IN THE SUPREME COURT OF MISSOURI

Case No. SC99007

ALL STAR AWARDS & AD SPECIALTIES, INC.,
Appellant/Respondent,

v.

HALO BRANDED SOLUTIONS, INC.,
Respondent/Appellant,

On Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
Hon. John M. Torrence

SUBSTITUTE BRIEF OF RESPONDENT/APPELLANT HALO BRANDED SOLUTIONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

This case pushes the boundaries of allowable damages across multiple dimensions, seeking to turn a small-dollar business dispute between two competitors in the branded promotional products and services industry into a multi-million-dollar punitive damages award keyed to an already-inflated compensatory damages award that is itself based on unreliable and speculative testimony of lost profits that never should have been admitted. In 2018, Doug Ford, the general sales manager for Appellant/Cross-Respondent All Star Awards & Ad Specialties, Inc., decided to leave All Star to work for a competitor, Respondent/Cross-Appellant HALO Branded Solutions, Inc. Ford proceeded to accept his offer of employment with HALO, and to process 20 customer orders through HALO, before terminating his employment with All Star or informing All Star of his intent to do so. When All Star learned of this, it terminated Ford and contacted HALO's CEO, who immediately restricted Ford's sales activities to prevent him from using any of All Star's property to solicit customers going forward and offered to pay All Star the profits HALO had made from the 20 diverted orders, a figure that all agree amounted to $25,541.88. That should have been the end of the matter.

Instead, All Star brought this litigation, suing HALO for tortious interference with business expectancy and civil conspiracy to breach a duty of loyalty and seeking *millions* of dollars in compensatory and punitive damages. But All Star ran into what should have been an insurmountable problem: It had no proof that it had suffered or would suffer any damages beyond the $25,541.88 that HALO had already offered to pay. All Star tried to proffer its bookkeeper as an expert to opine on the "anticipated" profits it claimed it had

lost or would lose, but the trial court excluded his testimony after he conceded that he was not qualified to testify as an expert. Undeterred, All Star tried to introduce evidence of "anticipated loft profits" through its chief financial officer, a lay witness who holds no type of accounting degree and conceded that she had no experience calculating lost profits. Relying on an admittedly inflated measure of profit, she proceeded to testify that All Star's "anticipated lost profits" were $111,106.07, a number that she derived by extrapolating "anticipated future profits" from three-year averages that were demonstrably not accurate predictors of future sales. Among other things, she attributed to tortious interference a claimed "loss" of $15,000 in "anticipated" business from a client that had filed for bankruptcy. Yet the court nonetheless overruled HALO's objections to her testimony and submitted the question of future damages to the jury, again over HALO's objection.

Left as a roving commission empowered to award future damages that there was no reliable evidence to support, the jury awarded $500,000 in compensatory damages on All Star's tortious-interference claim—a figure that finds support only in All Star's empty rhetoric urging the jury to award any measure of damages it thought "just and fair," whether that be "500,000" or "a million dollars." More remarkable still, the jury then awarded All Star *$5.5 million* in punitive damages. The trial court refused to vacate or remit that award as legally unsubstantiated and grossly excessive, instead reducing it only in half pursuant to the statutory cap established by Mo. Rev. Stat. §510.265. All Star thus has been awarded a total of more than *$3 million*—all for a business dispute between two competitor companies that All Star failed to prove cost it any more than $25,541.88. That award cannot stand. The compensatory damages award is devoid of any reliable evidentiary

support. Indeed, the only evidence and testimony that could have supported *any* future damages award (which still could not support the $500,000 figure the jury appears to have plucked from thin air) was insufficient as a matter of law and should not have been admitted. Nor should the trial court have sustained any punitive damages award—let alone one that was more than 215 times greater than the only admissible evidence of damages.

Not content with this multi-million-dollar windfall, All Star now asks this Court to reinstate the jury's $5.5 million punitive damages award, insisting that applying the statutory limit on punitive damages would violate its constitutional right to a trial by jury. But this Court has repeatedly held that statutory limits on damages are unconstitutional *only* as applied to causes of action that were triable at common law in 1820, which the claims All Star brought here were not. Indeed, this Court did not recognize either tortious interference with business interests or breach of duty of loyalty as torts until well into the twentieth century. That was not, as All Star suggests, because those torts were subsumed in some other cause of action at common law. It is because the kind of conduct All Star alleges here *was not considered tortious* at common law. A plaintiff could not have sustained such an action at all in 1820, let alone claimed a right to have such an action tried by a jury.

All Star is thus left advancing sweeping arguments that would effectively nullify statutory limits on damages across the board, such as claiming that statutory limits are unconstitutional as applied to any "civil action for monetary damages," any and all "torts," and any request for punitive damages (which, of course, is the only context in which the punitive damages cap ever applies). This Court has repeatedly rejected such claims before,

and it should do so again here. Indeed, if this Court were inclined to reconsider any of its holdings in this area, the right one to reconsider would be the Court's minority position that statutory limits on damages raise constitutional concerns. In all events, under no circumstances should the Court extend that doctrine to hold such limits unconstitutional as applied to causes of action that did not even exist at common law in 1820.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered in a civil action concerning common-law claims of breach of the duty of loyalty, civil conspiracy, and tortious interference with business expectancy. It involves application of Missouri's statutory limit on punitive damages, Mo. Rev. Stat. §510.265, and application of the U.S. and Missouri Constitutions' Due Process Clause limitations on punitive damages. This Court has jurisdiction both because the case involves the constitutionality of §510.265 and because the Court granted transfer after opinion by the Missouri Court of Appeals, Western District. Mo. Const. art. V, §§3, 10.

The appeal is timely because, after post-trial briefing, the trial court entered final judgment on October 29, 2019, D.115 (App.136), HALO timely filed its notice of appeal on November 8, 2019, D.117 (App.143), and All Star timely filed its cross-notice of appeal on November 18, 2019, D.120 (App.148). The court of appeals issued its opinion on January 12, 2021, and denied HALO's timely motion for transfer on March 2, 2021. HALO then timely filed its application for transfer before this Court on March 17, 2021, and this Court granted the application on August 31, 2021.

STATEMENT OF FACTS

All Star's Statement of Facts violates Rule 84.04(c) because it is incomplete, it is argumentative, and it contains alleged facts that are not relevant. HALO offers this Statement of Facts to provide the relevant factual background.

A. Factual Background

HALO and All Star

HALO and All Star both sell branded promotional products and services, such as "apparel, … signage, banners, name badges," "awards, trophies, [and] engraving." Tr.87:22-23, 190:20-21. HALO is a national distributor and has a facility in Sterling, Illinois, with approximately 400 employees. Tr.300:23-25, 456:20-21, 457:4-8. All Star, which began as a screen-printing company, is located in Kansas City, Missouri, and has approximately 20 employees. Tr.64:10-11, 65:11-12. All Star is owned and managed by Bill Vogt, who is its president, chief executive officer, and "Custom Project Coach/Manager." Tr.64:6-7, 83:14-24, 183:15-16. Mr. Vogt's wife, Moira Vogt, is All Star's chief financial officer. Tr.692:24-693:3.

Ford's Employment and His Decision to Leave All Star

Doug Ford worked for All Star in a sales position from 1994 until February 8, 2018, ultimately rising to the position of general sales manager. Tr.475:2-6. In his final years with All Star, Ford began noticing that All Star was "having cash flow issues." Tr.550:17-21; *see also* Tr.550:25-552:6. While All Star had approximately $2 million in sales in 2017 and 2018, Ex.236 (D.98, at p.2; App.194), the company generally spent between 50 and 60 percent of that gross revenue on "labor, material, [and] direct cost on each sale," Tr.256:4-

258:7. Factoring in other overhead, that left All Star "not overly profitable." Tr.105:5-6, 10. All Star's financial statements showed a net loss of $25,748.66 for the 2017 fiscal year. Ex.343 (App.200).

By 2017, Ford noticed that things "were definitely getting worse." Tr.552:7-11. For instance, when one client wanted to place an order for Christmas gifts for its employees, and All Star's vendor asked All Star to prepay for the order (not an unusual request in the industry), Mrs. Vogt e-mailed Ford: "Can we do something else here? Because we've got a cash flow issue. We can't lay out this sort of money." Tr.552:11-553:12; Ex.346 (App.201). Earlier that year, Mrs. Vogt stated in an e-mail that "[c]ash flow [was] at a desperate level," and indicated that sales employees' commission checks, which were already often "[h]eld or delayed," may be delayed indefinitely. Tr.561:15-563:6; *see also* Tr.566:7-568:12, 569:5-570:6, 570:17-571:9; Exs.340 (App.195), 347 (App.203), 348 (App.204), & 368 (App.207). Ford also had a $93.40 charge declined on a company credit card in October 2017. Tr.563:22-564:21; Ex.342 (App.199). And he experienced several "production problems" while at All Star, including a botched delivery for a time-sensitive awards event for one client and a missed shipping date for another. Tr.554:22-557:22, 558:23-560:7.

Around the end of 2017, Ford started searching for another job. In November 2017, he submitted an unsolicited recruiting inquiry through HALO's website and began talking to HALO about potentially joining HALO as a sales representative. Tr.322:1-10, 476:7-18, 554:15-19; Ex.30 (App.171). HALO was not the only company to which Ford reached out; he also talked to a local competitor of All Star's based in Kansas City and a company

that dealt with franchisees for promotional products distributors. Tr.578:3-25. In his inquiry to HALO, Ford estimated that his annual "book of business" was worth $450,000. Tr.480:25-481:3; Ex.30 (App.171); *see also* Tr.625:16-626:1. Ford also sent HALO a customer list, which involved filling in a form and was standard practice for recruits in order to check for account conflicts. *See* Tr.330:5-14, 331:11-332:2; Ex.11 (App.160).

