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 BRIEF OF APPELLANT/RESPONDENT ALL STAR AWARDS & AD SPECIALTIES, INC.

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STATEMENT OF THE ISSUE

All Star Awards & Ad Specialties, Inc. ("All Star"), a local promotional products, awards and custom project shop, sued HALO Branded Solutions, Inc. ("HALO"), a national promotional products distributor, and Doug Ford (a former sales manager at All Star), for breach of loyalty, civil conspiracy and tortious interference with business expectancy. All Star discovered HALO employed Ford while he still worked for All Star, and both engaged in a scheme to use All Star confidential customer information and trade secrets to disparage All Star and steal away its customers.

All Star submitted to a jury its claims of breach of the duty of loyalty against Ford, civil conspiracy to breach the duty of loyalty against HALO, and tortious interference with business expectancy against both defendants. The jury found unanimously in favor of All Star on all claims, awarding actual damages of $525,541.88 and punitive damages against Ford for $12,000, and $5.5 million against HALO.

The trial before the jury was error free. The only error in this case occurred *post-verdict*, when the trial court improperly reduced the jury's punitive damages award against HALO from $5.5 million to just over $2.6 million. The court improperly applied the statutory cap pursuant to section 510.265 RSMo. because All Star's claims were common law claims not subject to the cap. All Star's claims of civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy are civil actions for damages involving a fact issue that would have been determined without limitation by a jury in 1820 when Missouri's Constitution was first adopted. Point I demonstrates how the court misstated the law, and Point II demonstrates how the court misapplied the law in improperly applying the statutory cap thereby denying All Star its right to trial by jury.

Though the trial court expressly applied the statutory cap, the post-verdict order also references remittitur pursuant to Section 537.068 RSMo. and "statutory and due process considerations." To the extent the trial court reduced the punitive damages award on either of these grounds, the judgment should also be reversed. Points III and IV demonstrate how reduction of the punitive damages award based on due process or

remittitur was also error because the trial court found "the Jury's verdict is not against the weight of the evidence presented at trial." Without a finding the award is excessive, there are no legal grounds by which to reduce the award based on due process or remittitur. In short, no matter how or why the trial court capped punitive damages, the trial court wrongly reduced the punitive damages award. This Court should leave intact the court's judgment except the full punitive damages verdict against HALO should be reinstated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under article V, section 10 of the Missouri Constitution because it granted transfer after opinion by the Missouri Court of Appeals, Western District and because Jackson County lies within this Court's jurisdiction. The appeal further involves the misapplication of the law and whether a statute is unconstitutional as applied, issues within this Court's jurisdiction. *See Terpstra v. State*, 565 S.W.3d 229, 237 (Mo. App. W.D. 2019); *AAA Unif. & Linen Supply, Inc. v. Barefoot, Inc.*, 17 S.W.3d 627, 629 (Mo. App. W.D. 2000); *Hodges v. S.E. Mo. Hosp. Ass'n*, 963 S.W.2d 354, 358 (Mo. App. W.D. 1998), *as modified* (Mar. 3, 1998).

The appeal is timely in that the case was tried to a jury between April 29, 2019 and May 6, 2019 on the common law claims of breach of the duty of loyalty, civil conspiracy, and tortious interference with business expectancy; judgment was entered on the verdict on July 8, 2019; post-trial motions were timely filed on August 6, 2019 and were ruled on by the trial court on October 29, 2019; an amended judgment was entered on October 29, 2019; HALO timely filed its notice of appeal on November 8, 2019; and All Star timely filed its cross-notice of appeal on November 18, 2019. Following the appellate court's opinion issued on January 12, 2021, HALO filed its application for transfer before this Court on March 17, 2021, which was granted on August 31, 2021.

STATEMENT OF FACTS

HALO Branded Solutions, Inc.

HALO Branded Solutions, Inc. calls itself "the largest full-service promotional products distributor in the country." [Tr. 303; Ex. 6 at 2] Headquartered in Illinois, with executive offices in Chicago, HALO has roughly 2,000 employees, 1,200 of which are account executives, or salespeople. [Tr. 301] HALO's company philosophy emphasizes growth, and HALO is growing. [Tr. 301, 388] In 2018, HALO was purchased by a private equity group for $456,250,000. [Ex. 280 at 113] Between December 2017 and November 2018, HALO paid $116 million to buy three competitor companies. [Ex. 280 at 109-111] These "significant acquisitions" increased HALO's "earnings power." [Ex. 280 at 24] HALO Chief Executive Officer Marc Simon testified in 2018 he expects in the next five years, HALO will be "at least" a billion-dollar company. [Ex. 275, App. 426] HALO's annual sales volume was $416 million in 2017 and for 2018 was around $600 million. [Ex. 244, App. 381; Ex. 275, App. 479]

Growth is not just an emphasis; it is an expectation, and not internal growth from existing business. [Ex. 275, App. 425] Simon believes that for HALO to continue to grow, it needs to give all its attention to recruiting big producers. [Tr. 302-303; Ex. 275, App. 425] HALO calls these sales professionals "account executives." [Tr. 301] Account executives typically earn straight commission, meaning their compensation depends solely on how much they sell. [Tr. 409-410]

HALO does not develop account executives; it looks for account executives who already have a book of business that they can bring over. [Tr. 317] HALO has an informal agreement with five of its largest national competitors not to take each other's salespeople, which does not include companies like All Star. [Tr. 316-317]

Darryl Haddox is Regional Vice-President for HALO. [Tr. 300] His job is to recruit new salespeople to HALO. [Tr. 311-312] In 2018, HALO expected him to recruit salespeople who would bring in $1.5 million in gross revenue to HALO. [Ex. 275, App. 410] HALO's regional vice presidents "are all remined how important it is to . . . hit our numbers." [Tr. 418] In late 2017, Haddox was "running behind" on his numbers, and

both he and management were "disappointed." [Tr. 418] Haddox's supervisor, Executive Vice President of Sales and Business Development Jim Stutz, who is number two at the company, wrote to Marc Simon, the CEO, that in 2018 Haddox would have to "get out of the gate strong or noose will get tighter." [Ex. 2, App. 187; Ex. 275, App. 426]

All Star Awards & Ad Specialties, Inc.

All Star Awards & Ad Specialties, Inc. is a promotional products, awards and "custom project shop" on 39th Street in Kansas City, Missouri. [Tr. 66, 68] The president is Bill Vogt, whose parents started All Star in 1977. [Tr. 64] Moira Vogt is Bill's wife and the "CFO" of All Star. All Star employs about 20 people, some of whom have been with the company for two or three decades. [Tr. 66, 105] It is important at All Star that the employees "rely on each other like a team" and "trust each other to do the work that needs to be done." [Tr. 81]

The sales department employees are called "custom project coach/managers." [Tr. 84] Sales are done in "a teamwork-based approach". [Tr. 86] There are no sales quotas. [Tr. 92] While the teammates do build relationships with clients, the clients do not belong to the teammates. [Tr. 88] All Star relies on "a simple approach" that is its "core foundation." [Tr. 80] "We treat people the way we want to be treated." [Tr. 80]

As a small business, All Star is "profitable but not overly profitable." [Tr. 105] They pay employees what they can and have offered a year-end bonus plan and limited commission plan to increase employee compensation in a way that made sense for All Star. [Tr. 107-111] Although All Star has never missed payroll or had an order fall through due to financial issues, it does have cash flow issues from time-to-time. [Tr. 742-743, 746-747]

Doug Ford started working at All Star in 1994, and eventually became the general sales manager. [Tr. 100, 102] On January 31, 2018, Ford announced he would be leaving All Star to take a sales position with HALO. [Tr. 119-120] Vogt allowed Ford to remain at All Star with an undetermined last date of employment and honored Ford's request to announce his leaving to the rest of the team a week later. [Tr. 120-123] Ford

did not tell Vogt that "he had already been in contact with several All Star clients" about the fact he was leaving for HALO. [Tr. 122] Nor did Ford tell Vogt he had already been moving customer orders to HALO, had taken artwork and files from All Star, and was already a HALO employee. [Tr. 122]

On February 8, 2018, Ford said farewell to coworkers at an All Star team meeting. [Tr. 125] Minutes later Moira Vogt entered Bill Vogt's office looking "very pale and very ghostlike with her jaw basically dropping open and said, 'You have got to come see this.'" [Tr. 126] Moira had asked for a search of Ford's work email account to be "prudent." [Tr. 97, 126] The search uncovered a "mountain of evidence" about HALO's involvement with Ford. [Tr. 127] The Vogts were "stunned" and in disbelief. [Tr. 127] They immediately fired Ford. [Tr. 130]

HALO recruits and employs Ford

Months before, in early November 2017, Ford sent a job inquiry to HALO, [Ex. 30, App. 201] and HALO Regional Vice President Haddox pursued Ford as a sales recruit with the knowledge and encouragement of HALO management. [Tr. 322, 324-325] Ford originally told HALO he could bring $450,000 in sales, meaning sales from All Star. [Tr. 481; Ex. 30, App. 201] In the previous three years, Ford generated over $1.4 million in sales to All Star. [Tr. 200-203, 631, 770; Ex. 601-604, 623, 624, 642] Ford calculated that he generated a profit of 54% (or $793,035.10) over those three years. [Tr. 652; Ex. 642]

Ford did not originate these clients, [Tr. 88-89], but HALO believed he could bring them to HALO. Haddox reported to Stutz that Ford's sales volume was $525,000, based on his belief that Ford would grow his business in the upcoming year. [Tr. 350; Ex. 76, App. 345] Haddox later increased this to $550,000. [Tr. 354; Ex. 77, App. 346] Regional Vice President Darryl Haddox told his boss Jim Stutz, Executive Vice President Sales and Business Development, that HALO could gain around $850,000 of All Star's *yearly* sales through Ford and his All Star coworker Christy Tucker. [Tr. 312; Ex. 76, App. 345] Stutz told CEO Simon that HALO could get $800,000 of All Star's *yearly* sales. [Tr. 312; Ex. 2, App. 187; Ex. 275, App. 426] Others at HALO suggested

$900,000 was possible. [Ex. 79, App. 347-348] Given the evidence that HALO made roughly a 50% profit, this meant HALO could make $400,000 to $450,000 *each year* if it could take these customers from All Star. [Ex. 237, App. 376-380; Ex. 394, App. 533] Such numbers appealed to HALO.

