 2014); *Pope v. Pope*, 179 S.W.3d 442, 450 (Mo. App. W.D. en banc 2005). It is not proper to only raise a submissibility issue after the jury's verdict. In order to preserve a claimed error, the issue must appear in both the motion for directed verdict at the close of the evidence and in the motion for judgment. *Heifetz v. Apex Clayton, Inc.*, 554 S.W.3d 389, 395 (Mo. banc 2018), *reh'g denied* (Sept. 25, 2018), *opinion modified on denial of reh'g* (Sept. 25, 2018). HALO has not preserved this issue.

**b. HALO waived any error regarding submission of the claim.**

HALO's counsel told the jury in closing argument that it could award damages under either claim submitted against it (conspiracy to breach Ford's duty of loyalty and tortious interference with business expectancies): "And if you choose to do it under Verdict Form A or Verdict Form B, whichever one you do it under, that is your prerogative." [Tr. 956] HALO told the jury throughout trial that it made a mistake, and All Star suffered damages. [*E.g.,* Tr. 46:13-16, 51:18-20, 946:3-5] In taking this position, HALO waived any error as to the submission of the tortious interference claim. *See Hampe v. Versen*, 32 S.W.2d 793, 796-97 (Mo. App. E.D. 1930) (holding that because defendant conceded liability and argued only damages, appellate court was "in no position to hold that the verdict was the result of any action of the court materially

affecting the merits of the action"). The trial court correctly submitted the claim in order to give the jury the opportunity to determine the proper amount of damages. The jury's verdict was the natural result of HALO's admitting liability and arguing damages, not the result of any error by the trial court in submitting the claim. The point should be dismissed. *See id.* at 796-97 ("Since the defendants themselves conceded liability, the only error committed, if any, was their own error, of which they may not complain.").

**c. Even if this point is considered, the trial court properly denied directed verdict and judgment notwithstanding the verdict.**

Even if the Court were to consider the merits, HALO fares no better. As the Court of Appeals recognized, All Star "clearly submitted some evidence of lost profits." [Opinion 19]

**1. The standard of review requires examining the evidence in the light most favorable to the verdict and disregarding contrary evidence.**

HALO fails to set forth or adhere to the complete standard of review for denial of a directed verdict or a judgment notwithstanding the verdict. "The standard of review for a decision on a motion for a directed verdict or a judgment notwithstanding the verdict is the same." *Blue v. Harrah's N. Kansas City, LLC*, 170 S.W.3d 466, 472 (Mo. App. W.D. 2005). This Court's "review is restricted to determining whether the plaintiff made a submissible case." *Kelly v. State Farm Mut. Auto. Ins. Co.*, 218 S.W.3d 517, 520–21 (Mo. App. W.D. 2007), "In reviewing for a submissible case, this court must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence." *Moran*, 178 S.W.3d at 609 (internal quotation omitted). Reversal is warranted only if "reasonable minds could *only* find in favor of the defendants." *Kerr v. Vatterott Educ. Ctrs., Inc.*, 439 S.W.3d 802, 809 (Mo. App. W.D. 2014) (quotation marks and citation omitted).

"Appellate review of a jury's verdict begins with the recognition that the jury retains 'virtually unfettered' discretion in reaching its decision because there is a 'large range between the damage extremes of inadequacy and excessiveness.'" *Stewart v. Partamian*, 465 S.W.3d 51, 57 (Mo. banc 2015). Jurors "are in much better positions than

the appellate court to assess the credibility of damage witnesses and to determine the appropriate compensation." *Krysa v. Payne*, 176 S.W.3d 150, 155 (Mo. App. W.D. 2005). The Court "will not invade the trial court's province, as the trier of fact, to determine the weight and credibility of the evidence as to damages." *Stom,* 153 S.W.3d at 365.

**2. HALO's own arguments and the evidence supported submission.**

**a. HALO admitted submissibility by conceding liability.**

First, there was abundant evidence that HALO tortiously interfered with All Star's business expectancies. As argued *supra,* HALO admitted it made a mistake and owed damages. HALO told the jury it could award damages under either claim submitted against it, one of which was All Star's claim for tortious interference. [Tr. 956-957] HALO's multiple admissions invited, indeed *required,* the trial court to submit All Star's claim of tortious interference to the jury.

**b. HALO's own sales documents prove HALO caused actual damages beyond the first group of orders.**

There was also substantial evidence of damages from HALO's tortious interference. While there was substantial evidence to support the jury's award of $500,000, the precise amount is not how HALO attacks damages. HALO argues that "All Star failed to introduce any evidence of any *actual* loss in sales or profits." [Resp. Br. 34] HALO seeks to escape *any and all liability* on All Star's claim for tortious interference with business expectancies by arguing that it was entitled to directed verdict or judgment notwithstanding the verdict. As such, HALO loses this point entirely if the evidence supports *any* amount of damage, which it obviously does, as the Court of Appeals recognized. [Opinion 19]

"The damages recoverable for intentional interference are not measured by contract rules. The injured party can recover from the tortfeasor: the pecuniary loss; the benefits of the contract; consequential losses for which the interference is the legal cause; and emotional distress or actual harm to reputation if they are reasonably to be expected

to result from the interference." *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. App. E.D. 1982) (*citing* RESTATEMENT (SECOND) OF TORTS § 774 A). Here, the jury heard substantial evidence of a variety of damages including lost orders, stolen property, and reputational harm, which would continue.