Ford's Transition and the 20 Diverted Orders

Eventually, HALO offered Ford a job and set his start date as February 6, 2018. Tr.323:3-5. But in January 2018, while Ford was still at All Star (and had not yet told All Star he planned to leave), Ford asked HALO to process 20 one-time orders from five clients. Tr.579:16-580:10; Ex.394 (App.211). Although this was "not standard practice," HALO agreed to process the orders because Ford "came to [HALO] with concerns about [All Star's] financial failures … and getting [the orders] shipped on time" and "handled properly." Tr.347:17-348:3; *see also* Tr.345:24-346:10, 358:11-359:4, 383:5-13, 403:7-404:20, 409:21-411:12, 588:20-590:18; Ex.79 (App.179). HALO sent Ford an official employment offer, which he returned on January 15, 2018. Tr.325:19-326:13. HALO then "sign[ed] him up as an" account executive and processed the orders through "a house account," even though Ford was still employed by All Star. Tr.348:3-6.

On January 31, 2018, Ford told Mr. Vogt that he was leaving All Star to work for HALO. Tr.119:16-120:10. Ford offered to "stay for a month or two and help with [the] transition" and told Mr. Vogt that he would "certainly start moving … toward [HALO] at the time," and Mr. Vogt "said that would be fine." Tr.120:24-121:4. Mr. Vogt also agreed to let Ford "wait and tell the rest of the team" at a meeting scheduled the next week.

Tr.123:6-19. A few days later, however, when Mr. Vogt shared the news with Mrs. Vogt, she decided that All Star should look at Ford's e-mails to "see if anything untoward was going on." Tr.124:4-14. On February 8, 2018, after Ford made his announcement at the team meeting, the Vogts reviewed e-mails from Ford's All Star account, which revealed the orders he had sent to HALO and his already-executed offer letter from HALO. *See* Tr.125:4-127:3, 129:11-21. Mr. Vogt fired Ford that day. Tr.130:25-131:8.

Several weeks later, after Ford had transitioned to HALO, HALO's CEO, Marc Simon, received a letter from All Star informing him of Ford's actions. Ex.94 (App.187). Simon immediately spoke to Ford and "made clear to him that HALO's sales policy manual prohibits any [account executive] from using confidential and proprietary lists of customers that are owned by another company to solicit for business," "made it clear that [HALO] will not accept orders from customers [Ford] solicited using his prior employer's property," and imposed additional restrictions on Ford's sales activities. *Id.*; *see also* Tr.377:11-378:2, 412:15-414:2. HALO's Executive Vice President of Sales and Business Development, Jim Stutz, was equally clear: "Stand down. Follow Marc's direction. [Ford] cannot use any information that was mis[]begotten." Ex.94 (App.185). HALO also 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, which was later determined to be $25,541.88.

B. Procedural History

Rather than accept HALO's offer, All Star brought this lawsuit against both Ford and HALO, alleging that Ford breached his duty of loyalty to All Star by diverting sales to

HALO and taking All Star's confidential information for the benefit for HALO, and that Ford's and HALO's actions constituted tortious interference with business expectancy and a civil conspiracy. Even though All Star did barely $2 million in sales in 2017 and 2018, was generally "not overly profitable," and actually did *better* in the wake of Ford's departure than it had done the previous year, *supra* pp.14-15; Ex.343 (App.200), All Star claimed that it was entitled to *millions* of dollars in damages.

The Trial and All Star's Efforts to Prove Future and Punitive Damages

At trial, HALO admitted that it should not have agreed to process the 20 orders for Ford before he left All Star, that "taking those orders ahead of time" was "a mistake," and that it should have told Ford to either "tell All Star that he was leaving and join us and/or place the orders through All Star." Tr.390:18-391:1; *see also, e.g.*, Tr.359:8-21, 404:9-20. HALO also conceded that it made $25,541.88 in profit from those orders, profit that HALO's CEO had offered to return as soon as he learned of Ford's actions. But HALO vigorously disputed whether All Star had suffered any damages beyond that, for HALO had immediately put in place measures to guard against that possibility.

All Star, meanwhile, struggled mightily to produce reliable evidence to support its multi-million-dollar damages claim. While its theory was that it had lost, or was likely to lose, all manner of business on account of Ford's and HALO's actions, it chose not to produce as a witness a single one of the clients with which it had ever done, or even tried to do, business. Instead, All Star tried to substantiate that theory exclusively through the testimony of its own employees. Initially, All Star designated its "bookkeeper/accountant" Curt Freking as an expert witness to provide expert testimony on lost-profit damages.

Suppl.Tr.7:15-18, 10:19-23. But the trial court sustained HALO's pre-trial motion to exclude Freking's testimony after he provided no expert report or analysis and admitted during his deposition that he did not have "sufficient professional competence" to prepare a lost-profits calculation. Suppl.Tr.7:18-24; App.1-11. The court also sustained HALO's motion in limine to exclude a "worksheet" All Star "had marked on lost profits, future lost profits." Suppl.Tr.7:25-8:8; App.1-11; D.88 (App.12). All Star was thus left with no expert witness or evidence to try to prove that it lost more than the undisputed $25,541.88 in profits.

Undeterred, All Star shifted gears, calling Mrs. Vogt—who not only has no accounting background, but likewise concededly has no experience calculating lost profits—to provide lay testimony about All Star's "anticipated lost profits." Mrs. Vogt based her testimony on a document, Exhibit 235, that had not been produced in discovery and that she conceded had been prepared solely for this litigation to try to estimate All Star's "anticipated lost profits." Tr.711:12-712:17; Ex.235 (D.97; App.189). Through Exhibit 235, Mrs. Vogt attempted to calculate All Star's "anticipated lost profits" by comparing the three-year historical average of the profit All Star made from 20 clients Ford had served with All Star's profits from those same clients in 2018 and the first quarter of 2019.[1] Employing that methodology, she claimed Ford's departure had cost All Star $111,106.07 in 2018 and the first quarter of 2019.

[1] While All Star claimed it was 25 clients at trial, Exhibit 235 lists only 20 distinct clients. All Star appears to have inflated the number before the jury by sometimes (but not always) counting separate entities within a single client as separate clients. *See* Ex.235 (D.97; App.189-92).

The first problem with that claim is that All Star's financial statements showed a $4,170.40 *increase* in net profits from fiscal year 2017 to fiscal year 2018, Tr.189:3-190:1; Ex.343 (App.200), making it hard to fathom how Ford's departure could have cost it more than $100,000 in net profit over that same period. Tr.189:3-190:1; Ex.343 (App.200). On top of that, moreover, it quickly became clear during Mrs. Vogt's testimony that the central assumption in Exhibit 235—namely, that each of the clients had a "historical average" order pattern that was likely to be repeated over the next two years—was demonstrably flawed. For example, Mrs. Vogt used a three-year average to estimate how much in future sales All Star anticipated to four companies that had purchased from All Star only once during the previous three years, thus demonstrating no consistent purchasing pattern at all. Ex.235 (D.97; App.189-92); Tr.778:24-780:23. She used the three-year averaging methodology even if a client's sales had severely dropped off over that same period. For instance, while KMBC's sales had declined from $14,325 in 2015, to $2,525 in 2016, all the way down to $115 in 2017, the averaging methodology enabled her to use the strong year in 2015 to claim that All Star anticipated that its sales to KMBC would have increased 60-fold to more than $7,000 over the following 15 months. Ex.235 (D.97; App.191). And Mrs. Vogt claimed that All Star anticipated making $28,390 in sales to Beauty Brands in 2018 and the first quarter of 2019 even though Beauty Brands *filed for bankruptcy*. Tr.771:22-772:18.

Making matters worse, Mrs. Vogt assumed that any dollar of this purportedly "anticipated" profit All Star did not make was attributable to misconduct on the part of Ford or HALO—again, even when that was demonstrably not the case. For instance, she

claimed that All Star lost more than $35,000 in sales from clients that *remained All Star clients* in 2018 and 2019 and moved none of their business to HALO. *See* Exs.235 (D.97; App.189-92) & 237 (All Star App.376-80). To take one example, Mrs. Vogt claimed that All Star "lost" $26,563.67 in sales from Farmers in 2018 and the first quarter of 2019 even though All Star actually *made* $83,959.09 in sales to Farmers over that time, and HALO conversely made zero. *See* Exs.235 (D.97; App.189) & 237 (All Star App.376-80). Mrs. Vogt could make that claim only because her three-year averaging methodology enabled her to include one anomalously high sales year that skewed the average "anticipated" sales. Cerner is much the same: Mrs. Vogt claimed that All Star "lost" $23,353.95 in sales to Cerner on account of Ford's and HALO's actions even though All Star made $99,360.95 in sales to Cerner in 2018 and the first quarter of 2019, while HALO made zero. *Id.* Indeed, of the 20 clients as to whom All Star claimed to have lost "anticipated" profits, 15 remained clients of All Star and 13 did no business with HALO. *See* Exs.235 (D.97; App.189-92) & 237 (All Star App.376-80). And, of course, Beauty Brands did no business with either company after declaring bankruptcy—yet it nonetheless accounted for 13.5% of the "lost profits" Mrs. Vogt claimed across 2018 and early 2019. *Id.*

Casting even more doubt on her methodology, Mrs. Vogt did not use a legally acceptable calculation of "profit," as she concededly failed to subtract All Star's own costs from her measure of "profit[]." Tr.713:21-715:6. She failed to do so, moreover, even though Mr. Vogt testified that All Star *does* subtract those same costs when calculating how much "profit" a sales employee brought in for purposes of paying profit-sharing

bonuses, Tr.278:5-280:1. Even the trial court expressed frustration that it did not "fully understand exactly what is happening with these calculations." Tr.736:8-9.

Compounding All Star's problems, Mr. Vogt testified that he had no knowledge of even a single order that All Star was expecting but did not receive because of Ford's or HALO's actions. *See, e.g.*, Tr.160:14-17; 161:7-10; 162:5-163:16, 166:6-7. Further, with the exception of Beauty Brands, which had gone bankrupt, Mr. Vogt testified that *none* of the business relationships between All Star and the 20 identified clients was disrupted due to Ford's or HALO's alleged acts. Tr.172:14-21. Indeed, Mr. Vogt admitted that All Star has continuing business relationships with at least 18 of the remaining 19 clients, many of which placed substantial orders with All Star *after* Ford left—*e.g.*, 178 from Concorde Career College, 69 from Children's Mercy Hospital, 67 from Cerner, 16 from Sizewise, and 14 from Dairy Farmers. Tr.145:17-160:5, 197:19-23. And All Star conspicuously chose not to produce a single former or would-be client to testify about whether any conduct by Ford and/or HALO had any impact at all on its interest in purchasing branded promotional products from All Star.