HALO and Ford devise a deceitful scheme to take All Star's clients.

HALO knew the clients it was valuing were All Star clients, and HALO needed a plan to make sure the customers went with Ford to HALO. [Tr. 665-666] HALO wanted to grab as much business as it could before All Star even knew there was a competition. [Tr. 516] HALO knew that customers stick with what they are comfortable with. [Tr. 336; Ex. 32, App. 202-208] In fact, prior to this conspiracy, no customer had ever told Ford, "We are running into problems. All Star isn't what it used to be. We are taking our business elsewhere." [Tr. 533] It is far easier for a customer to stay with the company that knows its needs and has successfully performed year after year than start from scratch with someone else. [Tr. 484-485] HALO and Ford were concerned about this. [Ex. 32, App. 202-208; Ex. 34, 51]

HALO and Ford used a three-step technique to disrupt All Star's customer relationships and harm All Star by 1) giving the clients a reason to leave All Star by telling them something untrue and negative about All Star (*e.g.,* "production problems," "not happy with the fact I am leaving," "ownership struggles"), 2) telling the customers "you are my priority", and 3) making it a "seamless transition" to HALO for the customer. [Tr. 483-485; Ex. 45] Ford lied to clients and to vendors necessary for orders Ford and HALO wanted to take. [Tr. 527-529; Ex. 34, 44-45, 51] Ford admitted he never would have said such negative things about All Star had he intended to stay because he "might lose a client." [Tr. 483; *accord* Tr. 492, 509, 520]

HALO and Ford lied to prevent competition.

Their scheme worked. After hearing false comments about All Star, clients expressed concern about staying with All Star. [Tr. 489, 512, 531; Ex. 44-45, 50-51, 65] But lies alone were not enough. HALO and Ford attempted to switch Cerner Corporation to HALO, for example, before All Star knew there was a competition, but Cerner

hesitated and instead suggested HALO and All Star bid for its business due to its long relationship with All Star. [Tr. 512; Ex. 50] To keep All Star from finding out, Ford instead promised HALO would match All Star's price and terms on the biggest and most expensive award order. [Tr. 512; Ex. 50] Ford then suggested Cerner keep other less profitable business with All Star. [Tr. 517-519] This was done to get Cerner to buy from HALO without All Star finding out and having the chance to compete for the business. [Tr. 516]

HALO wrongfully took and used All Star confidential property and information.

Taking or copying All Star's confidential information and materials was key for the "seamless transition." HALO asked for, disseminated, and used All Star's information and property. [Tr. 304, 326-327, 330-333, 335, 337-342, 351-352, 354-358, 380-382, 403, 431; Ex. 11, App. 190-196; Ex. 15, 32, App. 202-208; Ex. 87, App. 353-354; Ex. 89, App. 355-356] Before telling All Star he was leaving, Ford had All Star employees send him information and materials, then sent them to his personal account and used them for HALO. [Tr. 501-502, 535-538; Ex. 42-43, 88, 142, 154-156] Ford took physical files on clients from All Star so he could use them at HALO. [Ex. 337] HALO's own artist testified that her artwork belongs to HALO and she would not use it in competition with HALO. [Ex. 278 at 16-18] Yet HALO knew that Ford was using All Star artwork and information to move these clients. [Tr. 368, 374; Ex. 53, App. 269-286; Ex. 67] While Ford still worked for All Star, HALO intentionally took and used All Star's confidential information to mimic All Star and sent Ford out to meet with clients in secret to show how HALO could provide a painless transition. [Tr. 336-339, 342-343; Ex. 32, App. 202-208; Ex. 35, 61, 87, App. 353-354; Ex. 88, 89, App. 355-356]

As one example, Ford provided Haddox with confidential All Star information, such as the login, password and invoice used for a web store All Star created for a client site so that HALO could copy it and Ford could show the client HALO's site before he left All Star. [Tr. 335, 337-339, 342; Ex. 32, App. 202-208; Ex. 87, App. 353-354; Ex. 89, App. 355-356] Even though Haddox acknowledged that he would not send similar HALO information to a competitor, he used All Star's information and distributed it

inside HALO. [Tr. 334-341; Ex. 32, App. 202-208] This web store copying was not isolated to one All Star customer. [Tr. 343-345; Ex. 61-64, 86, App. 352]

HALO also had Ford send a list of All Star clients he believed could be moved to HALO, including confidential details about those clients, such as contact person at the client, annual sales volume for that client, tenure as a customer, invoicing terms, and customer credit limits. [Tr. 331-332; Ex. 16, App. 197-199] Even though HALO understood that a competitor's sensitive information about clients is confidential, HALO not only had Ford provide it but then distributed it within HALO. [Tr. 304, 330-333; Ex. 6 at 27; Ex. 11, App. 190-196; Ex. 16, App. 197-199] At the same time, however, HALO had Ford sign a nondisclosure agreement preventing Ford from telling All Star he was talking with HALO, while having Ford send All Star information to HALO. [Tr. 334; Ex. 38, App. 209-214]

Even though HALO's policies expressly prohibit taking jobs with competitors or use of its information "in connection with rendering services for any other individual or company," [Tr. 305; Ex. 6 at 27-28] HALO hired Ford in January 2018 knowing he still was employed by All Star and was using All Star information to render services to HALO. [Tr. 325-326; Ex. 41] Several other members of HALO management knew HALO was working with Ford even though Ford still had not quit his job at All Star, including Jim Stutz, Stacy Sibley, Human Resources Manager, Marti Eastman, Manager of Customer Service, Pam Gray, Manager of On-Boarding New Recruits, and her subordinate Dawn O'Neal, who processed orders. [Tr. 326-327, 351-352, 354-355, 357-358; Ex. 15, 20, 79, App. 347-348; Ex. 80]

HALO took early orders to secure customers and Ford's employment.

Even with the lies and use of All Star property, HALO still wanted to do more to ensure it would take All Star's customers. HALO prohibits its employees from selling through a competitor. [Tr. 306-307; Ex. 9 at 14] But HALO was concerned that Ford would change his mind and not join HALO, as had happened previously to Haddox. [*See* Tr. 358-59 ("[T]he longer you let a recruit go, the longer the recruiting process, the more likely that they are going to find a reason maybe and decide they don't want to…It wasn't

done for, you know, grabbing an order."); Tr. 360-361; Ex. 2, App. 187-188; Ex. 276 at 21] Jim Stutz, second in command at HALO, pushed for and supported having Ford send over orders before he quit All Star. [Tr. 351, 403, 431; Ex. 79, App. 347-348] According to Haddox, Stutz hesitated and thought it through before deciding to do it. [Tr. 403, 431] Stutz wrote, "I am supportive." [Tr. 351; Ex. 79, App. 347-348] Haddox emailed Senior Vice President of Sales Dale Limes to report that Ford was "already entering orders with HALO". [Tr. 353; Ex. 82, App. 349-350] Limes responded, "Perfect, thanks" and expressed no concerns. [Tr. 353; Ex. 82, App. 349-350] Pam Gray and Dawn O'Neal were heavily involved in helping Ford send over orders before he quit All Star. [Tr. 357-358, 363; Ex. 80] Multiple members of HALO management knew this was going on even though Ford still had not quit his job at All Star, and no one expressed concerns. [Tr. 326-327, 351-352, 354-355, 357-358; Ex. 1, 15, 20, 79, App. 347-48; Ex. 80]

Knowing All Star was in the dark, HALO processed orders for All Star clients such as Garmin, First Hand Foundation, Sizewise, and Olathe Ford. [Tr. 364-366; Ex. 46, App. 215-223; Ex. 47, App. 224-252; Ex. 48, App. 253-260; Ex. 49, App. 261-268; Ex. 53, App. 269-286; Ex. 54, App. 287-302; Ex. 55, App. 303-325; Ex. 59, App. 326-341; Ex. 60, App. 342-344; Ex. 394, App. 533] A HALO invoice for Olathe Ford even contained the false statement, "All Star Awards & Ad Specialties, Now Powered by Halo Branded Solutions." [Tr. 369; Ex. 5, App. 189] Many of these clients no longer do business with All Star and instead do business with HALO. [Tr. 740-741; Ex. 233, 235, App. 373-375; Ex. 237, App. 376-380; Ex. 394, App. 533] Others moved their most lucrative business to HALO. [Tr. 134-35; Ex. 233, 235, App. 373-375; Ex. 237, App. 376-380; Ex. 394, App. 533]

HALO concealed its conduct from All Star.