HALO's artificial stopping point of $25,541.88 in lost orders is contrary to the evidence. While HALO claims that "speculation is all that All Star offered here," [Resp. Br. 34], HALO ignores that its own documents show that these stolen customers continued making purchases from HALO after these initial orders, *which was always the point*. [Tr. 626; Ex. 237, App. 376-380] HALO's sales to All Star clients through March 31, 2019 totaled "approximately $188,000." [Tr. 739; Ex. 237, App. 376] HALO's documents showed a profit to HALO of "$84,000 and change" from All Star's customers in just over a year. [Tr. 740; Ex. 237, App. 376][6] These are actual sales by HALO to former All Star clients that occurred after the initial orders and before trial (not just "future" post-trial losses). These sales show former All Star clients who were successfully diverted due to HALO's and Ford's illegal conduct. This alone defeats HALO's argument that All Star only offered "speculation" or that there was *no* "actual" evidence to submit All Star's claim of tortious interference. [Resp. Br. 34]

All Star's records (and Ford's testimony and documents), all of which came into evidence without objection, also showed All Star had suffered damages from HALO's tortious interference in the year or so leading to trial. (Ex. 232, 233, 234, 601-604, 623, 624, 642). Mr. Barberich agreed All Star's financial statements showed sales down "approximately $178,000" in the fiscal year ending July 31, 2018. [Tr. 827] Regarding future damages, the jury had ample evidence that damages would not stop after trial. [Tr. 725-730; Ex. 16, App. 197; Ex. 235, App. 373] HALO expected to keep working with these customers and to grow the amount of business it received from former All Star

[6] Of this, "around $112,000" of the sales were to the group of clients who were part of the initial $25,541.88 in orders, resulting in profit to Ford and HALO of "approximately $53,000." [Tr. 741; Ex. 237, App. 376-380]

customers. [Tr. 349-350, 631-632] It was within the jury's prerogative to value the continuing losses.

HALO also ignores the property it took (and still retains), including physical customer files, hundreds of pages of artwork, Ford's complete client list, confidential customer information, order histories, and other information taken to mimic or undercut All Star. [Tr. 128-129, 329-333, 374, 428, 541; Ex. 16, App. 197; Ex. 32, App. 202; Ex. 42-43, 67, 87, App. 353; Ex. 88, 89, App. 355; Ex. 142, 154-156, 337] This property constitutes the tools and information critical to pursuing All Star customers – stolen with the unwitting help of All Star teammates using All Star's own email system. HALO also ignores that it "planted seeds" with key clients and took "key proprietary information" to use to take business in the future. [Tr. 134, 136, 543-545] HALO knows such information has value; that is why it prohibits its own employees from taking it from HALO. [Tr. 304-307, 330-342; Ex. 6 at 26-28; Ex. 9 at 47] Again, the jury had a right to value such losses.

The continuing losses cannot be ignored. Ford generated over $1.4 million in sales to All Star in three years prior to leaving All Star. [Tr. 200-203, 631, 770; Ex. 601-604, 623, 624, 642] Ford personally calculated that he generated a profit of 54% (or $793,035.10) over those three years. [Tr. 652; Ex. 642] Haddox (whose job was in jeopardy without lots of sales) [Ex. 2, App. 187] thought the book of business Ford could bring from All Star was worth $550,000 or more in sales *each year*, even though Ford did not originate any of these customers. [Tr. 88-89, 354; Ex. 77, App. 346] HALO thought it could gain around $800,000 to $900,000 of All Star's yearly sales through Ford and his All Star coworker Christy Tucker, meaning roughly $400,000-450,000 in profits to HALO *each year*. [Tr. 312; Ex. 2, App. 187; Ex. 76, App. 345; 79, App. 347; Ex. 275, App. 426] While Ford did not bring in this much due to the lawsuit and so-called "moratorium" on selling to certain All Star clients, HALO still pocketed handsomely even before trial, let alone into the future. [Tr. 626; Ex. 237, App. 376]

Bill and Moira Vogt also testified about the reputational harm and impact on their business. Customers "are going to believe [Ford] because he's worked with those clients

for a number of years." [Tr. 134, 695] Indeed, the evidence showed customers and vendors have done less business with All Star, regardless of whether they went to HALO. [Tr. 161-164; Ex. 232-233, 235, App. 373] After Defendants' efforts to disrupt All Star's relationships, customers were simply silently going away, both to HALO and otherwise. [Tr. 163-164, 722-724, 782; Ex. 232-233, 237]

HALO objected to none of the evidence about stolen property or harm to reputation or to All Star's closing arguments regarding the same. [Tr. 912, 923] This waives error. *See Kerr*, 537 S.W.3d at 880 ("Where evidence is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered . . . .") (internal quotation marks omitted).[7] HALO's argument that no evidence of damages existed is groundless.

**c. Copious evidence showed All Star's damages would continue after trial into the future.**

HALO is still benefitting from its misdeeds. Not only did HALO already profit off its conspiracy, HALO plans for this to continue and wants to do more business with All Star clients. There was substantial evidence that damages continued after Ford's termination and would continue after trial.