Those evidentiary failings were not terribly surprising given All Star's strained theory of future lost profits. All Star alleged that Ford made copies of All Star's confidential information, including certain client files, client information, artwork, and designs, before leaving. But while All Star alleged that Ford did this at the direction of and for the benefit of HALO, it failed to prove that HALO solicited any such information from Ford, let alone that HALO ever used any such information. Tr.343:2-9. Moreover, HALO's witnesses testified that once its CEO learned of Ford's actions, he took swift

action to ensure that HALO would *not* benefit from any All Star material Ford may have taken. For example, while Ford initially provided HALO with the log-in, password, and invoice information for an All Star client's website store to process the diverted orders, once HALO learned that this website "was actually designed by All Star," it made clear that it was "not something that [Ford] would be able to transfer with the change to HALO." Ex.89 (App.184); Tr.335:14-336:13, 337:21-338:7; Exs.32 (App.172) & 87 (App.181).[2] All Star thus failed to prove that HALO even engaged in any unlawful conduct that could have caused All Star to lose profits.

Nonetheless, the trial court overruled HALO's objections to Mrs. Vogt's testimony on lost profits and to the admission of Exhibit 235 and instructed the jury—again, over HALO's objections—that it could award future damages. Tr.705:15-737:24, 890:4-24, 900:5-18. All Star proceeded to invite the jury to award whatever measure of damages it deemed "fair," focusing on amorphous notions of noneconomic damages like "shock and betrayal" and "loss of trust." For example, during closing arguments, All Star's counsel urged: "You have to figure out a fair dollar amount to compensate All Star for all of Doug Ford's breaches of loyalty and trust, and their continuing effects. I would suggest to you that $1,000,000 is not too much for the multiple, flagrant, unapologetic betrayals by a manager in whom All Star entrusted the company's well-being for 23 years.… You decide what is just and fair." Tr.916:17-25; *see also* Tr.919:24-920:2 ("What is a fair value for

[2] While Ford provided artwork relevant to certain clients, HALO understood that artwork to be "the property of the client," not All Star. Tr.367:17-25.

damage to All Star's 40-year reputation and its customer relationships? Are 500,000, are a million dollars enough to compensate All Star?").

The Verdicts

The jury returned verdicts for All Star on all counts. Initially, the jury returned with a verdict form that left all damages lines blank. Tr.979:7-982:13. After further instruction and additional deliberations, the jury filled in the damages numbers. Tr.982:16-984:23. On the civil conspiracy to commit breach-of-loyalty claim, the jury awarded $25,541.88 in actual damages—*i.e.*, the amount of lost profits HALO had agreed All Star suffered from the handful of diverted orders Ford processed through HALO before he left All Star. Tr.982:23-983:10. On the tortious-interference claim, the jury awarded $500,000—an award with no evident basis in anything but the seemingly random numbers All Star threw out during its closing argument. Tr.983:15-984:1. On top of that, the jury found HALO liable for punitive damages on both counts, Tr.983:10-13, 984:1-3, and, in the second stage of the bifurcated trial proceedings, awarded a staggering *$5.5 million* in punitive damages against HALO—an award more than 215 times greater than the $25,541.88 in damages actually proven, more than 49 times greater than All Star's own unreliable estimate of $111,106.07 in "anticipated lost profits," and more than 10 times greater than the compensatory damages award. Tr.1006:4-5.

Judgment and Appeal

The trial court entered judgment on the jury verdict on July 8, 2019. D.107 (App.92). Although HALO argued that the $500,000 award on the tortious-interference claim should be reduced because it impermissibly awarded duplicative recovery on the

$25,541.88 in lost-profits damages awarded on the civil conspiracy breach-of-loyalty claim, D.105 (App.76), All Star insisted that the $500,000 award did *not* include the $25,541.88, D.106 (App.82), and the trial court agreed. After additional post-trial briefing, the court amended the judgment to reduce the punitive damages award against HALO from $5.5 million to $2,627,709.40 (*i.e.*, five times the combined $525,541.88 in compensatory damages), in accordance with the statutory limit on punitive damages. Mo. Rev. Stat. §510.265 (capping punitive damages at the greater of $500,000 or "[f]ive times the net amount of the judgment awarded to the plaintiff against the defendant"). The court then entered an amended final judgment against HALO totaling $525,541.88 in compensatory damages and $2,627,709.40 in punitive damages. D.115, at p.4 (App.139); D.116 (App.141). Both parties timely appealed. D.117 (App.143); D.120 (App.148).

The court of appeals denied HALO's points of authority challenging the $500,000 award for tortious interference and granted All Star's points of authority challenging the trial court's decision to apply the statutory punitive damages limit. The court rejected HALO's argument that All Star's evidence of lost profits was unduly speculative, concluding that "[w]hether the methodology" Mrs. Vogt employed "was flawed went to its weight," not its admissibility or competence as proof of lost profits. *All Star Awards & Ad Specialties Inc. v. HALO Branded Sols., Inc.*, --- S.W.3d ----, 2021 WL 96073, at *7-11 (Mo. App. W.D. Jan. 12, 2021). And the court held that "the trial court erred in applying the statutory punitive-damages cap" because conspiracy to breach a duty of loyalty and tortious interference with business expectancy "are wrongs to the person or property for which money damages are claimed" and are loosely analogous to some common-law torts.

Id. at *4. The court remanded for the trial court to consider whether the reinstated $5.5 million punitive damages award violates due process and/or should be remitted under Mo. Rev. Stat. §537.068. *Id.* at *5, *11.

HALO moved for transfer in the court of appeals, which was denied on March 2, 2021. HALO then moved for transfer in this Court, which was granted on August 31, 2021.

POINTS RELIED ON

I. *Tortious Interference with Business Expectancy.* The trial court erred in denying HALO's motion for a directed verdict on the claim for tortious interference with business expectancy, in submitting to the jury the question of future damages on that claim, and in denying HALO's motions for judgment notwithstanding the verdict on the tortious-interference claim, because All Star failed to submit any legally sufficient evidence of damages, in that the only legally sufficient evidence of damages was the $25,541.88 in lost profits from a handful of one-time diverted orders, which All Star expressly conceded and the trial court held was not the basis for the jury's $500,000 award for tortious interference, leaving that award unsubstantiated by any competent evidence.

Mo. R. Civ. P. 72.01

Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.,
155 S.W.3d 50 (Mo. banc 2005)

Coonis v. Rogers,
429 S.W.2d 709 (Mo. 1968)

Ozark Emp't Specialists, Inc. v. Beeman,
80 S.W.3d 882 (Mo. App. W.D. 2002)

Gorman v. Wal-Mart Stores, Inc.,
19 S.W.3d 725 (Mo. App. W.D. 2000)

II. *Unreliable Evidence of Lost-Profit Damages.* The trial court erred in permitting All Star to introduce Exhibit 235 as evidence of All Star's lost profits and refusing to strike Mrs. Vogt's testimony regarding Exhibit 235 and lost profits, because that evidence and testimony was not admissible evidence of lost profits, in that Exhibit 235 was a made-for-litigation document containing a lay witness's calculations prepared

through an unreliable methodology, and Mrs. Vogt's testimony was not based on actual facts or data that supported a rational estimate of lost profits.

Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.,
155 S.W.3d 50 (Mo. banc 2005)

Coonis v. Rogers,
429 S.W.2d 709 (Mo. 1968)

Gorman v. Wal-Mart Stores, Inc.,
19 S.W.3d 725 (Mo. App. W.D. 2000)

Hobbs v. Harken,
969 S.W.2d 318 (Mo. App. W.D. 1998)

III. *Punitive Damages.* The trial court erred in denying HALO's motions for a directed verdict and judgment notwithstanding the verdict on punitive damages and in denying, in part, HALO's motion to reduce the $5.5 million punitive damages award, because All Star did not make a submissible case for punitive damages, and the punitive damages award is grossly and unconstitutionally excessive, in that punitive damages are an extraordinary and harsh remedy that should be applied only sparingly and in cases with the kind of outrageous conduct not present here, and are subject to due process constraints that were not satisfied here.

U.S. Const. amend. XIV, §1

Mo. Const. art. I, §10

Mo. Rev. Stat. §510.263.6

Mo. Rev. Stat. §510.265

Mo. Rev. Stat. §537.068

Mo. R. Civ. P. 72.01

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008)

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

BMW of N. Am., Inc. v. Gore,

517 U.S. 559 (1996)

Williams v. ConAgra Poultry Co.,
378 F.3d 790 (8th Cir. 2004)

ARGUMENT

I. *Tortious Interference with Business Expectancy.* The trial court erred in denying HALO's motion for a directed verdict on the claim for tortious interference with business expectancy, in submitting to the jury the question of future damages on that claim, and in denying HALO's motions for judgment notwithstanding the verdict on the tortious-interference claim, because All Star failed to submit any legally sufficient evidence of damages, in that the only legally sufficient evidence of damages was the $25,541.88 in lost profits from a handful of one-time diverted orders, which All Star expressly conceded and the trial court held was not the basis for the jury's $500,000 award for tortious interference, leaving that award unsubstantiated by any competent evidence.

Preservation

HALO moved for a directed verdict on All Star's claim for tortious interference with business expectancy and renewed its motion at the close of trial. Tr.798:6-815:16, 876:13-20. HALO also repeatedly objected to the introduction of alleged evidence and testimony of "future lost profits," Tr.708:22-710:5, 812:10-21, objected to the submissibility of future damages, including by objecting to jury instructions that instructed the jury to award future damages, D.101, at pp.15, 25 (App.52, 62); Tr.890:4-24, 900:5-18, and moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or for remittitur, D.112 (App.97); D.116 (App.141). After the trial court entered a final judgment, D.115 (App.136), HALO filed a timely notice of appeal, D.117 (App.143), and, ultimately, a timely application for transfer.