HALO kept the conspiracy quiet and secretly employed Ford, knowing he was still employed at All Star. [Tr. 325-26; Ex. 41] While this was happening, someone from HALO called All Star looking for Ford, which Ford called a "little whoopsie." [Ex. 19, App. 200] Darryl Haddox responded, "Oooh…not good. Any word from All Star as a result of the call?", to which Ford replied, "No worries and I don't think anyone picked

up on anything." [Ex. 19, App. 200] Haddox had to reach out to multiple people at HALO to tell them to keep quiet and not tip off All Star. [Ex. 21, 276 at 26]

HALO gave Ford no limits on what he could and could not do on his way out of All Star. [Tr. 328] As a "key member of [the] management team" at All Star, Ford had access to all company information, including financials and customer information and artwork. [Tr. 103, 120] Ford copied (and still has) hundreds of pages of artwork and customer files from All Star. [Tr. 541; Ex. 337] Ford "planted seeds" with key clients and had taken "key proprietary information" to use to take business in the future. [Tr. 134] Even though Ford was fired from All Star, Ford possesses tools and information that will allow HALO to pursue All Star customers. [Tr. 136, 543-545]

HALO did this to disrupt and take All Star's client relationships.

This case was not about one group of orders. It was about relationships. As HALO's CEO Marc Simon testified, "in our industry, it's relationships that matter." [Ex. 275, App. 509] All Star had worked years to develop its relationships with customers. [Tr. 480-481] Its president, Bill Vogt, testified, "[a] lot of our business is from our 42-years experience in Kansas City. So we get a lot of clients continuing to come back. We really are relationship-based in a lot of ways." [Tr. 86-87] All Star teammates "depend on trust and honesty among each other." [Tr. 81] Trust is "vital to what we do every day." [Tr. 90] Given its nature, All Star is "very connected with the clients, with the team," and develops "strong relationships." [Tr. 92-93]

Given its focus on trust and relationships, All Star is not afraid of fair competition. [Tr. 120] All Star believes it can compete on a level playing field. All Star did not make Ford (or any employee) sign a noncompete. [Tr. 66] As All Star CFO Moira Vogt put it, All Star never contended that HALO could not compete. Rather, HALO "can absolutely compete. But not with a three-month head start, and cheating and lying." [Tr. 778]

HALO's actions harmed All Star beyond lost sales.

Because All Star is a "relationship-based" company, it has "concerns about what customers and vendors think of All Star" because of what Ford may have told them. [Tr. 86-87, 695] Indeed, Ford told customers and vendors that All Star was having

"production issues" [Ex. 45, 50] and "ownership issues" [Ex. 34], and that All Star fired him because it "was not happy with the fact that I am leaving." [Ex. 65] Customers "are going to believe [Ford] because he's worked with those clients for a number of years." [Tr. 134] All Star's "level of trust has basically been lost with clients, vendors, fellow teammates. You just don't know who to trust anymore." [Tr. 695] All Star's employees feel betrayed. [Tr. 132-133] Mr. Vogt explained that the damage to the company's reputation "is something obviously very near and dear to my heart. My family's business for 41 years. And our character means more than a sale or than any particular order." [Tr. 135] 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. 373-375] After HALO's and Ford's' efforts to disrupt All Star's relationships, customers were silently going away, both to HALO and otherwise. [Tr. 163-164, 722-724, 782; Ex. 232, 233, 237, App. 376-380]

HALO continues to victimize All Star without remorse.

Once All Star uncovered the email evidence of the activity between Ford and HALO, All Star retained counsel and demanded that HALO stop. [Ex. 91, App. 358] Instead, CEO Simon decided that HALO would continue taking orders from the very customers Ford and HALO diverted while Ford was still employed at All Star, continuing to benefit from the head start Ford and HALO gained over All Star before All Star even knew there was a competition. [Tr. 378, 384, 546; Ex. 104, App. 363-364] Simon then altered his position and decided that HALO would take orders from *any* customer so long as Ford explained his prior relationship to them. [Tr. 384; Ex. 106, App. 365-366; Ex. 107, App. 367-370] HALO made no effort to confirm whether Ford was telling the truth about those customers. [Ex. 275, App. 508-510] While HALO told Ford not to make contact with Cerner, this was "for the time being" due to the lawsuit. [Tr. 660-61]

HALO is still benefitting from its misdeeds and has made nothing right. HALO presented no evidence of retracting any disparagement or misrepresentation to customers (such as its "All Star Powered by HALO" invoice). [Tr. 472; Ex. 5, App. 189] After being told it was improper to use All Star's information, Haddox asked that Christy

Tucker, Ford's All Star coworker, send a list of her All Star customers. [Tr. 381-382, 387; Ex. 98]

When this lawsuit is over, HALO hopes to pursue more of All Star's customers. [Tr. 315, 545-546] HALO still has in its possession the misappropriated tools and information to accomplish this goal, such as hundreds of pages of physical files, artwork, confidential customer information, Ford's complete client list, contact information, and order histories. [Tr. 128-129, 289-290, 315, 329-333, 374, 428, 435, 541-546, 603-605, 662-663; Ex. 16, App. 197-199; Ex. 32, App. 202-208; Ex. 42-43, 61-64, 67, 87, App. 353-354; Ex. 89, App. 355-356; Ex. 337] HALO did not direct Ford to return All Star's property, even though HALO's own policies dictate that employees who leave and fail to return HALO property can be sued by HALO. [Tr. 305; Ex. 6 at 28] Rather, Simon specifically dictated that HALO would not even look into what All Star property Ford had. [Tr. 382]

After the conspiracy came to light, Stutz, who pushed and approved it, [Tr. 351, 403, 431; Ex. 79, App. 347-348] falsely claimed that he had been "against this." [Tr. 376; Ex. 91, App. 357-358] Yet Stutz then gave Haddox a good review and a raise rather than any discipline. [Tr. 310; Ex. 275, App. 462] HALO did not fire or discipline Ford beyond his supposed "moratorium." [Ex. 275, App. 526-527] Instead, Stutz felt sorry for *Ford*. [Tr. 376; Ex. 91, App. 357-358] No one at HALO has been disciplined over any actions that led to this lawsuit. [Ex. 275, App. 466] In other words, HALO takes no responsibility and is only sorry it got caught. [Tr. 136]

Trial

A jury trial was held between April 29, 2019 and May 6, 2019. In opening statement HALO's counsel admitted, "Ford should not have sent those sales to HALO and HALO should not have processed those sales." [Tr. 46] Ford also admitted to wrongdoing. [Tr. 56] HALO's counsel reiterated in closing that HALO was liable for its conduct. [Tr. 956]

All Star submitted its claims of breach of the duty of loyalty against Ford [D101 at 13] civil conspiracy to breach the duty of loyalty against HALO [D101 at 16], tortious

interference with business expectancy against both defendants [D101 at 20], and punitive damages against both HALO and Ford. [D101 at 18, 26]

The jury found unanimously in favor of All Star on all claims, awarding actual damages of $525,541.88 and $12,000 in punitive damages against Ford[1] and $5.5 million in punitive damages against HALO. [D101 at 31-34, 36] Judgment was entered accordingly. [D107, App. 45]

On August 6, 2019, HALO filed its Motion Notwithstanding the Verdict or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur and Suggestions in Support. [D112, App. 3-40] HALO argued that section 510.265 RSMo. "requires the punitive damages award to be reduced" to five times actual damages. [D112, App. 39] In its opposition suggestions, All Star argued, *inter alia,* that application of the cap would be unconstitutional under *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014). [D113 at 18]

On October 29, 2019, the trial court entered an Order Regarding Post-Trial Motions ("Order"), which indicated in relevant part:

> . . . .The Court finds that Plaintiff presented sufficient evidence at trial to establish each element of its claims against Defendant.
>
> . . . . Moreover, the *Jury verdict is not against the weight of the evidence* presented during trial.
>
> Lastly, pursuant to RMSo [sic] § 537.068, the Court finds that RSMo § 510.265 applies to this case because *Plaintiff's claims are not common law claims. Punitive damages must therefore be capped accordingly.* After duly considering all of 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*, the Court finds and concludes that the punitive damage award should be reduced to five times the actual damages, Two Million, Six Hundred Twenty-Seven Thousand, Seven Hundred Nine dollars and forty cents. ($2,627,709.40).
>
> **IT IS THEREFORE ORDERED** that Defendant's Motion for Judgment Notwithstanding the Verdict or, In the Alternative, Motion For

[1] Ford is not appealing any aspect of the judgment against him.