Missouri has long recognized that tortious interference results in ongoing damage. For example, in *Horizon Mem'l Grp., L.L.C. v. Bailey*, 280 S.W.3d 657, 671 (Mo. App. W.D. 2009), the trial court blocked a former employee from working with a competitor, yet the Court rejected the argument that this ended any damages. As the Court explained, the plaintiff "will suffer future damages even if Memorial Park no longer employs Bailey" because "the negative effects of Memorial Park's tortious interference with the contract remain." *Id.* at 670-671.

[7] To the extent the jury awarded noneconomic damages (a position HALO cannot support), HALO's argument that All Star should not have been able to recover for noneconomic damages is not properly preserved and waived because HALO did not identify the issue in its First Point Relied On.

The overwhelming message here was that the damages would continue. Everyone understood that the business is repeat, with long-term customers often purchasing the same items repeatedly. HALO did not engage in this conspiracy just to get $25,541.88 in orders. Haddox admitted this. [Tr. 360-361; Ex. 2, App. 187; 276 at 21; *see also* Tr. 358-59 ("It wasn't done for, you know, grabbing an order.")] HALO wanted Ford's entire $450,000-plus *book* of business and got some of it. HALO expected to keep working with these customers and to grow the amount of business it received from former All Star customers. [Tr. 332, 349-350, 631-632] Moira Vogt testified (and HALO does not challenge on appeal) that based on her experience, it would be reasonable to believe that All Star would have continued working with those customers for at least five years. [Tr. 730] The jury heard from Ford that these customers had an average tenure of almost *13 years* [Ex. 11, App. 190-196] and from All Star that that those customers averaged a relationship of almost *18 years* with All Star. [Tr. 725-30; Ex. 235, App. 373] The length of these relationships was even longer because some predated All Star's computer system. [Tr. 726] This "regular course of dealings suggests a valid business expectancy." *W. Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 19 (Mo. banc 2012) (*quoting Stehno v. Sprint Spectrum, L.P.,* 186 S.W.3d 247, 251 (Mo. banc 2006); *Sloan v. Bankers Life & Cas. Co.,* 1 S.W.3d 555, 565 (Mo. App. W.D. 1999)). And that expectancy is for "[a] probable future business relationship that gives rise to a reasonable expectancy of financial benefit." *W. Blue Print*, 367 S.W.3d at 19.

That is why HALO took its illegal head start – it wanted to disrupt All Star's relationships before All Star could begin to compete. But for the interference of HALO and its agent Ford, All Star expected to continue doing business with its customers in the same fashion as before. But HALO stole some of that continuing business and planned to pursue more as soon as the lawsuit was over. [Tr. 315, 545-46, 626; Ex. 237, App. 376] HALO's repeated characterization that this case is "small dollar" is contrary to its own internal statements about the hundreds of thousands of dollars it thought it could gain from All Star and its actions in secretly trying to secure All Star's long-term, profitable clients. And it is contrary to the jury's decision.

**d. Tortious interference does not require a complete severance of the business relationship.**

The Court should also disregard HALO's argument that All Star cannot claim ongoing damages because All Star still does *some* business with certain customers taken by HALO. This argument is not contained in HALO's First Point Relied On, so it is waived.

The argument is also flawed. The notion that a little theft is okay is illogical and contrary to Missouri law. A plaintiff need not prove total destruction of the expectancy or relationship to recover damages. *Rusk Farms, Inc. v. Ralston Purina Co*., 689 S.W.2d 671, 680-81 (Mo.1985) (affirming $500,000 in actual damages for tortious interference given history of business relationship even though some customers did not cease doing business with plaintiff).

As in *Rusk*, the evidence was that All Star's business expectancy is not simply to continue *some* business with a customer; it is that it would continue to get the same work it had been receiving from that customer for years. Any loss of that established business due to misdeeds of HALO and Ford supports damages for interference. This is especially true when the evidence showed that HALO and Ford targeted repeat, profitable orders. [Tr. 126-127, 286-287, 498] For example, while All Star continued to work with Garmin, HALO ignores that it took Garmin's biggest annual order—an order All Star had done for roughly ten to fifteen years – and All Star did substantially less work with Garmin than it had done before. [Tr. 286-287, 294; Ex. 232, 233, 235, App. 373-375; Ex. 237, 394] A complete loss of all business is not required under Missouri law.

**e. Expert testimony was not required to submit tortious interference to the jury.**

Regarding lost profits, as the Court of Appeals recognized, "[t]his was not a series of calculations that required a doctorate in mathematics or accounting." [Opinion 22] Both HALO and Ford calculated lost profit damages without expert testimony. HALO calculated the $25,541.88 on the first group of sales by taking the sale price and subtracting the cost of the product, not by calling an expert. [Ex. 394, App. 533] Ford

likewise calculated the profits he brought to All Star by deducting out only the material costs. [Tr. 229-232, 254-256; 354, 650; Ex. 77, App. 346; Ex. 610, 623-624, 642] HALO cannot simultaneously claim that this was "readily ascertainable" when HALO does it, [Resp. Br. 28] but that it but requires "exacting scrutiny" [Resp. Br. 36] when All Star does the same thing. There was no error.

Missouri law discusses how the calculation is to be done:

> In general, in calculating lost profits damages, lost revenue is estimated, and overhead expenses tied to the production of that income are deducted from the estimated lost revenue. Overhead expenses include both fixed and variable expenses. Fixed expenses are the continuous expenses of the business that are incurred regardless of the loss of a portion of the business, for example rent, taxes, and administrative salaries. Variable expenses, also called direct expenses, are costs directly linked to the volume of business.

*Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. 2005) (citations omitted). This Court held that "variable expenses, not fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profits damages. These variable expenses are expenses that are tied directly to the unit of business or property damaged as a result of the defendant's actions." *Id*. Notably, what is fixed versus variable depends on the facts of the case. *See id*. (finding certain "expenses to be fixed under the facts of this case").

Here, the jury heard that the main variable cost in the industry was the cost of the materials to HALO or All Star. [Tr. 229-232, 254-256; Ex. 610, 623-624] In other words, if All Star made a plaque for a customer, All Star had to pay a supplier for the plaque before engraving and otherwise finalizing it. HALO does not suggest any other variable expense that was appropriate to deduct. The jury was told how lost profits are calculated as spelled out by Missouri law and done by both Defendants (lost revenue minus variable costs), and had multiple forms of evidence to decide on the proper compensation (all admitted without objection). [Tr. 254-256, 354, 650; Ex. 77, App. 346; Ex. 232-234, 237, App. 376-380; Ex. 394, App. 533; Ex. 601, 610, 623-624, 642]

Finally, to the extent expert testimony was helpful, All Star *did* present expert testimony. All Star read the deposition testimony of Matt Barberich in its case-in-chief. [Tr. 683] Mr. Barberich explained lost profits [Tr. 855; Ex. 279 at 30] and testified there was nothing unusual about this case regarding calculating lost profits. [Ex. 279 at 35] Mr. Barberich agreed it was up to the jury to decide whether or not to accept All Star's data and how much the circumstances impacted it. [Tr. 861]

**f. All Star satisfied the threshold for damages evidence under Missouri law.**

HALO's refusal to recognize the abundant evidence on damages for its tortious interference not only grossly misrepresents the record, it misstates Missouri law.

Missouri courts have soundly rejected any suggestion that defendants can engage in wrongdoing then get off scot-free by demanding an overly-stringent standard of proof for damages. Lost profits in particular "cannot be expected to operate as an exact science." *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc*., 279 S.W.3d 179, 186 (Mo. banc 2009). Rather:

> [a] plaintiff may recover for lost profits that he or she establishes with reasonable—not absolute—certainty. "Certainty," however, means that damages have been suffered and not exact proof of the amount. Where the fact of damage is clear, it is reasonable to require a lesser degree of certainty as to the amount of loss, leaving a greater degree of discretion to the jury, subject to the usual supervisory power of the court.

*BMK Corp. v. Clayton Corp*., 226 S.W.3d 179, 195-96 (Mo. App. E.D. 2007) (internal quotation marks and citations omitted). Further, "once the plaintiff has established the *fact* of lost profits, to establish the *amount* of lost profit with reasonable certainty, all that is required by Missouri courts is that it be supported by the best evidence available. *Id*. at 196 (citation omitted) (court-added emphasis); *see Ameristar,* 155 S.W.3d at 55 ("[I]t is not always possible to establish the amount of damages with the same degree of certainty" as the fact of damages); *Gasser v. John Knox Vill.*, 761 S.W.2d 728, 731 (Mo. App. W.D. 1988) ("[T]he modern emphasis on the requirement that damages be shown with certainty is on the fact of damages and not on the particularized amount."). "Best

evidence available" simply requires that a plaintiff produce "all relevant facts tending to show the extent of damages." *BMK*, 226 S.W.3d at 196. While an estimate of prospective or anticipated profits must rest upon more than mere speculation, "'[u]ncertainty as to the amount of profits that would have been made does not prevent a recovery.'" *Ameristar*, 155 S.W.3d at 54-55 (citation omitted). Matt Barberich agreed that "[r]easonable certainty doesn't require perfection or exact accuracy." [Tr. 870]

Here, the issue is submissibility. The jury heard All Star's, Ford's and HALO's sales data on lost profits before March 31, 2019. This is the best evidence available. As for future losses, HALO's own predictions of Ford's "book of business," its stated intent to go after All Star's business once the lawsuit is over, and All Star's knowledge of its own client relationships, its past sales data, and sales trends were the best evidence. The jury was free to consider such evidence as part of its damages deliberation. The trial court correctly submitted the tortious interference claim based on this substantial evidence.

**g. Given the abundance of evidence, HALO does not come close to meeting its high burden in its First Point Relied On.**

In sum, any combination of legal and substantial evidence admitted at trial supported submission of the claims of tortious interference with business expectancy. HALO fails to meet its burden to show "a complete absence of probative fact to support the jury's conclusion" or that "reasonable minds could *only* find in favor of the defendants." *Kerr,* 439 S.W.3d at 809. Even HALO admitted the jury could award damages on All Star's tortious interference claim, and its own records defeat its argument that there was *no* evidence of damages beyond the first set of orders. [Tr. 626, 739-741; Ex. 237, App. 376] Thus, the trial court correctly denied both the motion for directed verdict and motion for judgment notwithstanding the verdict. The Court should deny HALO's first point.