Standard of Review

When, as here, the "denial of a directed verdict or judgment notwithstanding the verdict is based upon a conclusion of law," this Court "review[s] the trial court's decision *de novo*." *Kelly v. State Farm Mut. Auto. Ins. Co.*, 218 S.W.3d 517, 520-21 (Mo. App. W.D. 2007). To present a submissible case, a plaintiff must offer "evidence to support every element necessary for liability." *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 798-99 (Mo. banc 2017). "Future damages may not be submitted if they are not supported by the evidence," *Fincher v. Murphy*, 825 S.W.2d 890, 894 (Mo. App. W.D. 1992), and "[i]nstructional error is reviewed de novo," *Howard v. City of Kan. City*, 332 S.W.3d 772, 789 (Mo. banc 2011).

Argument

"A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011). For a claim for tortious interference with business expectancy, a submissible case requires substantial evidence of damages. *See, e.g., Ozark Emp't Specialists, Inc. v. Beeman*, 80 S.W.3d 882, 893 (Mo. App. W.D. 2002) ("Tortious interference with a contract or business expectancy requires proof of five elements," including "damages."). That was no easy task here, as All Star sought to recover not just the readily ascertainable amount of profit that it lost on account of the 20 diverted orders (which it was separately awarded on its breach-of-duty-of-loyalty claim), but some additional, unquantifiable amount of damages for injury that it claimed to anticipate

suffering in the future on account of the harm that Ford and HALO allegedly did to its business as a general matter.

Unlike a plaintiff seeking to recover a sum certain for a breach of contract or other quantifiable event, a plaintiff whose recovery hinges on proving "the loss of expected profits flow[ing] from the destruction of or injury to a business" faces an uphill battle. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 195 (Mo. App. E.D. 2007). Indeed, under Missouri law, "[t]he general rule as to the recovery of anticipated profits of a commercial business is that they are too remote, speculative, and too dependent upon changing circumstances to warrant a judgment for their recovery." *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968). Those kinds of anticipated lost-profits damages "may be recovered only when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount." *Id.* Accordingly, "[i]n evaluating the sufficiency of evidence to sustain awards of damages for loss of business profits the appellate courts of this state have made stringent requirements, refusing to permit speculation as to probable or expected profits, and requiring a substantial basis for such awards." *Id.* at 713-14; *see also, e.g.*, *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. banc 2005). Unreliable evidence, such as a "mere estimate or opinion of loss of profits, unsupported by factual evidence," is "insufficient to support an award of lost profits." *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725, 735 (Mo. App. W.D. 2000).

Leading up to trial, All Star seemingly understood that exacting burden. All Star designated Freking, its "bookkeeper/accountant," as an expert witness to provide expert testimony on lost-profit damages. But the trial court granted HALO's pre-trial motion to

exclude his testimony after Freking provided no expert report or analysis and freely admitted that he lacked "sufficient professional competence" to prepare a lost-profits calculation. Suppl.Tr.7:15-18, 10:19-23; App.1-11. The trial court also sustained HALO's motion in limine to exclude the exhibit All Star had prepared to try to demonstrate lost profits. D.88 (App.12); Suppl.Tr.7:25-8:8.

While those pre-trial rulings *should* have foreclosed All Star from seeking "anticipated" future lost profits, and *should* have prevented the trial court from submitting the issue of future damages to the jury, the court instead allowed All Star to try to prove lost profits by introducing unreliable, speculative evidence through Mrs. Vogt, a lay witness who purported to identify $111,106.07 in "anticipated lost profits" All Star had suffered in 2018 on account of Ford's and HALO's actions—losses that she speculated All Star would continue to suffer for years to come. Ex.235 (D.97; App.190). That testimony and evidence should not have been admitted in the first place, *see infra* Part II, but in all events was legally insufficient to sustain the $500,000 compensatory damages award.[3]

Mrs. Vogt relied principally on Exhibit 235, a prepared-for-litigation document that used three-year historical purchasing "averages" from certain clients to estimate both past

[3] HALO does not dispute that All Star demonstrated $25,541.88 in lost profits from the 20 diverted orders. But All Star expressly disclaimed reliance on that evidence to sustain the tortious-interference award in its post-trial briefing, where it insisted (to avoid a duplicative recovery problem) that the $500,000 tortious-interference award was based *solely* on "the losses All Star *expected* to have going forward even after it fired Ford, not what it lost when the 20 sales were diverted." D.106, at p.5 (App.86). And the trial court agreed with All Star, concluding that the tortious-interference award need not be reduced by the $25,541.88 that was awarded on the breach-of-loyalty claim (which HALO does not challenge here) because there was no duplicative recovery. Accordingly, as this case comes to this Court, the tortious-interference award may be not be sustained based on that evidence.

and "anticipated" profits in 2018 and the first quarter of 2019. Ex.235 (D.97; App.190-192); Tr.711:12-712:17. At the top of Exhibit 235, Mrs. Vogt included an estimate of All Star's "anticipated lost profits" for 2018 and the first quarter of 2019 totaling $111,106.07, Ex.235 (D.97; App.190)—a figure that she admitted included the undisputed $25,541.88 in *already*-lost profits from the 20 diverted orders, Tr.759:10-24. Mrs. Vogt proceeded to explain that she predicted All Star's "anticipated" business in 2018 and 2019 with those 20 clients by calculating the average profit All Star made from each one over the past three years. But her own figures showed that most of those clients had no consistent purchasing pattern, rendering those "averages" patently unreliable predictors of future business. To take a handful of examples:

- She claimed $7,068.75 in anticipated sales to KMBCTV even though All Star had made only $115 in sales to KMBCTV in 2017 and only $2,525 in 2015. Ex.235 (D.97; App.192).
- She claimed $12,400.52 in anticipated sales to Sprint even though All Star had made less than $1,000 in sales to Sprint in two of the three preceding years. *Id.*
- She claimed $1,308.54 in anticipated sales to Honeywell, a customer that had placed only a single order with All Star over the preceding three years. *Id.* (D.97; App.191); Tr.778:24-780:23.
- She claimed $1,255 and $169.08 in anticipated sales to Wachter Corp. and Olathe Ford, respectively, even though both had placed no sales with All Star in two of the preceding three years. Ex.235 (D.97; App.191-92).
- She claimed $1,443.75 in anticipated sales to GBA Architects & Engineers even though GBA was a new client that had placed only $1,155.00 in sales with All Star in 2017. *Id.* (D.97; App.191).

Mrs. Vogt also claimed that All Star lost substantial sales to HALO from clients who not only did *no* sales with HALO in the 15 months following Ford's departure, but

continued to do significant sales with *All Star*. For example, she claimed that All Star lost $26,563.67 in sales from Farmers to HALO in 2018 and the first quarter of 2019 even though All Star made $83,959.09 in sales to Farmers during that period (while HALO conversely made zero), and that All Star lost $23,353.96 in sales from Cerner to HALO during that same period even though All Start made $99,360.95 in sales to Cerner (while HALO, again, made zero). *Id.* (D.97; App.190); Ex.237 (All Star App.376-80). She even claimed that HALO was somehow responsible for $28,390.82 in lost "anticipated" sales to Beauty Brands, a company that filed for bankruptcy and (unsurprisingly) ceased purchasing promotional products from either party. Ex.235 (D.97; App.190); Tr.172:14-21. And on top of all that, she concededly made no effort to subtract All Star's own costs from her measure of "profit[]" when estimating damages, Tr.713:21-715:6, even though the company routinely subtracted those costs when calculating profits for its own internal purposes, *see* Tr.278:5-280:1.

Compounding these methodological problems, not only did All Star fail to present a single client witness to testify that Ford's and/or HALO's conduct impacted its purchasing decisions, but All Star's own witnesses testified that they were not aware of *any* business beyond the 20 diverted orders that All Star lost because of HALO's or Ford's actions. *See, e.g.*, Tr.160:14-17; 161:7-10; 162:5-163:16, 166:6-7. Indeed, the only client Mr. Vogt could identify as to whom All Star's business relationship had been "disrupted" was Beauty Brands, which filed for bankruptcy. Tr.172:14-21. He readily admitted that All Star maintained continuing business relationships with at least 18 of the remaining 19

clients, many of which placed several orders with All Star *after* Ford left. Tr.145:17-160:5, 197:19-23.

Lacking any competent proof of damages beyond the $25,541.88 in profit from the diverted orders, All Star repeatedly urged the jury to award damages divorced from actual evidence, inviting it to award All Star a "fair" amount based on amorphous concepts like the "shock and betrayal" and "loss of trust" All Star suffered on account of Ford's actions. *See, e.g.*, Tr.915:14-20 ("Betrayal of loyalties is so impactful to people. It is what literature and movies are full of, from Shakespeare, to Star Wars…. That shock and disbelief…. It's devastating, after 23 years of friendship and trust."). Indeed, All Star essentially urged the jury to just pluck a damages measure out of thin air, throwing out options that varied by as much as 100%. Tr.919:24-920:2 ("What is a fair value for damage to All Star's 40-year reputation and its customer relationships? Are 500,000, are a million dollars enough to compensate All Star?").

All of that is legally insufficient to sustain a lost profits claim. To be sure, damages are a question on which the jury has considerable discretion. But it is black-letter law that the plaintiff has "the burden of proving the existence and amount of damages with reasonable certainty." *The Manors at Vill. Green Condo., Inc. v. Webb*, 341 S.W.3d 162, 164 (Mo. App. E.D. 2011). Moreover, a corporation may recover only economic losses, not noneconomic losses like the pain, suffering, or emotional distress of "shock and betrayal." *See, e.g.*, *Ameristar*, 155 S.W.3d at 54. Even as to less readily quantifiable concepts like reputational harms or loss of goodwill, a plaintiff may not simply ask the jury to award whatever it thinks is "fair," but rather must "*quantify* and … bolster its claim of

actual reputational harm" by "adduc[ing] *substantial and competent evidence* pertaining to its pecuniary losses." *The Fireworks Restoration Co., LLC v. Hosto*, 371 S.W.3d 83, 90 (Mo. App. E.D. 2012) (emphases added). "[T]he evidence proffered to establish [such] actual damages may not be too speculative and must be founded upon more than the plaintiff's embarrassment or perception of their own reputation." *Id.* at 87.