> New Trial is DENIED. Defendant's Motion For Remittitur is GRANTED and the punitive damage award shall be reduced to $2,627,709.40.

[D116, App. 1-2 (emphasis added)] Simultaneously, the trial court entered an Amended Final Judgment and Order ("Amended Judgment") reducing the $5.5 million punitive damages award against HALO to $2,627,709.40. [D115, App. 50]

All Star timely appealed to the Missouri Court of Appeals, Western District. D120. On January 12, 2021, the appellate court rejected HALO's requests for JNOV or new trial relief and ruled under *Lewellen v. Franklin*, 441 S.W.3d 136, 143-44 (Mo. banc 2014) and other precedent, the trial court erred in applying section 510.265 to limit the jury's award of punitive damages. Court of Appeals Opinion ("Op.") at 8. The appellate court remanded the case for the trial court to determine whether the jury's punitive-damages award must be reduced as a matter of due process or remittitur. *Id.* at 24.

Following the appellate court's denial of HALO's request for rehearing, or in the alternative, application for transfer, HALO timely filed its application for transfer before this Court raising the questions: 1) Can Missouri Revised Statute 510.265 constitutionally be applied to claims for civil conspiracy to breach a duty of loyalty and tortious interference with business expectancy? and 2) Does testimony and supporting evidence from a lay witness who employed a demonstrably flawed methodology of calculating lost profits suffice to satisfy Missouri's "stringent requirements" for proving lost profits? On August 31, 2021, this Court granted HALO's application.

POINTS RELIED ON

I.

The trial court erred in granting HALO's post-trial motion for reduction of the jury's verdict reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 because the trial court misstated the law for application of the punitive damages cap in section 510.265.1 RSMo. violating All Star's right to trial by jury in that the applicable analysis is not whether the plaintiff's claims are "common law claims," but is instead whether the claims for which the jury awarded actual damages, namely, civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy, are civil actions for damages involving a fact issue that would have been determined without limitation by a jury in 1820 when Missouri's Constitution was first adopted.

Lewellen v. Franklin,
441 S.W.3d 136 (Mo. banc 2014).

State ex rel. Diehl v. O'Malley,
95 S.W.3d 82, 85 (Mo. banc 2003).

Watts v. Lester E. Cox Med. Ctrs.,
376 S.W.3d 633, 638 (Mo. banc 2012).

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

Section 510.265 RSMo.

Section 510.190.1 RSMo.

Mo. Const. Art. I, § 22(a).

II.

The trial court erred in granting HALO's post-trial motion for reduction of the jury's verdict reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 because the trial court misapplied the punitive damages cap in section 510.265.1 RSMo. violating All Star's right to trial by jury in that the claims for which the jury awarded actual damages, namely, civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy, are civil actions for damages involving a fact issue that would have been determined without limitation by a jury in 1820 when Missouri's Constitution was first adopted and, therefore, not subject to the statutory cap.

Lewellen v. Franklin,
441 S.W.3d 136 (Mo. banc 2014).

State ex rel. Diehl v. O'Malley,
95 S.W.3d 82, 85 (Mo. banc 2003).

Watts v. Lester E. Cox Med. Ctrs.,
376 S.W.3d 633, 638 (Mo. banc 2012).

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

Section 510.265 RSMo.

Section 510.190.1 RSMo.

Mo. Const. art. I, § 22(a).

III.

The trial court also erred in granting HALO's post-trial motion for reduction of the jury's verdict and reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 to the extent the trial court did so for constitutional due process reasons because due process was not implicated in that the trial court found the jury verdict was not against the weight of the evidence, and the award was not unconstitutionally excessive or arbitrary and was justified by, and commensurate with, HALO's reprehensible conduct, trickery and deceit.

Lewellen v. Franklin,
441 S.W.3d 136 (Mo. banc 2014).

Diaz v. AutoZoners, LLC
484 S.W.3d 64 (Mo. App. W.D. 2015).

Poage v. Crane Co.,
523 S.W.3d 496 (Mo. App. E.D. 2017).

IV.

The trial court also erred in granting HALO's post-trial motion for reduction of the jury's verdict and reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 to the extent the trial court did so as a remittitur pursuant to section 537.068 RSMo because the trial court misapplied the law in that remittitur is inappropriate without a predicate finding that the award is excessive, and the trial court instead found that the jury's verdict was not against weight of the evidence.

Badahman v. Catering St. Louis,
395 S.W.3d 29 (Mo. banc 2013).

Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC,
361 S.W.3d 364 (Mo. banc 2012).

Diaz v. AutoZoners, LLC,
484 S.W.3d 64 (Mo. App. W.D. 2015).

Section 537.068 RSMo.

STANDARD OF REVIEW

The standard of review for whether a trial court misstated or misapplied the law is *de novo. See Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. banc 2010), *as modified* (May 25, 2010).

The standard of review for whether a statute's application is constitutional is *de novo. Lewellen v. Franklin*, 441 S.W.3d 136, 143 (Mo. banc 2014).

The Court reviews "the trial court's determination of the constitutionality of the punitive damages award *de novo,* deferring to the trial court's findings of fact, unless they are clearly erroneous." *Peel v. Credit Acceptance Corp*., 408 S.W.3d 191, 211 (Mo. App. W.D. 2013) (quoting *Heckadon v. CFS Enter., Inc.,*400 S.W.3d 372, 382 (Mo. App. W.D. 2013)). "A finding is clearly erroneous when, even if there is some evidence to support it, we are left with the definite and firm conviction from the evidence as a whole that a mistake has been made." *State v. Miller,* 162 S.W.3d 7, 14 (Mo. App. E.D. 2005).

ARGUMENT

I.

The trial court erred in granting HALO's post-trial motion for reduction of the jury's verdict reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 because the trial court misstated the law for application of the punitive damages cap in section 510.265.1 RSMo. and violated All Star's right to trial by jury in that the applicable analysis is not whether the plaintiff's claims are "common law claims," and is instead whether the claims for which the jury awarded actual damages, namely, civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy, are civil actions for damages involving a fact issue that would have been determined without limitation by a jury in 1820 when Missouri's Constitution was first adopted.

The trial court misstated the test for determining whether the punitive damages cap in section 510.265.1 applies. Using the proper test, articulated in well-settled case law, application of section 510.265.1 violated All Star's right to trial by jury.

A. The issue is preserved for appeal.

Following the jury's verdict, HALO filed its post-trial motion seeking the alternative relief of JNOV, new trial or remittitur. [D112, App. 3-40] HALO argued that section 510.265 RSMo. "requires the punitive damages award to be reduced" to five times actual damages. [D112, App. 39] All Star opposed the post-trial relief since the evidence supported submission of its claims; the trial court committed no error during trial; and the punitive damages award was not subject to the statutory cap because its claims were those existing by common law prior to the adoption of Missouri's Constitution and the application of the cap would be unconstitutional under *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014) and violate its right to have its claims submitted to a jury. [D113] All Star also argued the award was not unconstitutionally excessive and any reduction by way of remittitur was improper. [D113]

B. Facts related to Point I.

A jury trial was held between April 29, 2019 and May 6, 2019. All Star submitted on claims of breach of the duty of loyalty against Ford [D101 at 13], civil conspiracy to breach the duty of loyalty against HALO [D101 at 16], tortious interference with business

expectancy against both defendants [D101 at 20], and punitive damages against HALO and Ford. [D101 at 18, 26]

The jury found unanimously in favor of All Star on all claims awarding actual damages totaling $525,541.88; $12,000 in punitive damages against Ford; and $5.5 million in punitive damages against HALO. [D101 at 31-34, 36] Judgment was entered on the jury's verdict. [D107, App. 42-46] Following briefing and argument on HALO's post-trial motions, the trial court entered an Amended Final Judgment and Order ("Amended Judgment") reducing the $5.5 million punitive damages award against HALO to $2,627,709.40. [D115, App. 47-51] In its post-trial order the court states in relevant part:

> . . . .The Court finds that Plaintiff presented sufficient evidence at trial to establish each element of its claims against Defendant.
>
> . . . . Moreover, the *Jury verdict is not against the weight of the evidence* presented during trial.
>
> Lastly, pursuant to RMSo [sic] § 537.068, the Court finds that RSMo § 510.265 applies to this case because *Plaintiff's claims are not common law claims. Punitive damages must therefore be capped accordingly.* After duly considering all of 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*, the Court finds and concludes that the punitive damage award should be reduced to five times the actual damages, Two Million, Six Hundred Twenty-Seven Thousand, Seven Hundred Nine dollars and forty cents. ($2,627,709.40).
>
> **IT IS THEREFORE ORDERED** that Defendant's Motion for Judgment Notwithstanding the Verdict or, In the Alternative, Motion For New Trial is DENIED. Defendant's Motion For Remittitur is GRANTED and the punitive damage award shall be reduced to $2,627,709.40.