## II. The trial court properly allowed a business owner to testify about her business using a demonstrative summary of admitted evidence, and HALO cannot show prejudice.[8]

HALO's second multifarious point about Moira Vogt and her demonstrative summary, Exhibit 235, goes to the weight of the evidence, not its admissibility. As the Court of Appeals observed, "documents containing that data and information she compiled and used in calculating those figures were admitted into evidence without any objection by HALO."[9] [Opinion 21]; *see also* [Tr. 713, 723; Ex. 162, 232-234, 237, App. 376] Exhibit 235 summarized that data, but the data stands on its own. And despite all of its complaints about Exhibit 235 or Mora Vogt's testimony, HALO does not argue that the admitted data was not summarized accurately by either Mrs. Vogt or Exhibit 235. HALO, therefore, cannot show how Exhibit 235 or Moira Vogt's testimony about it materially affected the outcome of this case. The point should be denied.

### a. The standard of review is abuse of discretion.

A trial court enjoys "considerable discretion" in the admission or exclusion of evidence and absent a "clear abuse of discretion," the trial court's actions are not grounds for reversal. *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014) (*quoting Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011)). Likewise, the standard of review for denial of a motion to strike is abuse of discretion. *Urbach v. Okonite Co.,* 514 S.W.3d 653, 659 (Mo. App. E.D. 2017). An abuse of discretion occurs when the ruling is "clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (quoting *In re Care &*

[8] HALO's Second Point Relied On is multifarious and, therefore, preserves nothing. *Griffits v. Old Republic Ins. Co*., 550 S.W.3d 474, 478 n.6 (Mo. banc 2018). Thus the Court can disregard HALO's Second Point Relied On.

[9] Ford likewise testified and introduced evidence about the amount of his sales (and profits) during his time at All Star, which could then be contrasted with the evidence of All Star's sales after HALO and Ford's misconduct. [Ex. 601-604, 623-624, 642]

*Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2007)). If reasonable persons can differ as to the propriety of the trial court's rulings, then it cannot be said that the court abused its discretion. *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 123 (Mo. banc 2013).

Furthermore, even if the trial court erred, the appellate court is not to reverse the judgment unless the error "materially affected the merits of the action." *Lewis v. Wahl*, 842 S.W.2d 82, 84-85 (Mo. banc 1992). An erroneous evidentiary ruling warrants reversal only when it "affects the result or the outcome of the case." *Moore*, 332 S.W.3d at 768 n.12. The appellate court uses "a deferential standard of review," *McGuire v. Kenoma, LLC,* 375 S.W.3d 157, 183-84 (Mo. App. W.D. 2012), and if the trial court's action was proper on any ground, it will be upheld. *Franklin v. Friedrich*, 470 S.W.2d 474, 476 (Mo. 1971).

**b. HALO cannot show prejudicial error given other abundant evidence of damages.**

As an initial matter, HALO has failed to describe how the admission of Exhibit 235 and testimony about it prejudiced HALO and materially affected the outcome of the case. There is no indication to what extent, if any, the jury factored Exhibit 235 or Mrs. Vogt's testimony into its actual damages verdict. This Court does not join in such speculation about what the jury did or did not consider. *Northrop Grumman Guidance & Elec. Co., Inc. v. Emp'rs Ins. Co. of Wausau*, 612 S.W.3d 1, 19 (Mo. App. W.D. 2020) ("A court may not speculate as to what the jury meant," and "[t]he parties are entitled to the unconditional judgment of the jury rather than the court's interpretation of its findings.") (*citing Kansas City Power & Light Co. v. Bibb & Assocs., Inc.*, 197 S.W.3d 147, 155 (Mo. App. W.D. 2006)). "We do not possess the insight of the Master Clocksmith which would enable us to peer into the works of the jury's collective mind and say which wheels were turning when the verdict was struck." *Id*. (*citing Blackman v. Botsch*, 281 S.W.2d 532, 536 (Mo. App. S.D. 1955)).

Pointing to a verdict alone does not "establish prejudice," *Burns v. Taylor*, 589 S.W.3d 614, 626 (Mo. App. W.D. 2019), *reh'g and/or transfer denied* (Nov. 26, 2019),

and as shown *supra*, the jury had substantial support independent of this summary or Mrs. Vogt's testimony about it. This bars any argument that this evidence had a material effect on the outcome. *See Gage v. Morse*, 933 S.W.2d 410, 419 (Mo. App. S.D. 1996) (holding that party cannot be prejudiced if challenged evidence is merely cumulative to other evidence admitted without objection).

**c. HALO makes arguments it did not raise or preserve.**

"To preserve an evidentiary issue on appeal, a party is required to object at trial to the introduction of the evidence and to reassert the objection in post trial motions." *Day Advert. Inc. v. Devries and Assoc., P.C.,* 217 S.W.3d 362, 365 (Mo. App. W.D. 2007) "A point on appeal must be based upon the theory voiced in the objection at trial and an appellant cannot expand or change on appeal the objection as made." *Holmes v. Kan. City Pub. Sch. Dist.,* 571 S.W.3d 602, 617 (Mo. App. W.D. 2018), *reh'g and/or transfer denied* (Jan. 29, 2019), *transfer denied* (Apr. 30, 2019). A blanket challenge to a legal ruling that does not identify specific erroneous rulings made by the trial court, to which the appellant objected at the time, preserves nothing for review. *Columbia Mut. Ins. Co. v. Long*, 258 S.W. 3d 469, 473 (Mo. App. W.D. 2008); *Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 132 (Mo. App. W.D 2009). Arguments not set forth in the point relied on are disregarded. *Karrenbrock Constr., Inc. v. Saab Auto Sales and Leasing, Inc.*, 540 S.W.3d 899, 902 (Mo. App. E.D. 2019); *United MO. Bank, N.A. v. City of Grandview*, 179 S.W.3d 362, 366 (Mo. banc. 2005).