Yet speculation is all that All Star offered here. Indeed, setting aside the $25,541.88—which All Star itself insisted was not included in the jury's $500,000 award—All Star's damages case boils down to legally unreliable testimony based on a flawed methodology divorced from the reality of All Star's business.[4] All Star failed to introduce any evidence of any *actual* loss in sales or profits; its own CEO testified that the only business it lost was from a client who went bankrupt; and its own counsel could not quantify damages beyond throwing out purportedly "fair" estimates varying anywhere from $500,000 to $1 million. That is exactly the kind of "mere estimate or opinion of loss of profits, unsupported by factual evidence," that is "insufficient to support an award of lost profits." *Gorman*, 19 S.W.3d at 735.

Notwithstanding these failings, the trial court overruled HALO's objections to Mrs. Vogt's testimony and instructed the jury, over HALO's objection, to compensate All Star "for any damages you believe All Star sustained and is reasonably certain to sustain *in the future* as a direct result of the occurrence mentioned in the evidence." D.101, at pp.15, 25

[4] In attempting to defend that award, All Star has emphasized Ford's self-appraised valuation of his "book of business" at $450,000, which he provided to HALO in his unsolicited job inquiry. Tr.480:25-481:3; Ex.30 (App.171). But that was Ford's estimate of his potential *sales*, not of the *profits* (let alone *net* profits) he could bring to HALO.

(App.52, 62) (emphasis added). That was error, as "[f]uture damages may not be submitted if they are not supported by the evidence." *Fincher*, 825 S.W.2d at 894. That error left the jury acting as a "roving commission," empowered "to roam freely the evidence and choose any facts which suit[] its fancy or its perception of logic to impose liability." *Scanwell Freight Express v. Chan*, 162 S.W.3d 477, 482 (Mo. banc 2005). And that is just what the jury did, returning a $500,000 award that is untethered from any concrete (let alone reliable) evidence. Accordingly, the trial court erred by submitting future damages to the jury over HALO's objection, D.101, at pp.15, 25 (App.52, 62); Tr.890:4-24, 900:5-18, and by denying HALO's motions for directed verdict and judgment notwithstanding the verdict on All Star's tortious-interference claim, Tr.798:6-815:16, 876:13-20; D.112 (App.97); D.116 (App.141). The Court should grant HALO judgment as a matter of law on All Star's tortious-interference claim, or at a minimum remand for a new trial at which anticipated lost profits cannot be submitted to the jury unless All Star presents competent evidence to support them.

II. *Unreliable Evidence of Lost-Profit Damages.* The trial court erred in permitting All Star to introduce Exhibit 235 as evidence of All Star's lost profits and refusing to strike Mrs. Vogt's testimony regarding Exhibit 235 and lost profits, because that evidence and testimony was not admissible evidence of lost profits, in that Exhibit 235 was a made-for-litigation document containing a lay witness's calculations prepared through an unreliable methodology, and Mrs. Vogt's testimony was not based on actual facts or data that supported a rational estimate of lost profits.

Preservation

HALO repeatedly objected to the introduction of Exhibit 235 at trial, *see, e.g.*, Tr.705:24-706:17, specifically noted that it would be "reversible" error for the trial court to let in that unreliable evidence of "future lost profits," Tr.709:20-710:15, moved to strike

Mrs. Vogt's testimony related to Exhibit 235, Tr.736:2-737:24, and moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or for remittitur, D.112 (App.97); D.116 (App.141). After the trial court entered a final judgment, D.115 (App.136), HALO filed a timely notice of appeal, D.117 (App.143), and, ultimately, a timely application for transfer.

Standard of Review

The "standard of review for the admissibility of evidence is whether an abuse of discretion results in substantial and obvious injustice," and "[a] stricter level of proof is required for lost profits." *Gorman*, 19 S.W.3d at 734.

Argument

While All Star's lost-profits evidence was insufficient to sustain the submissibility of future profits or the jury's award, at the very least the trial court erred by allowing All Star to introduce Exhibit 235 and Mrs. Vogt's testimony relating to it. Because lost profits "may be recovered only when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount," *Coonis*, 429 S.W.2d at 714, Missouri courts carefully police even expert economists to ensure that their testimony provides "more than a showing of contingent or speculative occurrences, possible or even probable developments, or conjecture, likelihood and probability," *Hobbs*, 969 S.W.2d at 323. Exacting scrutiny was required *a fortiori* of the testimony of Mrs. Vogt, a lay witness who does not hold any type of accounting degree, is not an expert on lost-profit damages, and freely conceded that she has no experience or training in calculating lost profits. Tr.791:12-792:6. And exacting scrutiny should have foreclosed Mrs. Vogt's testimony

and the evidence on which she based it, as both consisted almost exclusively of precisely the kind of unfounded conjecture that cannot suffice to demonstrate lost profits.

The key document on which Mrs. Vogt relied, Exhibit 235, not only employed a patently unreliable methodology of calculating "anticipated lost profits," *see supra* Part I, but contained opinions based on out-of-court statements to which no hearsay exception applies, *see, e.g.*, *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981), for a self-serving document prepared solely for litigation lacks the required indicia of reliability to be admissible. *See In re Estate of White*, 665 S.W.2d 67, 69 (Mo. App. S.D. 1984); *Koenig v. Babka*, 682 S.W.2d 96, 100 (Mo. App. E.D. 1984); Mo. Rev. Stat. §490.680. Yet the trial court not only overruled HALO's repeated objections to Exhibit 235, *see* Tr.705:24-706:1, Tr.709:20-710:15, but permitted Mrs. Vogt to use Exhibit 235 to provide legally unreliable lay-witness testimony (again over HALO's objection, Tr.734:7-739:24) regarding All Star's alleged "anticipated" lost profits.

These rulings were plainly erroneous, and they were just as plainly prejudicial. As explained, *supra* Part I, Mrs. Vogt's testimony and Exhibit 235 were the only things even approaching concrete evidence that All Star provided to try to support its lost-profit claim. Given this void, there can be no doubt that the jury's $500,000 award is the result of misplaced reliance on Mrs. Vogt's testimony and Exhibit 235. Indeed, if it were not, then there would be nothing left in the record that could even purport to sustain that figure since the only other evidence of damages was the $25,541.88 in *past* lost profits that All Star successfully persuaded the trial court were not included in the $500,000 award.

Accordingly, at a minimum, HALO is entitled to a new trial at which All Star is prohibited from introducing inherently unreliable evidence of anticipated lost profits.

III. *Punitive Damages.* The trial court erred in denying HALO's motions for a directed verdict and judgment notwithstanding the verdict on punitive damages and in denying, in part, HALO's motion to reduce the $5.5 million punitive damages award, because All Star did not make a submissible case for punitive damages, and the punitive damages award is grossly and unconstitutionally excessive, in that punitive damages are an extraordinary and harsh remedy that should be applied only sparingly and in cases with the kind of outrageous conduct not present here, and are subject to due process constraints that were not satisfied here.

Preservation

HALO moved for a directed verdict on punitive damages, Tr.802:2-17, 815:16-22, and also moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or for remittitur and to reduce the punitive damages award, D.112 (App.97); D.116 (App.141). The trial court granted that motion in part, reducing the award of punitive damages against HALO from $5.5 million to $2,627,709.40 (*i.e.*, five times the total $525,541.88 compensatory damages award), in accordance with Mo. Rev. Stat. §510.265, D.116 (App.141), and entered final judgment, D.115 (App.136). HALO filed a timely notice of appeal, D.117 (App.143), and, ultimately, a timely application for transfer.

Standard of Review

Denial of a motion for a directed verdict "based upon a conclusion of law" is reviewed de novo. *Kelly*, 218 S.W.3d at 520-21. While denial of a motion for remittitur is reviewed for abuse of discretion, *Poage v. Crane Co.*, 523 S.W.3d 496, 522 (Mo. App. E.D. 2017), whether the evidence was sufficient to support punitive damages is a question of law reviewed de novo, *Peters v. Gen. Motors Corp.*, 200 S.W.3d 1, 24 (Mo. App. W.D.

2006). Whether the amount of punitive damages is excessive or violates due process under the Fourteenth Amendment and the Missouri equivalent is also a question of law reviewed de novo. *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. banc 2014).

Argument

Punitive damages "are an extraordinary and harsh remedy and should be applied only sparingly." *Romeo v. Jones*, 144 S.W.3d 324, 334 (Mo. App. E.D. 2004). In addition, punitive damages "are subject to the limitations of the Due Process Clause of the Fourteenth Amendment, which 'prohibits the imposition of grossly excessive or arbitrary punishments.'" *Mignone v. Mo. Dep't of Corrs.*, 546 S.W.3d 23, 43 (Mo. App. W.D. 2018) (quoting *Lewellen*, 441 S.W.3d at 145); *see also* U.S. Const. amend. XIV, §1; Mo. Const. art. I, §10. Grossly excessive punitive damages awards violate a defendant's due process rights because such an award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Accordingly, courts not only must ensure that the evidence is sufficient to sustain this harsh measure, but have "a *mandatory* duty to reduce a verdict if it is unconstitutional and violates a defendant's due process." *Poage*, 523 S.W.3d at 525. Missouri courts must also review a punitive damages award "to determine the proper relationship between the degree of malice proved and the punitive damage award"—*i.e.*, whether the award is "so out of all proper proportion to the factors involved as to reveal improper motives or a clear absence of the honest exercise of judgment." *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. App. W.D. 1991).