[D116, App. 1-2 (emphasis added)]

C. The Missouri Constitution guarantees the right to trial by jury as heretofore enjoyed shall remain inviolate.

This Court has made clear that "application of the statutory cap on punitive damages in section 510.265 RSMo. in a cause of action that existed in 1820 violates the right to a jury trial." *Lewellen v. Franklin*, 441 S.W.3d 136, 143 (Mo. 2014).

The Missouri Constitution guarantees "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate." Mo. Const. Art. I, § 22(a) [App. 52]; *see* § 510.190.1 RSMo. ("The right of trial by jury as declared by the constitution or as given by a statute shall be preserved to the parties inviolate.") [App. 538]; Mo. R. Civ. P. 69.01(a) (same) [App. 536]. "'Heretofore enjoyed' means that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury trial when the Missouri constitution was adopted' in 1820." *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638 (Mo. banc 2012) (*citing State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003)); *see* § 1.010 RSMo. (noting that Missouri's common law is based on English common law) [App. 537]. The phrase "shall remain inviolate. . . means that any change in the right to a jury determination of damages as it existed in 1820 is unconstitutional." *Lewellen,* 441 S.W.3d at 143 (holding that statutory cap on punitive damages section 510.265 cannot apply to fraud claim, which existed in the common law in 1820 as a form of trespass) (*citing Watts*, 376 S.W.3d at 638).

"The right to trial by jury, where it applies, is a constitutional right, applies 'regardless of any statutory provision,' and is 'beyond the reach of hostile legislation.'" *State ex rel. Diehl*, 95 S.W.3d at 92 (*citing Lee v. Conran,* 213 Mo. 404, 111 S.W. 1151, 1153 (1908)). The "hostile legislation" in question here is Missouri Revised Statutes Section 510.265.1. It provides:

> 1. No award of punitive damages against any defendant shall exceed the greater of:
>
> (1) Five hundred thousand dollars; or
>
> (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant. . . .

§ 510.265.1 RSMo. (App. 53-54). This statute has been declared an unconstitutional infringement on the right to trial by jury using the test stated in *Lewellen* and *Holm v. Wells Fargo Home Mortgage Inc.*, 514 S.W.3d 590, 601 (Mo. banc 2017). Applying that same test here merits the same conclusion.

1. The right to jury trial attaches to actions that in 1820 would have been "civil actions for damages" involving an issue of fact.

To determine if the constitutional right to trial by jury attaches, "the simple analysis is whether the action is a 'civil action' for damages. If so, the jury trial right is to 'remain inviolate.'" *State ex rel. Diehl*, 95 S.W.3d at 85 (citations omitted). In determining whether a claim would have been tried to a jury in 1820, this Court has made clear that the nature of the claim, not its title, is what governs. The claims at issue in this case (civil conspiracy to breach the duty of loyalty and tortious interference with business expectancies) are precisely the kind of cases triable by juries from the inception of the Missouri's original constitution because they have historically been determined by juries: "Actions for trespass, which included actions for a variety of wrongs to the person, were tried to juries in the courts in 1820. This form of action, now commonly referred to categorically as torts. . . was an action for recovery of money only and involved issues of fact . . . ." *Diehl*, 95 S.W.3d at 87 (quoting *Briggs v. St. Louis & S.F. Ry. Co.*, 20 S.W.32, 33 (Mo. 1892)); *see Watts*, 376 S.W.3d at 638 (noting that in 1820, "civil action for damages resulting from personal wrongs" were tried by juries and such claims are therefore subject to the right to trial by jury); *Lee*, 111 S.W. at 1153.

2. There was no such thing as damages caps in the common law in 1820.

For a claim not created by statute, Missouri courts use the same analysis to determine when statutory damages caps are contrary to the inviolate right to a jury. "[I]n 1820, the jury determined the amount of damages at common law and there were no legislative limits on damages." *Lewellen*, 441 S.W.3d at 143 (Mo. 2014) (*citing Watts*, 376 S.W.3d at 639-640). "[A]pplication of a statutory cap to damages awarded by a jury in a cause of action that existed in 1820 'necessarily changes and impairs the right of a trial by jury 'as heretofore enjoyed.'" *Id*. (quoting *Watts*, 376 S.W.3d at 640).

The *Watts* Court, in declaring a prior version of the medical negligence noneconomic damages caps unconstitutional, made clear that "statutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate." *Watts*, 376 S.W.3d at 639. Such caps were "impermissible in 1820" because the constitutional "right and responsibility to determine damages" rested with the jury. *Id.* at 640; *see Holm*, 514 S.W.3d at 601 ("The right to trial by jury includes the right to have a jury determine the plaintiff's damages."); *Lewellen*, 441 S.W.3d at 143 ("[I]n 1820, the jury determined the amount of damages at common law and there were no legislative limits on damage."). Specifically, juries determined punitive damages as part of the common law in 1820. *See id.; Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. banc 2005) (finding "no question that punitive damages . . . were recognized under the common law in 1820") (*citing Lake Short & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893) (listing representative cases)).

Based on this analysis, this Court in *Lewellen* held that the statutory cap in section 510.265 did not apply to a fraud claim. In *Lewellen,* the plaintiff sued Chad Franklin National Auto Sales North, LLC and its owner, Chad Franklin, alleging she had been defrauded regarding a $49-per-month vehicle purchase program. *Lewellen*, 441 S.W.3d at 140. She received a jury award of $25,000 in actual damages and $1 million in punitive damages on each of her two claims of fraudulent misrepresentation and violation of the Missouri Merchandising Practice Act (MMPA). *Id.* at 139. The trial court capped the punitive damages awards at $500,000 and $539,050 pursuant to Section 510.265.1. *Id.* at 142 (*citing* § 510.265.1). Ms. Lewellen appealed application of the cap to punitive damages on her fraud claim, arguing *inter alia*, that the cap violated her right to trial by jury. *Id.* at 142. The Missouri Supreme Court agreed.

The *Lewellen* Court found that "there existed a right to jury determination of the amount of punitive damages in a fraud cause of action in 1820." *Id.* at 143. As *Lewellen* explained, this was true even though 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). The Court then reiterated that "in 1820, the jury determined the amount of damages at common law and there were no legislative limits on damage." *Id*. (*citing Watts*, 376 S.W.3d at 639-40). The Court also noted that "imposing punitive damages was a peculiar function of the jury." *Lewellen,* 441 S.W.3d at 143.

The Court held that in blindly capping punitive damages, section 510.265.1 "changes the right to a jury determination of punitive damages as it existed in 1820." *Id*. The statute improperly "imposes a legislative limit on the jury's assessment of punitive damages when such limits did not exist in 1820." *Id.* at 149. Thus, it "unconstitutionally infringes on Ms. Lewellen's right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution." *Id.* at 144. The Court vacated part of the trial court's judgment and rejected application of the cap, giving Ms. Lewellen the full jury award of $1 million in punitive damages. *Id.* at 151.

D. The trial court misstated the test and failed to examine whether the claims in question were civil actions for damages involving a fact issue.

The trial court misstated the test set forth in *Lewellen* and other cases. Providing little analysis, the trial court wrote in its Order, "Plaintiff's claims are not common law claims. Punitive damages must therefore be capped accordingly." [D116, App. 1-2] As the Court of Appeals noted, this an incorrect statement of the law under *Lewellen*. [Op. at 8]

As explained above, the test is whether in 1820, "a party seeking punitive damages would have had the right to have a jury try the issue of punitive damages." *Lewellen*, 441 S.W.3d at 145. Under that proper test, the cap in section 510.265.1 does not apply here.

First, as argued *supra*, it is well settled that punitive damages claims were tried to juries in 1820. *Lewellen*, 441 S.W.3d at 143; *Scott*, 176 S.W.3d at 142.

Second, "actions for trespass," seeking money damages were decided by juries in 1820. *Lewellen*, 441 S.W.3d at 143 n.10; *State ex rel. Diehl*, 95 S.W.3d at 87.

Third, both civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy claims have a long history of juries determining damages, well before 1820. Like the fraud claim addressed in *Lewellen*, these claims are historically encompassed in trespass. As the Court of Appeals correctly summarized:

> William Blackstone, writing in 1765, discussed the right of a master to bring an action in damages against his servant and the person hiring or retaining the servant, who yet remains in the master's employ, but "departeth from me and goeth to serve the other." 1 WILLIAM BLACKSTONE, COMMENTARIES *417. Civil conspiracy, or persons acting in concert, has been litigated in England since the early 1600s. RESTATEMENT (SECOND) OF TORTS § 876, Reporter's Note (1979). Similarly, "[t]hat one has a common law right 'to conduct one's business without the wrongful interference of others' has been recognized at least since 1621." Note, "Tortious Interference with Conduct of a Business," 56 Yale L.J. 885 (1947) (emphasis added); see also RESTATEMENT (SECOND) OF TORTS § 766, comment c, § 766B, comment b (describing development of the tort of interference with prospective business relationships in English common law). English common law also recognized that "an employee can be liable for disclosure of secrets learned during the course of employment" before the adoption of Missouri's 1820 constitution. Christopher A. Moore, Redefining Trade Secrets in North Carolina, 40 CAMPBELL L. REV. 643, 646 (2018).