At trial, HALO's objections related to Exhibit 235 and Mrs. Vogt's testimony were that the exhibit was speculative as to "anticipated losses" [Tr. 706], lacked foundation because "[w]e don't know if she actually did the calculations" [Tr. 712], and Mrs. Vogt was not "qualified as an expert to opine." [Tr. 706] No other objections were made at the time of admission, including hearsay.[10] HALO later moved to strike Exhibit 235 and Mrs. Vogt's testimony as unduly prejudicial. [Tr. 738, 811]

[10] The Court of Appeals rightly refused to consider this point because HALO did not include it in its point relied on. [Opinion 22] Even if HALO had included it, Exhibit 235

The Second Point Relied On, however, alleges error on the grounds of Mrs. Vogt's alleged lack of qualifications, the lack of "actual facts or data" in support of her lost profits testimony, and an "unreliable methodology" for her calculations. Even if these were proper bases to challenge a lay witness, HALO did not object as to an "unreliable methodology" for calculations (presumably because application of expert witness standards did not apply to Mrs. Vogt as a lay witness). The only objection regarding calculations was "we don't know if she actually did the calculations." [Tr. 712] Thus, the issue of methodology was not preserved for appeal and should be disregarded.

Regarding HALO's arguments about striking portions of Moira Vogt's testimony, HALO's brief does not set forth what its motion to strike was or how the issue was preserved for appeal. At best, HALO only states the conclusion that the failure to strike Mrs. Vogt's testimony about lost profits was "plainly prejudicial." [Resp. Br. 37] For this reason, the point is not preserved and should be disregarded.

**d. Allowing Mrs. Vogt to testify and use a demonstrative summary of the voluminous data to which HALO never objected was well within the trial court's discretion.**

HALO raises expert-based challenges to the testimony of a fact-witness business owner. Regardless, it is difficult to understand HALO's complaints when Exhibit 235 is simply a summary of admitted voluminous data, and Moira Vogt's testimony followed the same analysis spelled out by the Missouri Supreme Court and HALO's expert and used (without expert assistance) by HALO and Ford: lost revenue minus variable costs.

**1. Moira Vogt's testimony was competent and based on three decades of personal experience and knowledge.**

The Court of Appeals summarized Ms. Vogt's testimony as follows:

> Ms. Vogt compiled information about actual sales from a designated set of customers over previous years deducted a number of specified variable expenses to estimate the profits received and then extrapolated those

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was a summary of voluminous information, which is admissible. *Ameristar*, 155 S.W.3d at 54 (permitting admission of chart summarizing voluminous records to prove lost profit damages).

> numbers up to the time of trial to estimate that HALO's interference with All Star's business expectations amounted to about $111,000. . . . The trial court did not abuse its discretion in refusing to strike her testimony.

[Opinion 21-22]

"[A] business owner's testimonial evidence is sufficient to provide the trier of fact with a rational basis for estimating damages to the plaintiff, including lost profits." *BMK,* 226 S.W.3d at 196. Mrs. Vogt was entitled to use a document to summarize voluminous sales data, and it would have been error for the trial court to prevent All Star's CFO from testifying. *See Ameristar*, 155 S.W.3d at 54 (owner's testimony and chart summarizing revenue and expenses was admissible; reversing due to unclear record on variable expenses); *see also Gasser*, 761 S.W.2d at 733 (affirming admissions of summary of voluminous records to prove net profits). As the Court of Appeals noted:

> Exhibit 235 was also a demonstrative exhibit to show how Ms. Vogt had reached her estimate of the losses that All Star would incur in the future due to HALO's tortious interference. HALO cites no rule or caselaw proscribing the admission of a demonstrative exhibit to illustrate a party's calculation method.

[Opinion 23]

Mrs. Vogt is a 30-year employee of her small family business. [Tr. 693] She is familiar with how the company works and with customer purchasing history from All Star. [Tr. 723] Mrs. Vogt makes plans for the future of All Star by looking "at sales patterns, profit patterns, customer relationships." [Tr. 786] This is based on "30 years of experience, and discussion amongst our management team and just daily operations. It is a part of our daily operations." [Tr. 787] Mrs. Vogt testified at length about the actual sales data she used from accounting software and the documents showing sales to All Star customers produced by HALO. [Tr. 711-712, 739-740] HALO objected to *none* of this data. She thoroughly explained what she did. [Tr. 713-720]

Mrs. Vogt looked at All Star's lost revenue minus its avoided costs.[11] [Tr. 712] Mrs. Vogt took out not only product costs, but also the commissions on sales. [Tr. 713-715, 789-790; Ex. 162] While HALO's expert identified potential causes for lost profits other than Defendants' misconduct, he did not investigate any of these other reasons. [Tr. 856-858, 860-861; Ex. 279 at 26] Mrs. Vogt looked at each one and ruled them out as viable explanations. [Tr. 720-722, 762] The jury was entitled to believe her.