HALO challenged both the submissibility of punitive damages and the size of the jury's award. Tr.802:2-17, 815:16-22; D.112 (App.97). The trial court denied the motions for directed verdict and judgment notwithstanding the verdict, Tr.815:16-22, and granted HALO's motion for remittitur only in part, reducing the jury's $5.5 million punitive damages award to $2,627,709.40 in accordance with Mo. Rev. Stat. §510.265, D.116 (App.141). That half-measure was correct, but it did not solve the problems that All Star failed to make a submissible punitive damages case and that even the reduced punitive damages award remains excessive.

A. All Star failed to elicit clear and convincing proof that HALO's conduct warranted punitive damages.

To make a submissible case for punitive damages, a plaintiff must "establish[] with convincing clarity that the defendant's conduct was outrageous because of evil motive or reckless indifference." *Drury v. Mo. Youth Soccer Ass'n*, 259 S.W.3d 558, 573-74 (Mo. App. E.D. 2008); *see also, e.g.*, MAI 10.01. "[C]onvincing clarity" means that evil motive or reckless indifference must be "highly probable." *Williams v. Trans. States Airlines, Inc.*, 281 S.W.3d 854, 870 (Mo. App. E.D. 2009), *overruled on other grounds by Wilson v. City of Kan. City*, 598 S.W.3d 888 (Mo. banc 2020). All Star did not make that showing here.

The evidence showed that HALO did not know the extent of Ford's misconduct, agreed to process the 20 diverted orders based on a misunderstanding of All Star's ability to fulfill them, and acted to rectify the problem immediately. One day after receiving All Star's letter, HALO's CEO contacted All Star to determine how HALO could remedy the situation and offered to remit its profits from the diverted orders. *See* Ex.275 at 60:6-63:9

(All Star App.442-45). HALO also restricted Ford's sales activities and promptly "made clear to [Ford]" that neither he nor any other HALO account executive could use any "confidential and proprietary lists of customers that are owned by another company to solicit for business," that HALO would not "accept orders from customers [Ford] solicited using his prior employer's property," and that HALO would not permit Ford to "use any information that was mis[]begotten." Ex.94 (App.185, 187). That is patently insufficient to justify punitive damages.

White v. James, 848 S.W.2d 577 (Mo. App. S.D. 1993), is instructive. There, the court held that no "outrageous conduct occurred" when the evidence showed that the defendant stopped the offending conduct as soon as the plaintiff complained and offered a "substantial sum" to compensate the plaintiff—facts that "show[ed] an attempt to pacify, not outrage, Plaintiff." *Id.* at 580-81. Just as in *White*, the evidence showed that HALO attempted to pacify All Star as soon as its CEO learned of the misconduct. Tr.412:15-414:12. As a matter of law, that evidence cannot sustain a finding that HALO's conduct was so "outrageous" as to sustain punitive damages.

B. The punitive damages award is excessive.

Even if punitive damages had been submissible, the more than *$2.6 million* in punitive damages that the trial court sustained is radically out of proportion to the relevant factors. The jury's $5.5 million award was more than 215 times greater than the $25,541.88 in proven damages, more than 49 times greater than All Star's (unreliable) estimate of $111,106.07 in "anticipated lost profits," and more than 10 times greater than the jury's total compensatory damages award. Even reduced to $2,627,709.40, the award is still more

than 102 times greater than All Star's identified damages, more than 23 times greater than All Star's estimated lost profits, and five times greater than the total compensatory damages award—the absolute maximum permitted under Mo. Rev. Stat. §510.265. This case does not support such a lopsided ratio.

In determining whether an award is so "grossly excessive" as to violate due process, courts consider: "(1) the degree of reprehensibility of the conduct at issue; (2) the ratio of actual harm to punitive damages; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases." *Diaz v. AutoZoners, LLC*, 484 S.W.3d 64, 90 (Mo. App. W.D. 2015) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). The degree of reprehensibility is the most important factor. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 410 (Mo. App. E.D. 2014). In assessing reprehensibility, courts consider 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." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 373 (Mo. banc 2012) (quoting *State Farm*, 538 U.S. at 419). Application of these factors demonstrates that this award is grossly excessive, arbitrary, and unconstitutional.

First, "none of the aggravating factors associated with particularly reprehensible conduct is present." *BMW*, 517 U.S. at 576. Just as in *BMW*, any harm HALO inflicted "was purely economic in nature." *Id.* Processing orders while Ford was still employed by

All Star did not cause any physical injury or endanger anyone's health or safety. Nor does this case involve outrageous conduct directed toward a "financially vulnerable" target, like "tricking the elderly out of their life savings." *Id.* at 576, 589. This was simply a small-dollar financial dispute between two long-time business competitors. While All Star now maintains that it was "financially vulnerable" and "a prime target for HALO's tortious conduct," All Star Br.32-33, its own witnesses testified emphatically that All Star was "financially stable" at all relevant times, *see* Tr.76:20-77:4, 742:10-11. And All Star provided *zero* evidence that HALO "targeted" All Star; to the contrary, the undisputed record evidence demonstrates that *Ford* initiated contact with HALO through an unsolicited recruiting inquiry. Tr.322:1-10, 476:7-18, 554:15-19; Ex.30 (App.171).

Further, this dispute involves "an individual instance of malfeasance," not a "recidivist" who engaged in "repeated misconduct" of the same nature. *BMW*, 517 U.S. at 577. There is no allegation that HALO has ever engaged in the same conduct with respect any other former All Star employee (or, for that matter, any former employee of any other competitor). And while All Star tries to stretch HALO's alleged misconduct "over several weeks and months," All Star Br.33, it tellingly cites almost exclusively examples of *Ford's* conduct ("*Ford* copied (and still has) hundreds of pages of artwork and customer files from All Star," "*Ford* 'planted seeds' with key clients and had taken 'key proprietary information' to use to take business in the future," "*Ford* possesses tools and information that will allow HALO to pursue All Star customers" (emphases added)).[5] More to the

[5] All Star also claims that "HALO's CEO still permits sales to All Star customers … even though the customer information being used was 'misbegotten.'" All Star Br.33-34; *see*

point, the relevant question is not whether a single pattern of alleged misconduct involved multiple acts, but whether the pattern was repeated as to multiple victims. *See Estate of Overbey*, 361 S.W.3d at 373-74.

Nor did this case involve any deceit or trickery on HALO's part. To the contrary, the evidence reflected that HALO believed that Ford was sending orders to HALO because All Star did not have the financial capability to process them. *See* Tr.403:2-404:20. And far from did refusing to "express remorse" or offer to "make [its] victims whole," *Estate of Overbey*, 361 S.W.3d at 374, HALO's CEO acknowledged and tried to rectify the misconduct as soon as he learned of it. *See supra* pp.17-18, 41-42. HALO took responsibility for its actions by offering to return the $25,541.88 in profit, and by taking immediate steps to ensure that Ford would not use any of All Star's confidential information or materials going forward. And at trial, HALO expressed regret for how it handled the situation. *See, e.g.*, Tr.359:8-21, 390:18-391:1, 404:9-20. Simply put, this case does not involve anything like the kind of conduct the U.S. Supreme Court and the Missouri courts have identified as necessary to sustain a punitive damages award of this magnitude.

Second, the ratio of actual harm to punitive damages is grossly inflated. While All Star blithely asserts that "a punitive damages ratio of roughly 10:1 … raises no serious due

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also id. at 34 (alleging that HALO "allow[ed] Ford to continue working with All Star customers"). But that speculation is directly refuted by the repeated testimony from HALO's witnesses that neither Ford nor anyone else may "use any information that was mis[]begotten" to solicit business. Ex.94 (App.185-187).

process concerns," All Star Br.36, the U.S. Supreme Court begs to differ: The Court has admonished that "a single-digit maximum is appropriate in all but the most exceptional of cases, and '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008) (quoting *State Farm*, 538 U.S. at 425); *see also, e.g., Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (remitting punitive damages award to 1:1 ratio because $600,000 "is a lot of money," and that "large compensatory award … militates against departing from the heartland of permissible exemplary damages"). Indeed, even a 1:1 ratio can be constitutionally excessive. *See Exxon Shipping*, 554 U.S. at 513 (imposing 0.65:1 ratio in maritime law case involving substantial compensatory award); *State Farm*, 538 U.S. at 426 (holding $1 million award for year-and-a-half of emotional distress "substantial" and "complete compensation" where "harm arose from a transaction in the economic realm, not from some physical assault or trauma"). Missouri courts (as they must) likewise have reiterated that a punitive damages award beyond a 1:1 or single-digit ratio is the *exception*, not the norm. *See, e.g.*, *Estate of Overbey*, 361 S.W.3d at 374 (acknowledging "the usual single-digit ratio" from *State Farm* and *BMW*, and collecting exceptional cases with lopsided ratios "when the actual damage award was small and the conduct was egregious"); *Mignone*, 546 S.W.3d at 44-45 (noting that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process").

Even as partially reduced, the $2,627,709.40 punitive damages award here is more than 102 times greater than the $25,541.88 in proven damages, more than 23 times greater

than All Star's own inflated estimate of its anticipated lost profits, and five times greater than the total compensatory damages awarded. The $25,541.88 in proven damages is the proper benchmark to use because the ratio must start with the *actual harm* proven, not an inflated compensatory damages award that has no grounding in any actual evidence. *See, e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1067 (10th Cir. 2016) ("The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." (quoting *BMW*, 517 U.S. at 580)). But even assuming the jury's $500,000 award for the tortious-interference claim were sustainable (and it is not, *see supra* Parts I & II), that substantial award unquestionably would put All Star's total compensatory award at the most aggressive end of what the evidence could possibly sustain, and thus necessitate a ratio of (at most) 1:1. In all events, even in cases that do not involve substantial compensatory awards, the Supreme Court has repeatedly noted that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425. No matter the benchmark used, the punitive damages award in this case—even as reduced to $2,627,709.40—plainly crosses that line.