[Op. at 8-9]; *see also Keeble v. Hickeringill,* 11 Mod. 130, 88 Eng. Rep. 945 (K.B. 1707) (allowing recovery against defendant for scaring away ducks from plaintiff's duck business, holding that "he that hinders another in his trade or livelihood is liable to an action for so hindering him").[2] [App. 64-66] Further, this case was rife with the fraud

[2]*See also Garret v. Taylor, Cro. Jac.* 567, 79 Eng. Rep. 485 (K.B. 1621) [App. 57]; *Gregory v. Duke of Brunswick,* 6 Man. & G. 205, 134 Eng. Rep. E66 (C.P. 1843); *Tarleton v. McGawley, Peake N.P.* 270, 170 Eng. Rep. 153 (K.B. 1793); *see* KENNEDY AND FINKELMAN, THE RIGHT TO TRADE (1933); PROSSER, TORTS, 1013-20 (1943); Green, *Relational Interests*, 29 ILL. L. REV. 460, 1041, 30 ILL. L. REV. 1 (1935); Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 196-213 (1936); Lewis, *Should the Motive of the Defendant Affect the Question of His Liability*?, 5 COL. L. REV. 107 (1905); Sarat Basak, *Principles of Liability for Interference with Trade, Profession or Calling*, 28 L.Q. REV. 52 (1912); Terry, *Malicious Torts*, 20 L.Q. REV. 10 (1904).

and deceit previously discussed in *Lewellen*—HALO's misconduct was grounded in intentional, deceitful, and malicious conduct designed to benefit HALO to All Star's detriment.

The trial court misstated the test set forth by this Court in *Lewellen* and other cases, then erroneously determined that the award "must be capped accordingly." [D116, App. 1]. In so doing, the trial court denied All Star its right to trial by jury. No case from this Court after *Lewellen* suggests any modification or amendment to the analysis of the constitutionality of damages caps when applied to causes of action not created by statute. The grant of HALO's post-trial motion to reduce punitive damages should be reversed, the part of the Amended Judgment reducing punitive damages should be vacated, and the jury's determination of $5.5 million in punitive damages against HALO reinstated. *See Lewellen* 441 S.W.3d at 149.

II.

The trial court erred in granting HALO's post-trial motion for reduction of the jury's verdict reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 because the trial court misapplied the punitive damages cap in section 510.265.1 RSMo. and violated All Star's right to trial by jury in that the claims for which the jury awarded actual damages, namely, civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy, are civil actions for damages involving a fact issue that would have been determined without limitation by a jury in 1820 when Missouri's Constitution was first adopted and, therefore, not subject to the statutory cap.

A. This issue was preserved for appeal.

All Star incorporates by reference the facts demonstrating this issue is preserved for appeal as set forth in Point I.

B. Facts related to Point II.

All Star incorporates the facts under Point I.

C. The trial court misapplied *Lewellen's* test for whether section 510.265 violates the right to trial by jury.

Lewellen controls with respect to the analysis of whether application of section 510.265.1 to the claims in this case is constitutional. Point I demonstrates how the trial court misstated the law. In this Point, All Star demonstrates how the trial court misapplied the law.[3] This Court exercises independent judgment and reverses a trial court that misapplies the law. *AAA Unif. & Linen Supply, Inc. v. Barefoot, Inc.*, 17 S.W.3d 627, 629 (Mo. App. W.D. 2000) (citation omitted).

The analysis of whether the cap in section 510.265 applies centers on the analysis described *supra* in Point I. All Star incorporates the law and argument under Point I.

The correct inquiry is whether an action for punitive damages for civil conspiracy and tortious interference with business expectancy is a civil action for damages involving an issue of fact that would have been tried to a jury in 1820. *See Lewellen* 441 S.W.3d at

[3] While Points I and II are similar, All Star presents these points separately because misstatement of the law and misapplication of the law "are separate and distinct" points of error that cannot be combined in the same point relied on. *Griffits v. Old Republic Inc. Co.*, 550 S.W.3d 474, 478 n.6 (Mo. banc 2018).

143. It is. As already established, punitive damages, civil conspiracy, and tortious interference with business expectancy were all claims juries determined in 1820. As such, application of the cap in section 510.265 here violates the right to trial by jury. *See Lewellen* 441 S.W.3d at 149.

In sum, the trial court misapplied *Lewellen* by failing to employ the analysis that would have shown the cap violated All Star's right to trial by jury. A proper application of *Lewellen*'s cap analysis would have resulted in no reduction of the punitive damages award. Thus, All Star is entitled to the full $5.5 million in punitive damages.

III.

The trial court also erred in granting HALO's post-trial motion for reduction of the jury's verdict and reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 to the extent the trial court did so for constitutional due process reasons because due process was not implicated in that the trial court found the jury verdict was not against the weight of the evidence, and the award was not unconstitutionally excessive or arbitrary and was justified by, and commensurate with, HALO's reprehensible conduct, trickery and deceit.

The trial court "capped" punitive damages on statutory grounds based on a finding that "Plaintiff's claims are common law claims," as argued in the previous points. [D116, App. 1] In this third Point, All Star addresses other language in the Order indicating the trial court 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] (emphasis added). This statement shows two things: first, that the trial court correctly relied on *Lewellen* and, second, the trial court performed a due process analysis as required under *Lewellen.* Based on that analysis, the trial court found that "the Jury verdict is not against the weight of the evidence presented during trial." [D116, App. 1] It is, therefore, unlikely the trial court reduced punitive damages for due process concerns in addition to capping damages. But to the extent it did, the trial court erred.

A. This issue was preserved for appeal.

All Star incorporates by reference the facts demonstrating this issue is preserved for appeal as set forth in Point I.

B. The punitive damages award is not "grossly excessive or arbitrary" and satisfies the guideposts for a due process analysis.

The constitutions of the United States and Missouri guarantee that no person will be deprived of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, §1 [App. 534-535]; Mo. Const. art. I, § 10. [App. 52] "This due process guarantee 'prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" *Lewellen*, 441 S.W.3d at 145 (quoting *State Farm Mut. Ins. Co. v. Campbell,* 538 U.S. 408, 409 (2003)); *see Diaz v. AutoZoners, LLC*, 484 S.W.3d 64, 90 (Mo. App. W.D.

2015) (noting that an award must be "grossly excessive" to violate the Due Process Clause of the Fourteenth Amendment).

Missouri courts turn to three guideposts to determine whether a punitive award is grossly excessive or arbitrary: "(1) the reprehensibility of the defendant's misconduct; (2) the disparity between the harm and the punitive damages award; and (3) the difference between the punitive damages award and penalties authorized or imposed in comparable cases." *Lewellen*, 441 S.W.3d at 146.

Of the three guideposts, reprehensibility is the "most important" and includes consideration of whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at 146 (quoting *State Farm Mut. Auto. Ins. Co.,* 538 U.S. at 419). Both the Missouri Supreme Court and the United States Supreme Court have recognized that "'trickery and deceit are more reprehensible than negligence' and that 'infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty.'" *Lewellen*, 441 S.W.3d at 146 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996)).

C. Under the first guidepost, HALO's reprehensible conduct warranted an award of $5.5 million in punitive damages.

HALO's deceitful, reprehensible conduct toward All Star easily satisfies the first guidepost and justifies the jury's imposition of $5.5 million in punitive damages to punish and deter HALO. The jury heard and saw abundant evidence regarding the extent of HALO's "malice, trickery and deceit" and the disparity between the parties. The Court of Appeals laid out such evidence in detail on pages 12 to 15 of its opinion and concluded: "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." [Op. at 14, original emphasis]

A jury could reasonably believe that All Star, a family business employing about 20 people, whose CFO earns $10 per hour, was victimized by HALO. [Tr. 65, 292] Whereas All Star's focus was on trust and honesty, HALO's focus was aggressive growth and profit. [Tr. 81, 90, 301, 388; Ex. 275, App. 426] While pursuing All Star's customers, HALO spent $116 million buying competing businesses to increase HALO's "earnings power." [Ex. 280 at 24, 109-111] HALO had sales of over $575,000,000 in 2018 alone. [Ex. 280 at 96-97] HALO has far more resources than All Star but wanted more. Rather than compete fairly and openly with a mom-and-pop store in Kansas City, HALO conspired to secretly and illegally take All Star's customers. Such disparity in philosophy and power combined with HALO's effort to keep All Star in the dark about its shenanigans establishes All Star's vulnerability.

As the jury heard, All Star was not only financially vulnerable, but this vulnerability also made it a prime target for HALO's tortious conduct. [Tr. 390-391] This is because HALO has a "gentlemen's agreement" with the other biggest players in the promotional awards industry not to recruit from, let alone tortiously interfere with each other's sales forces – leaving HALO to target the sales people working for small companies like All Star. [Tr. 390-391] As the Court of Appeals noted:

> When HALO's regional vice president Mr. Darryl Haddox learned that Mr. Ford did not have a non-competition agreement with All Star and had estimated that he could bring about $450,000 in annual sales from All Star, which would help Mr. Haddox meet his annual business targets, efforts quickly began to bring Mr. Ford into HALO as an account executive, before his employment with All Star ended.