All Star showed the difference between what it would have anticipated making for each customer based on the customer's history versus what All Star actually made for those customers in the year and a quarter from Defendants' conspiracy and through trial – $111,106.07. [Tr. 716-720; Ex. 235, App.373] Mrs. Vogt did not expect All Star's losses to end. [Tr. 725] HALO did not object to Mrs. Vogt's testimony about the longevity of All Star's customer relationships, some extending into decades. [Tr. 725-730] All Star's evidence that clients would have continued their long-standing relationship with All Star and continued to place orders provides sufficient reasonable certainty that profit losses would continue.[12]

While HALO insists that Exhibit 235 estimated "future lost profits," it does not. [Tr. 709] Mrs. Vogt testified that Exhibit 235 does not include any future lost profits, and HALO's expert agreed. [Tr. 710, 725, 774, 864, 866][13] Rather, the exhibit includes the time frame from January 1, 2018 until March 31, 2019. [Tr. 725]

Accountant Matt Barberich had no "issue . . . with the structure of [Mrs. Vogt's] analysis" of lost profits. [Tr. 862] Barberich offered no lost profits calculations of his own, though "[h]ad [HALO] wanted me to do that, I could have done it." [Tr. 853-854]

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[11] HALO's false assertion that Mrs. Vogt "made *no effort* to subtract All Star's own costs from her measure of 'profit[]' when estimating damages," [Resp. brief 32] (emphasis added), is contrary to the evidence, let alone the evidence viewed in the light most favorable to the jury's verdict.

[12] *See* n.2, *supra*.

[13] The trial court examined exhibit 235 and stated, "Unless I'm missing something, none of it has to do with anything involving projections of future revenue, gain or loss." [Tr. 708] (emphasis added).

Mrs. Vogt's testimony was competent, based on personal knowledge, experience, and actual data. It was backed up by sales records that came into evidence with no objection. HALO vigorously cross-examined Mrs. Vogt, put on its own expert testimony, and argued extensively about Mrs. Vogt's testimony in closing. No Missouri case has held that such witnesses' testimony is inadmissible. There was no abuse of discretion in admitting this evidence.

**2. HALO's attacks go to the weight of the evidence, not admissibility.**

HALO's complaints address the weight, not the admissibility of the evidence. For example, HALO can point to no authority that consideration of three-year historical averages was so improper that its admission was an abuse of discretion. Mrs. Vogt took what she believed based on her experience to be a good sampling of Ford's sales patterns and his histories. [Tr. 757] As Matt Barberich conceded, it was up to the jury to decide if using a three-year average "makes sense." [Tr. 870]

Similarly, it was up the jury to evaluate the evidence regarding overhead costs or other fixed expenses. Contrary to HALO's assertions, Mrs. Vogt accounted for the avoided costs. [Tr. 714-716] Matt Barberich agreed that "[w]hat should be considered are all of the avoided costs." [Tr. 867] Barberich discussed some other potential variable costs but did not identify any that All Star did not consider. [Tr. 868, 871; Ex. 279 at 31] Mrs. Vogt made clear that the calculations did indeed consider and include appropriate overhead (*i.e.*, avoided costs). [Tr. 733, 735-736, 766-767, 789-790] That makes this case different from *Meridian Enterprises Corp. v. KCBS, Inc.*, 910 S.W.2d 329, 331 (Mo. App. E.D. 1995), *abrogated by Ameristar*, 155 S.W.3d at 331.

The trial court committed no error. HALO's complaints go to the weight of the evidence, not admissibility. HALO falls far short of the onerous burden of proving that admission of either Exhibit 235 or Moira Vogt's testimony was so "arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *See Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 216 (Mo. App. W.D. 2010).

## III. The jury's award of $5.5 million in punitive damages was supported by substantial evidence in all respects.

### a. This point is multifarious and preserves nothing.

HALO's Third Point Relied On preserves nothing and is so violative that it should be summarily denied. *See Wolf v. Midwest Nephrology Consultants, PC.*, 487 S.W.3d 78, 84 (Mo. App. W.D. 2016) (a point relied on should not combine issues that would involve separate rulings by the court and require determinations concerning whether timely and sufficient objections were made and involving different legal standards). In violation of Rule 84.04, HALO's multifarious point mentions four discernible errors and commingles multiple arguments in a "shotgun" challenge to punitive damages. HALO also fails to "state concisely the legal reasons for the claim of reversible error" and "explain in summary fashion why those legal reasons support the claim of reversible error." Mo. R. Civ. P. 84.04(d)(1). Points on appeal that "'group[] together multiple, independent claims rather than a single claim of error . . . . preserve nothing for review.'" *Griffitts*, 550 S.W.3d at 478 n.6 (*quoting Kirk*, 520 S.W.3d at 450 n.3). "[A] multifarious point is subject to dismissal." *Id*.

HALO's Third Point Relied On combines entirely separate errors (submissibility of punitive damages, due process, and remittitur), resulting in a multifarious point that is difficult to comprehend, let alone address.

> Deficient points relied on force the appellate court to search the argument portion of the brief or the record itself to determine and clarify the appellant's assertions, thereby wasting judicial resources, and, worse yet, creating the danger that the appellate court will interpret the appellant's contention differently than the appellant intended or his opponent understood.

*Wallace v. Frazier*, 546 S.W.3d 624, 627-28 (Mo. App. W.D. 2018), *transfer denied* (May 1, 2018) (*quoting Treaster v. Betts*, 297 S.W.3d 94, 95 (Mo. App. W.D. 2009)). Neither this Court nor All Star should have to discern every nuance or chase down every rabbit hole that may be encompassed in HALO's multifarious point. HALO's blending of

multiple issues hinders the Court's ability to understand HALO's arguments without advocating arguments HALO did not properly make.