Third, the difference between the punitive damages awards and civil penalties in comparable cases weighs against sustaining the award. There are no civil penalties authorized in comparable cases, and there are no analogous cases with comparable punitive damages awards. Indeed, All Star identifies no tortious-interference case affirming a punitive damages ratio as extreme as this one. The best it can muster are two cases that

predate *Gore* and *State Farm* by more than a decade and a lone 2005 decision from the Missouri Court of Appeals, Southern District that it misdescribes.

All Star claims that *Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc.*, 178 S.W.3d 691 (Mo. App. S.D. 2005), sustained "a 20:1 imposition of punitive damages in a tortious interference case," All Star Br.38, but that is incorrect. There, the jury issued *two* compensatory awards totaling $127,546.25 and a $500,000 in punitive damages, producing a ratio that the court expressly characterized as "less than 4:1," not 20:1. *Env't Energy Partners*, 178 S.W.3d at 701. All Star's account of *Rusk Farms, Inc. v. Ralston Purina Co.*, 689 S.W.2d 671 (Mo. App. E.D. 1985), is equally misleading. All Star claims that this pre-*Gore* case affirmed a $200,000 punitive damages award "despite reducing the actual damage award from $20,000 to $1." All Star Br.38. In fact, the court affirmed the $200,000 award as to a plaintiff to whom the jury had awarded *$500,000* in compensatory damages—an award the court did not disturb. 689 S.W.2d at 676, 683. The court reversed in part as to a *different* plaintiff to whom the jury had awarded $25,000 in compensatory damages and $50,000 in punitive damages, awarding him $1 nominal damages and leaving the $50,000 punitive damages award intact. *Id.* The *total* ratio of damages assessed against the defendant was therefore $250,000 in punitive damages, as compared with $500,001 in compensatory damages, for an unremarkable ratio of approximately 1:2.

All Star fares marginally better as to its third case, *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135 (8th Cir. 1986), insofar as that one at least did "affirm[] a punitive damages award of $250,000 based on tortious interference with business

relationship, where the actual damage was nominal." All Star Br.38 (citing *Am. Bus.*, 798 F.2d at 1147). But All Star neglects to mention that the defendant had not challenged the award on due process grounds (likely because the case pre-dated *Gore* by a decade), so the case was resolved based primarily on the Eighth Circuit's perception "of the considerable deference Missouri courts give punitive damage awards" in the much lower range of $20,000 to $200,000 under traditional remittitur principles. *Am. Bus.*, 798 F.2d at 1147. All Star thus fails to identify any remotely comparable case affirming a ratio like this one.

That is likely because both U.S. Supreme Court and Missouri case law overwhelmingly suggests that punitive damages beyond a 1:1 or single-digit ratio are appropriate only in cases involving egregious harm to an individual, not in cases involving purely financial harm to a company like All Star. *See Estate of Overbey*, 361 S.W.3d at 374 (collecting cases with lopsided ratios "when the actual damage award was small and the conduct was egregious"); *Mignone*, 546 S.W.3d at 45 (collecting Missouri Human Rights Act cases with "high[] ratios between the actual and punitive damage[s] awards"). Thus, even assuming punitive damages were submissible, all three factors confirm that the punitive damages award is grossly excessive and violates HALO's due process rights.

RESPONSE TO ALL STAR'S POINTS RELIED ON

Not content with recovering more than $3 million on a $25,000 claim, All Star maintains that it is entitled to the jury's *$5.5* million punitive damages award—an award more than 215 times greater than All Star's proven damages of $25,541.88, more than 49 times greater than All Star's estimated $111,106.07 in lost "anticipated" profits, and more than 10 times greater than the jury's total compensatory damages of $525,541.88. Despite

these remarkable double- or triple-digit lopsided ratios—ratios that the U.S. Supreme Court has held are inappropriate "in all but the most exceptional of cases," *Exxon Shipping*, 554 U.S. at 514-15—All Star maintains that this Court should reverse the trial court's application of Missouri's statutory punitive damages cap to reduce the award to a still-staggering $2,627,709.40. That course has nothing to recommend it, and indeed would only exacerbate the due process problems.

I. *Response to All Star's Points Relied On Nos. 1 and 2.* The trial court correctly applied Missouri's statutory punitive damages cap to the punitive damages award because the relevant causes of action, tortious interference with business expectancy and civil conspiracy to breach a duty of loyalty, did not exist at common law before 1820 and therefore can constitutionally be subject to the statutory cap.

Missouri limits punitive damages to the greater of $500,000 or "[f]ive times the net amount of the judgment awarded to the plaintiff against the defendant." Mo. Rev. Stat. §510.265. The trial court correctly applied that statutory limit to reduce the jury's $5.5 million punitive damages award to $2,627,709.40, which is five times $525,541.88, the net amount of compensatory damages awarded to All Star. D.116 (App.141-42); *see also* D.115 (App.136). That conclusion is entirely consistent with the constitutional right to trial by jury and this Court's cases interpreting it. All Star's contrary arguments cannot be reconciled with those cases and would effectively nullify statutory damages limits virtually across the board.

1. For decades, this Court held that statutory limits on noneconomic and punitive damages do not violate the constitutional right to a jury trial. *See Adams by and through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992). As *Adams* explained, "[a] jury's primary function is fact-finding," which "includes a determination of a

plaintiff's damages." *Id.* at 907. A statutory limit on damages does not disturb that function, as "the permissible remedy is a matter of law, not fact, and not within the purview of the jury." *Id.* Moreover, "[i]f the legislature has the constitutional power to create and abolish causes of action," which it unquestionably does, then "the legislature also has the power to limit recovery in those causes of action." *Id.* The Court accordingly concluded that statutory caps do not interfere with the constitutional right to trial by jury—a view shared by the vast majority of courts to consider the issue. *See Siebert v. Okun*, 485 P.3d 1265, 1277 n.3 (N.M. 2021) ("Of the thirty jurisdictions to consider whether a statutory cap on damages violates the constitutional right to trial by jury, twenty-four have upheld such caps, reasoning that a statutory limit on recovery is a matter of law within the purview of the state legislature."); Michael S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. Chi. L. Rev. 469, 469 (1999) ("Federal courts and most state courts have ruled that statutory caps do not violate the constitutional right to a jury trial in civil cases.").

In 2012, however, a bare majority of this Court reversed course, overruling *Adams* "to the extent that it holds that the section 538.210 caps on noneconomic damages do not violate the right to trial." *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 646 (Mo. banc 2012). And two years later, the Court invoked *Watts* to hold the statutory limit on punitive damages unconstitutional as applied to a common-law fraud claim. *See Lewellen*, 441 S.W.3d at 143. In doing so, however, the Court declined to read *Watts* as rendering statutory limits on damages unconstitutional across the board. The Court instead concluded that such limits are unconstitutional only as applied to a cause of action for which "there

existed a right to a jury determination of the amount of punitive damages" when the Missouri Constitution was adopted "in 1820." *Id.*

Applying that test to the case at hand, the Court did not ask whether fraud is a "civil action[] for damages involving a fact issue that would have been determined without limitation by a jury in 1820." All Star Br.21. Nor did the Court hold that §510.265 is unconstitutional as applied to any case in which damages are sought (which would be every case to which it could apply) because damages are "a fact issue." *Id.* Instead, the Court focused on whether "[*a*]*ctions for fraud* in which only damages were sought were tried by juries in 1820." *Lewellen*, 441 S.W.3d at 143 (emphasis added); *see also, e.g.*, *id.* at 145 (asking whether "a party seeking punitive damages for fraud in 1820 would have had the right to have a jury try the issue of punitive damages"). And the Court concluded that "[b]ecause a party seeking punitive damages *for fraud* in 1820 would have had the right to have a jury try the issue of punitive damages, the statutory reduction of Ms. Lewellen's punitive damages award against Mr. Franklin pursuant to section 510.265 was unconstitutional." *Id.* (emphasis added).

The Court returned to the constitutionality of statutory limits on damages once again in *Dodson v. Ferrara*, which concerned application of the noneconomic cap to statutory wrongful-death claims. 491 S.W.3d 542 (Mo. banc 2016). While the Court had held such limits constitutional as applied to such claims in a decision issued shortly before *Watts*, *see Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012), the plaintiff argued that *Watts* had implicitly overruled *Sanders* and rendered statutory limits unconstitutional as applied to *all* civil actions seeking damages for personal injuries. The Court disagreed, explaining

that *Watts* only "applies to 'cause[s] of action to which the right to jury trial attaches at common law.'" *Dodson*, 491 S.W.3d at 555 (quoting *Watts*, 376 S.W.3d at 640). And the Court rejected the plaintiff's effort to analogize wrongful-death claims to common-law claims under which a parent could seek money damages for the loss of the services of a child whose death was wrongfully caused. *Id.* at 555-56. As the Court explained, a wrongful-death claim and a common-law "loss of services" claim based on a wrongful death "may both be civil actions for monetary damages" arising out of a wrongful death, "but they arise from completely different principles of law." *Id.* at 556-57. The Court accordingly found the analogy too strained to support an argument that wrongful-death claims qualify as common-law claims that were tried to a jury in 1820. *Id.*

The Court recently rejected a similarly broad reading of *Watts* yet again in *Ordinola v. University Physician Associates*, 625 S.W.3d 445 (Mo. banc 2021). There, the plaintiff argued that applying the cap to her statutory medical negligence claim would violate her jury trial right because medical negligence actions were triable to juries at common law in 1820. This Court rejected that argument. Although the Court agreed that "[i]t is well-established that medical negligence actions were recognized at common law," it emphasized that it is also "undisputed that the General Assembly possesses the authority to abolish common law causes of action." *Id.* at 449-50. That power, in turn, includes the power to replace common-law claims with statutory claims subject to limitations on what measure of damages can be recovered. *Id.* Because the legislature had taken that step for medical negligence actions, *see* Mo. Rev. Stat. §538.210, the Court concluded that "*Sanders* controls," not *Watts*. *Ordinola*, 625 S.W.3d at 449.