[Op. at 12]

HALO's conduct was not isolated, but rather stretched over several weeks and months and continued even after All Star learned of HALO's conduct, demanded that it stop, and filed this lawsuit. [Tr. 335, 337-39, 342, 378, 384, 527, 546; Ex. 32, App. 202-208; Ex. 79, App. 347-348; Ex. 104, App. 363-364; Ex. 394, App. 533]

Ford copied (and still has) hundreds of pages of artwork and customer files from All Star. [Tr. 541; Ex. 337] Ford "planted seeds" with key clients and had taken "key

proprietary information" to use to take business in the future. [Tr. 134] Even though Ford was fired from All Star, Ford possesses tools and information that will allow HALO to pursue All Star customers. [Tr. 136, 543-545] Yet HALO's CEO still permits sales to All Star customers even though the customer information being used was "misbegotten." [Tr. 381; Ex. 106, App. 365-366; Ex. 107, App. 367-370; Ex. 237, App. 376-380]

HALO and Ford also acted in secrecy to keep All Star from finding out and to continue the flow of information and orders to HALO. [Tr. 326-327] For example, to quote HALO's Darryl Haddox when he found out HALO staff called All Star asking for Doug Ford, "Oooh . . . not good! Any word from All Star as a result of the call?" to which Ford responded, "No worries and I don't think anyone picked up on anything." [Tr. 327-328; Ex. 19, App. 200] The deceit was uncovered only through the fortuitous discovery of emails by All Star's shocked owners. [Tr. 126]

As the appellate court recognized, "HALO has not disciplined anyone involved in taking business from All Star customers brought to it by Mr. Ford and intends to compete with All Star in the future with Mr. Ford continuing to use information improperly obtained." [Op. at 4] Even when All Star demanded that HALO cease and desist, HALO did the opposite, allowing Ford to continue working with All Star customers. [Tr. 378, 384, 546; Ex. 104, App. 363-364; Ex. 106, App. 365-366; Ex. 107, App. 367-370] Nor did HALO take any actions to return All Star's property. [Tr. 305, 382, 545-546] The appellate court found this was wrongdoing motivated by financial gain: "This business diverted from All Star customers was expected to bring in $450,000 to $550,000 in Mr. Ford's first year with HALO by interfering with All Star's justifiable business expectancy, i.e., Ford/HALO's solicitation and processing of recurring orders from All Star's long-time customers." [Op. at 14]

Substantial punishment was also warranted based on HALO's ethical double standard. HALO's conduct cannot be characterized as "accidental." Hiring Ford while he was also employed by a competitor, All Star, expressly violated HALO's own policies. [Tr. 305, 325-26; Ex. 6 at 28; Ex. 9 at 14; Ex. 41] HALO prohibits and threatens to

punish employees for misconduct when the shoe is on the other foot, yet HALO did not hesitate to victimize All Star. As the Court of Appeals recognized:

> Despite HALO's written policy that defines confidential client information as the types of material Mr. Ford took from All Star and that prohibits HALO employees from disclosing the information, personally profiting from it, or rendering services for another company, HALO specifically requested this information. Mr. Haddox asked that Mr. Ford send him a customer list with specific contact information and annual sales volume per customer, and Mr. Ford did so. This list was shared inside HALO.

[Op. at 12; s*ee* Tr. 304-07, 330-342; Ex. 6 at 26-28; Ex. 9 at 14; Ex. 11, App. 190-196; 160-170; 172-178, 87, App. 181- 182, App. 183-184] Several members of HALO management and even the head of Human Resources knew Ford was still an All Star employee yet HALO moved forward in accepting orders and All Star's confidential customer information in violation of HALO's own policies. [Tr. 326-327, 351-352, 354-355, 357-358, 380-382, 403, 431; Ex. 1, 15, 16, App. 197-199; Ex. 20, 32, App. 202-208; Ex. 79, App. 347-348, Ex. 80, 82, App. 349-350] Jim Stutz, the second in command at HALO, specifically thought about whether HALO should take All Star orders before Ford quit, which caused him to "hesitate," but ultimately decide to proceed and was "supportive." [Tr. 351, 403, 431; Ex. 79, App. 347-348] Several members of HALO were involved in obtaining and distributing All Star confidential information, information that Haddox acknowledged he would never provide to a competitor of HALO if the shoe were on the other foot. [Tr. 334-341; Ex. 16, App. 197-199; Ex. 32, App. 202-208; Ex. 88, 89, App. 355-356] "Indeed, HALO suggested on at least one customer invoice that there was no competition—that All Star was "now powered by HALO." [Tr. 369; Ex. 5, App. 189]

As the appellate court noted, HALO engaged in this "[m]isconduct 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 . . . ." [Op. at 15] Such conduct is brazen, driven entirely by economics, and the very definition of intentional disregard of All Star's rights. There can be little dispute that HALO's

conduct was adequately reprehensible to support the jury's reasoned award and satisfy the first guidepost factor. *Lewellen*, 441 S.W.3d at 146.

All Star employees rightfully felt "shock, disappointment, hurt, a lot of frustration" and betrayal. [Tr. 81, 128-129, 132-133, 694-695] HALO's and Ford's conduct hurt "the entire team," especially when they used All Star employees as unwitting pawns. [Tr. 132-133, 534-538; Ex. 42-43, 142, 154-156] Clients were told "absolute untruths" about All Star such as "we are screwing up, we can't produce things effectively." [Tr. 133-134, 534-538; Ex. 45] Because All Star is a "relationship-based" company, it has "concerns about what customers and vendors think of All Star" after HALO's and Ford's lies. [Tr. 86-87, 695] Mr. Vogt testified the damage to the company's reputation "is something obviously very near and dear to my heart. My family's business for 41 years. And our character means more than a sale or than any particular order." [Tr. 135] All Star's "level of trust has basically been lost with clients, vendors, fellow teammates. You just don't know who to trust anymore." [Tr. 695]

The evidence of reprehensibility is replete in the record. In short, HALO knew what it was doing was wrong but did it anyway so that it could pocket expected gains of roughly a half million dollars per year from recurring business diverted from All Star. Such reprehensible conduct supports the jury's decision to punish HALO with a significant award.

D. Under the second guidepost, the amount of harm is not disparate to the punitive damages.

The second guidepost, the disparity between the harm and the punitive damages award, is also satisfied here. The jury found HALO liable for $525,541.88 in actual damages and awarded punitive damages totaling $5.5 million. This resulted in a punitive damages ratio of roughly 10:1, which raises no serious due process concerns and certainly does not eclipse the reprehensible conduct by HALO.

"The Supreme Court has 'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.'" *Diaz*, 484 S.W.3d at 91 (*citing BMW of N.*

Am., Inc., 517 U.S. at 580). In *Diaz*, a store employee alleging harassment received a punitive damages award of $1 million – thirteen times greater than her compensatory damages award of $75,000. *Id.* at 75. The appellate court held that "the most important consideration was "the degree of reprehensibility of the defendant's conduct." *Id.* (citation omitted). The appellate court refused to "elevate the ratio analysis above the reprehensibility factor", especially where the jury could have determined the defendant corporation's "conduct was motivated by purely economic concerns" and that it would take a big award to deter the defendant because it "was a large and well-off company." *Id.* at 92.

For similar reasons, the appellate court upheld a 10:1 ratio of punitive damages to actual damages in *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426 (Mo. App. W.D. 2015). The plaintiff received a $2-million-dollar punitive damages award where the actual damages were $200,000 based a disability discrimination claim. *Id.* at 442. The appellate court affirmed the trial court's refusal to remit the award based in part on the size and assets of the defendant corporation. *Id.*

In *Poage v. Crane Co.*, 523 S.W.3d 496 (Mo. App. E.D. 2017), the Court of Appeals affirmed a $10 million punitive damages award with ratio of either 7:1 or 12:1. The court noted the defendant was "a large corporation—generating revenues exceeding $1 billion in 1974 and $2.5 billion in 2012, 2013, and 2014" so "a large amount of punitive damages is necessary to have a deterrent effect". *Id.* at 523.

Here, HALO is the epitome of a nearly-one-billion-dollar corporate defendant [Ex. 244, App. 381; Ex. 275, App. 426] that can be punished and deterred only through a substantial punitive damages award such as the one awarded by the jury. HALO is unapologetically driven purely by economics—its focus is fixed on growth, and growth via acquiring business from other sources. [Tr. 301, 388] The second-in-command at HALO (Jim Stutz) thought Regional V.P. Darryl Haddox needed to improve his sales recruitment numbers "or noose will get tighter." [Tr. 248; Ex. 2, App. 187-188; Ex. 275, App. 426] HALO pursued Ford based on its estimate that he brought a book of business worth more than a half-million dollars. [Tr. 350, 354; Ex. 30, App. 201; Ex. 76, App.