HALO's argument regarding remittitur also fails because it is not developed. "Under Rule 84.04(e), a brief must include an argument section that discusses the points relied on. Points that are not developed in the argument are deemed to be abandoned." *Hiner v. Hiner*, 573 S.W.3d 732, 736 (Mo. App. W.D. 2019) (quotation marks and citation omitted). HALO asserts in its Third Point Relied On that the trial court erred "in denying, in part, HALO's motion to reduce" the punitive damages award. However, this point is not developed in the argument section of the brief. The Court should ignore this undeveloped point.

The Court can, therefore, disregard HALO's Third Point Relied On.

**b. The trial court correctly found "ample" evidence to submit punitive damages to the jury.**

HALO first challenges the submissibility of punitive damages. The trial court correctly submitted punitive damages.

**1. All Star's evidence of intentional torts supports submission of punitive damages.**

HALO ignores that the two verdicts against it – civil conspiracy to breach the duty of loyalty and tortious interference with business expectancies – are both intentional torts. "It is well settled by Missouri law that a submissible punitive damage question is made for the jury once the plaintiff has presented sufficient evidence of legal malice–the intentional doing of a wrongful act without just cause or excuse." *Boyer v. Grandview Manor Care Ctr., Inc.*, 759 S.W.2d 230, 235 (Mo. App. W.D. 1988); *see Downey v. McKee*, 218 S.W.3d 492, 497–98 (Mo. App. W.D. 2007) ("a submissible case for tortious interference necessarily includes a submissible case for punitive damages") (citing cases). All Star made a submissible case on both the civil conspiracy and tortious interference claims. The civil conspiracy verdict is not challenged on appeal, and HALO admitted liability for these intentional torts. This alone supports submission of punitive damages.

### 2. Clear and convincing evidence supports punitive damages.

The trial court correctly noted that All Star "put on ample evidence here of behavior which could be categorized by the jury as motived by an evil motive or reckless indifference for the rights of the plaintiff in this case. It is amply sufficient." [Tr. 815] The Court of Appeals also correctly held that:

> The evidence of misconduct as to HALO's conspiracy with Mr. Ford to breach the duty of loyalty and to interfere with business expectancy was sufficiently clear and convincing to submit All Star's claim for punitive damages to the jury.

[Opinion 13]

HALO presents a self-serving description of the evidence that should be disregarded. Viewed in the proper light, the evidence was replete with examples showing HALO's willfulness and reckless indifference. All Star incorporates herein its discussion *supra* with regard to due process and the arguments in its Appellant's Brief under Point III. The Court of Appeals correctly summarized:

> Misconduct in derogation of HALO's own written policies with the expectation that hundreds of thousands of dollars of business would be taken from All Star using the fruits of that misconduct meets the clear-and-convincing-evidence standard required to submit the question of HALO's liability for punitive damages to the jury.

[Opinion 15]

HALO's citation to *White v. James*, 848 S.W.2d 577 (Mo. App. S.D. 1993), only proves All Star's point. The defendant, who was digging a trench, was "unaware the excavation was on the Plaintiff's property," came to the plaintiff's home, apologized, stopped the work, and promised to make things right. *Id.* at 579. The instant case is nothing like *White*. HALO knew it was taking All Star's property and sales [Tr. 357-358], sneaked around to make sure All Star did not find out [Tr. 326-3327], secretly hired Ford knowing he was still All Star's employee [Tr. 346-47], and continues to sell to All Star's customers even after being caught and contacted by All Star. [Tr. 378, 384, 546; Ex. 104, App. 363-364; Ex. 237, App. 376-380] HALO vigorously defended its actions

at trial, continuing to insist it only made a "mistake" and All Star suffered nothing but $25,541.88 in damages. This small sampling of evidence abundantly meets the standard for submission of punitive damages.

## CONCLUSION

All Star brought claims for damages revolving around taking All Star's property through deceit and trickery, that would have been tried to a Missouri jury in 1820. Even if HALO properly preserved and presented any issue, a fair review of the evidence (even HALO's own sales records) shows ample evidence of harm beyond the initial group of orders HALO stole. Defendants sought to disrupt All Star's relationships with its customers, and that is what happened. The evidence showed this in multiple ways, even ignoring Exhibit 235 and Moira Vogt's testimony about it. There was no error in or prejudice admitting Exhibit 235 and Moira Vogt's testimony.

Application of the cap denied All Star's constitutional right to have the jury decide the appropriate amount of punitive damages to punish and deter HALO. The jury's award comports with due process, and remittitur is not warranted because, as the trial court found, the award was consistent with the weight of the evidence. HALO's deceitful and improper behavior combined with its lack of remorse and its unwavering focus on monetary gain amply supported the jury's unanimous verdict. Trial of this case was error-free. The only error was the trial court's reduction of the jury's punitive damages award.

All Star prays that this Court deny all relief sought by HALO, reverse the ruling on the post-trial motion requesting reduction and restore the full $5.5 million punitive damages award against HALO.

Respectfully submitted,

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## RULE 84.06(C) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 84.06(b) and contains 15,051 words as calculated using the word processing system used to prepare the brief. The brief was served via electronic mail pursuant to Rule 43.01(c).

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## CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

*/s/ Brent N. Coverdale*