345; Ex. 77, App. 346] Haddox needed this business because it would make up a third of his recruitment numbers for 2018—numbers Haddox had been struggling to hit. [Tr. 418; Ex. 2, App. 187-188; Ex. 275, App. 410] In fact, CEO Simon prefers that HALO hires account executives who can bring HALO a million dollars or more each. [Ex. 275, App. 441] Haddox never gave a thought to how his actions could impact All Star. [Tr. 429]

HALO's unwritten agreement not to poach from the sales staff of the other largest companies in its industry but not the small players like All Star shows HALO's level of conscious disregard. [Tr. 316-317]. In other words, even HALO understands hiring such large producers impacts competitors. It just chooses to leave its large competitors alone, which leaves taking business from small competitors like All Star.

Even after All Star uncovered the scheme and filed suit, rather than discipline Haddox, HALO gave him a positive evaluation and a raise. [Tr. 310] Such facts support the award of $5.5 million in punitive damages to punish and deter HALO.

The jury's award is not out of line with awards in other tortious interference cases. Specifically, a 10:1 ratio is less than those found permissible by Missouri and federal appellate courts. In *Rusk Farms, Inc. v. Ralston Purina Co*., 689 S.W.2d 671, 683 (Mo. App. E.D. 1985), a tortious interference action against a large company by one of its suppliers, the appellate court held that an award of $200,000 in punitive damages was not "manifestly unjust," despite reducing the actual damage award from $20,000 to $1. *Id.* Similarly, in *Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc*., 178 S.W.3d 691 (Mo. App. S.D. 2005), the appellate court evaluated a 20:1 imposition of punitive damages in a tortious interference case, and sustained the award based on reprehensibility of conduct, and in light of an award of actual damages against a different defendant on a breach of contract claim arising out of the same nucleus of fact. *Id.* at 708. Likewise, in *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1147 (8th Cir. 1986), the Eighth Circuit Court of Appeals applied Missouri law and affirmed a punitive damages award of $250,000 based on tortious interference with business relationship, where the actual damage was nominal. *Id.*

Indeed, in other contexts, Missouri Courts have affirmed punitive damages ratios far greater than 10:1. *See, e.g., Lewellen*, 441 S.W.3d at 148 (affirming punitive damages ratio of 22:1); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 374 (Mo. banc 2012) (affirming 111:1 ratio); *Lynn v. TNT Logistics N. Am. Inc.*, 275 S.W.3d 304, 310 (Mo. App. W.D. 2015) (increasing punitive damages to a ratio of 75:1); *Heckadon v. CFS Enter., Inc.,*400 S.W.3d 372, 384 (Mo. App. W.D. 2013) (affirming ratio exceeding 233:1 in part because of the defendant's "trickery and deceit"); *Krysa v. Payne*, 176 S.W.3d 150, 162 (Mo. App. W.D. 2005) (affirming ratio of 27:1); *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 589 (Mo. App. W.D. 2001) (finding a ratio of 66:1 constitutionally permissible). Given the degree of reprehensibility demonstrated by HALO discussed *supra*, a 10:1 punitive damages award ratio fits well within the bounds of constitutional permissibility.

E. The third guidepost does not apply in this kind of case but also suggests no due process concerns.

The third due process guidepost "examines the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 111 (Mo. App. E.D. 2006). HALO's conduct involved a violation of tort duties that do not readily lend themselves to a comparison with statutory penalties. *See BMW of N. Am., Inc.*, 517 U.S. at 583 (comparing the punitive damage award based on defendant's fraud to penalties under Alabama's Deceptive Trade Practices Act); *see also Lewellen*, 441 S.W.3d at 148 (comparing the punitive damage award for Plaintiff's Missouri Merchandising Practices Act ("MMPA") claim to the statutory damages permitted under the MMPA). With specific respect to tortious interference with business expectancy claims, courts have found that the third guidepost does not apply. *See, e.g., Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (stating third factor is inapplicable to tortious interference with business expectancy claim because "misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with

statutory penalties.").[4] Missouri has no statute imposing penalties for civil conspiracy or tortious interference with business expectancy. Thus, this guidepost is inapplicable and does not change the appropriateness of the jury's punitive award here.

In short, the $5.5 million is not grossly excessive under a due process analysis. The trial court determined the verdict was not against the weight of the evidence, and it was correct. HALO's conduct was reprehensible and marked by malice and deceit. To the extent the trial court reduced punitive damages on due process grounds, the trial court erred.

[4] Missouri courts have recognized the difficulty of applying the third guidepost under similar circumstances. *See, e.g., Envtl. Energy Partners, Inc.*, 178 S.W.3d at 708 ("Tortious interference with contract involves acts that are ethically and morally reprehensible and are, in a civil sense, legally wrongful, whereas fraud claims founded in misrepresentation type acts are akin to criminal conduct for which sanctions might be identified and compared. The factor of comparative penalties is inconsequential in an action for tortious interference with contract."); *see also Brady*, 213 S.W.3d at 111 (finding third guidepost inapplicable to claim under MHRA because the Act allows for punitive damages "with no stated limit").

IV.

The trial court also erred in granting HALO's post-trial motion for reduction of the jury's verdict and reducing the jury's punitive damages award from $5,500,000 to $2,627,709.40 to the extent the trial court did so as a remittitur pursuant to section 537.068 RSMo.because the trial court misapplied the law in that remittitur is inappropriate without a predicate finding that the award is excessive, and the trial court instead found that the jury's verdict was not against weight of the evidence.

The final potential way the trial court may have erred in reducing punitive damages is through remittitur. The trial court makes two references in its Order to remittitur: the Order refers to section 537.068 RSMo., and the Order grants what HALO deemed a "Motion for Remittitur" (but which included requests for non-remittitur relief). To the extent the trial court reduced punitive damages via remittitur, the trial court misapplied the law and the full punitive damages award against HALO should be reinstated.

A. The issue is preserved for appeal.

All Star incorporates by reference the facts demonstrating this issue is preserved for appeal as set forth in Point I.

B. Facts relevant to Point IV.

All Star incorporates by reference the facts set forth in Point I.

C. Remittitur is distinct from capping damages or reducing them on constitutional grounds.

Missouri law is clear that remittitur is distinct from application of the cap in 510.265.1 RSMo. [App. App. 539-540], which was addressed in Points I and II. *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 377 (Mo. banc 2012).

Likewise, remittitur is distinct from the analysis of whether an award comports with due process, which was addressed in Point III. *Diaz v. AutoZoners, LLC*, 484 S.W.3d 64, 89 (Mo. App. W.D. 2015), (*citing Blanks v. Fluor Corp.*, 450 S.W.3d 308, 412 n.71 (Mo. App. E.D. 2014). Application of 510.265.1 RSMo. is not discretionary, which is the very reason it raises constitutional concerns. *Lewellen*, 441 S.W.3d at 143

(noting that the statute "operates wholly independent of the facts of the case"); *see also Holm v. Wells Fargo Home Mortgage Inc.*, 514 S.W.3d 590, 601 (Mo. banc 2017) (noting "[t]he right to a jury trial includes the right to have a jury determine the plaintiff's damages"). Similarly, a reduction under due process is mandatory and applies where there is "an unconstitutionally excessive verdict." *Diaz*, 484 S.W.3d at 89. Remittitur, however, is discretionary and substitutes "the court's judgment for that of the jury regarding the appropriate award of damages." *Id*.

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

Section 537.068 provides, "[a] court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages. . . ." § 537.068 RSMo.[5] Remittitur, therefore, depends on a finding by the court "that the jury's award is excessive and unreasonable on the facts." *Diaz,* 484 S.W.3d at 89. "The circuit court should not sustain a motion for additur or remittitur under § 537.068 without having determined that the verdict is against the weight of the evidence and that the party moving for additur or remittitur is entitled to a new trial." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 38 (Mo. banc 2013) (citations omitted); *accord Bare v. Carroll Elec. Coop. Corp.*, 516 S.W.3d 395, 398 (Mo. App. S.D. 2017).

Here, the trial court did not make any predicate findings that would support the application of 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] Under *Badahman*, these findings do not establish a basis for remittitur. To the extent the trial court cited remittitur or used remittitur as a basis for capping punitive damages, the trial court erred in applying the law.

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[5] A different statute, section 510.263.6, which the trial court did not cite, is the statute that authorizes remittitur of punitive damages awards. § 510.263.6 (1987) [App. 539-540]. No matter the statute, however, remittitur does not apply given the trial court did not find the award excessive.

In sum, the trial court made no finding that the award was excessive or that a new trial was in order, and so did not have a predicate basis for applying a remittitur. To the extent the trial court did so or intended to do so, the trial court erred.

CONCLUSION

The trial court erred in misstating and misapplying settled law in reducing punitive damages. The trial court's application of section 510.265 violated All Star's right to trial by jury as surely as the Missouri Constitution provides that this right "shall remain inviolate." The trial court's analysis and factual findings did not support a remittitur or due process reduction, and HALO's conduct was sufficiently reprehensible to justify the jury's reasoned award. All Star prays that this Court reverse the ruling on the post-trial motion requesting reduction and reinstate the $5.5 million punitive damages award in full.

Respectfully submitted,

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APPENDIX – ELECTRONICALLY FILED SEPARATELY

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RULE 84.06(C) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 84.06(b) and contains 13,974 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 September 20, 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 Coverdale*
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