Taken together, these cases illustrate that the legislature still retains broad authority to impose reasonable limits on punitive and noneconomic damages under *Watts* and *Lewellen*. Only when the legislature intrudes on common-law actions that were triable to a jury at common law in 1820 and are still-extant today does it overstep the bounds of the Missouri Constitution as interpreted by those cases.

2. Applying that rule here, §510.265 may constitutionally be applied to both of All Star's claims because neither tortious interference with business expectancy nor conspiracy to breach a duty of loyalty is a cause of action for which "there existed a right to a jury determination of the amount of punitive damages … in 1820." *Lewellen*, 441 S.W.3d at 143. In fact, neither is a cause of action that existed in 1820 at all, and the Missouri courts did not recognize either until more than a century later.

Starting with tortious interference with business expectancy, no common-law court—in Missouri or otherwise—recognized such a claim in 1820. As this Court explained in *Downey v. United Weatherproofing, Inc.*, 253 S.W.2d 976 (Mo. 1953), historically, inducing someone to breach a contract (let alone merely interfering with business relations) was not considered tortious conduct. *Id.* at 980-81. Instead, plaintiffs could recover for interference with contracts or business affairs only if they could prove that the breach or interference was "induced by means of fraud, deceit or coercion"—in other words, only if they could prove that the defendant committed some *other* common-law tort. *Id.* That was the law everywhere until the mid-1800s, when a divided Queen's Bench held for the first time that maliciously inducing someone to breach a contract was an actionable tort. *See Lumley v. Gye*, 118 E.R. 749 (1853) (QB) (Eng.).

Missouri, however, did not follow suit for another century. Indeed, for decades this Court expressly rejected the *Lumley* rule, siding with the *Lumley* dissent's view that any recovery should lie against the one who breached the contract, not the one who induced him to do so. *See, e.g.*, *Glencoe Sand & Gravel Co. v. Hudson Bros. Comm'n Co.*, 40 S.W. 93 (Mo. 1897). It was not until 1953 that the Court reversed course, expressly overruling *Glencoe* and adopting what by then had become the majority rule "that one who maliciously or without justifiable cause induces a person to breach his contract with another may be held responsible to the latter for the damages resulting from such breach." *Downey*, 253 S.W.2d at 980. And it took even longer for Missouri courts to recognize a form of tortious interference that did not require proof of a breach of contract. *See Rail Switching Servs., Inc. v. Marquis-Mo. Terminal, LLC*, 533 S.W.3d 245, 257-59 (Mo. App. E.D. 2017). Tortious interference with business expectancy is thus unquestionably not a cause of action for which "there existed a right to a jury determination of the amount of punitive damages … in 1820." *Lewellen*, 441 S.W.3d at 143.

The same is true of civil conspiracy to breach a duty of loyalty. While the common law recognized the right of an employer to recover against a disloyal employee in some circumstances, an employer was required to prove as an element of such a claim that the employee breached an employment contract, stole the employer's property, or engaged in some other common-law tort. *See Cox v. Bryant*, 347 S.W.2d 861, 864 (Mo. 1961). It was not until the mid-twentieth century that this Court recognized a distinct tort of breach of loyalty that bars an employee from directly competing with his existing employer even if

he commits no underlying common-law tort. *See Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1 (Mo. banc 1966).

A fortiori, the wholly derivate tort of civil conspiracy to breach a duty of loyalty, brought against a competitor rather than the breaching employee, did not exist 146 years earlier when the Missouri Constitution was adopted. Of course, civil conspiracy claims have long been litigated to juries. But a claim for civil conspiracy to breach a duty of loyalty would not have been recognized in 1820 because "a claim for civil conspiracy is not actionable alone absent an underlying tort." *Conway v. St. Louis Cnty.*, 254 S.W.3d 159, 165 (Mo. App. E.D. 2008). Like tortious interference with business expectancy, then, the kind of civil conspiracy claim All Star brought here is a modern-day departure from the historical rule that an action for breach lay against the breaching party, not a third party who induced or aided the breach. Thus, under a straightforward application of the principles set forth in *Lewellen* and *Dobbs*, the punitive damages cap may be applied to All Star's claims without running afoul of the constitutional right to trial by jury.

3. Rather than rely on this Court's cases addressing the constitutionality of statutory limits on damages, All Star invokes *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), for the proposition that all that matters is "whether the action is a 'civil action' for damages. If so, the jury trial right is to 'remain inviolate.'" *See* All Star Br.24 (quoting *Diehl*, 95 S.W.3d at 85). In other words, in All Star's view statutory damages caps are unconstitutional as applied to the entire universe of actions "'now commonly referred to categorically as torts.'" *Id.* (quoting *Diehl*, 95 S.W.3d at 87). That argument is not meaningfully different from the one this Court rejected in *Dodson*. As the Court explained

there, *Diehl* "is of no relevance in determining whether the constitutional right to a jury trial bars enforcement of legislatively created limitations on the amount of damages recoverable," for *Diehl* dealt only with whether "the right to a jury trial attaches" at all. *Dodson*, 491 S.W.3d at 555; *see also id.* at 570 (Fischer, J., concurring). The relevant cases for purposes of assessing statutory limits on damages are *Watts* and *Lewellen*. And "[b]y its own terms, *Watts* applies to 'cause[s] of action to which the right to jury trial attaches at common law,'" not to all civil actions for money damages. *Id.* at 555.

Indeed, if all that mattered were whether an action is "a 'civil action' for damages," then *Lewellen* would not have needed to analyze whether fraud claims *in particular* were triable to a jury in 1820. Yet the Court engaged in a detailed analysis not just of whether fraud is a civil action for damages (of course it is), but of whether "[*a*]*ctions for fraud* in which only damages were sought were tried by juries in 1820." *Lewellen*, 441 S.W.3d at 143 (emphasis added); *see also, e.g.*, *id.* at 145 (asking whether "a party seeking punitive damages *for fraud* in 1820 would have had the right to have a jury try the issue of punitive damages" (emphasis added)). And the Court summarized its holding as turning on the fact that "a party seeking punitive damages *for fraud* in 1820 would have had the right to have a jury try the issue of punitive damages." *Id.* (emphasis added). For much the same reason, All Star gets nowhere by emphasizing "that punitive damages claims were tried to juries in 1820." All Star Br.26. If that alone were enough, then *Lewellen* would have held §510.265 unconstitutional on its face, not just as applied to fraud claims, as the statute applies only to cases in which punitive damages are sought.

All Star next emphasizes that "'actions for trespass,' seeking money damages were decided by juries in 1820." All Star Br.27. But that does not help its cause, as this is not an action for trespass; it is an action for tortious interference with business expectancy and civil conspiracy to breach a duty of loyalty. To the extent All Star means to suggest that *Lewellen* treated "actions for trespass" as encompassing the entire universe of actions "'now commonly referred to categorically as torts,'" All Star Br.24 (quoting *Diehl*, 95 S.W.3d at 87); *see also* All Star Br.26, that is wrong too. To be sure, the Court observed that fraud did "not appear as a separate cause of action in Missouri cases until the mid-nineteenth century." *Lewellen*, 441 S.W.3d at 143 n.10. But the Court went on to explain that fraud was not designated a *separate* tort because "[f]raud claims were historically encompassed in trespass claims, as English common law recognized actions for trespass as a means to recover for deceit." *Id.* The same is not true of the claims All Star brought here, as the conduct it accuses HALO of committing was not considered tortious in 1820. *Lewellen* nowhere suggested that "trespass" encompasses causes of actions that were not recognized seeking to recover for conduct that was not considered tortious at common law.

All Star closes with a perfunctory argument, largely block quoted from the court of appeals, that tortious interference with business expectancy and civil conspiracy to breach a duty of loyalty really were "historically encompassed in trespass." All Star Br.27. That is not actually what the court of appeals concluded; it instead tried to ground such claims in principles of agency and property law. *See All Star Awards*, 2021 WL 96073, at *4. But the court of appeals was wrong even on its own terms, as the sources it invoked just

reinforce that one could recover at common law only by proving a distinct common-law tort like breach of an employment contract or theft of trade secrets.

For example, comment c of §766 of the Restatement (Second) of Torts explained that "[h]istorically the liability for tortious interference with advantageous economic relations developed first in cases of intentional prevention of prospective dealings, by violence, fraud or defamation—conduct that was essentially tortious in its nature, either to the third party or to the injured party," and that it was not until *Lumley* that "the development of inducement of breach of contract as a separate tort" began. Comment b of §766B likewise explained that "in all of" the cases before *Lumley* "the actor's conduct was characterized by violence, fraud or defamation, and was tortious in character." As for Blackstone, he explained that because servants were considered a form of "property" that had been "purchased by giving them wages," an action could lie against a master who knowingly hired a servant away from service for which he was being paid. *See* 1 Sir William Blackstone, Commentaries on the Laws of England 429 (1893) . But All Star does not claim that HALO interfered with its employment contract *with Ford*. It claims that HALO conspired with Ford to interfere with All Star's business relations *with customers*—conduct that was not considered tortious until long after 1820.

At best, these sources demonstrate that tortious-interference and breach-of-loyalty claims are analogous to common-law theft-of-trade-secrets or master/servant claims only in the same generic way that wrongful-death claims are analogous to common-law loss-of-services claims—which is to say not enough to make a legal difference. As *Dodson* teaches, what matters is not whether there are some circumstances in which a particular

class of plaintiffs could recover against a particular class of defendants. It is whether the same "principles of law" on which a claim is based were cognizable as a basis for recovery at common law. *Dodson*, 491 S.W.3d at 557. To be sure, 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. But as *Dodson* makes crystal clear, it must share more in common with such an action than simply involving an effort to recover money damages for some sort injury to person or property.

4. At bottom, All Star has nothing to offer but a sweeping reading of *Watts* and *Lewellen* that would nullify statutory limits on damages in virtually every instance. That is decidedly not how this Court has read either case. To the contrary, the Court has gone out of its way to make clear that its jurisprudence leaves the legislative with plenty of flexibility to limit remedies for claims or eliminate common-law causes of action entirely. But to the extent those decisions really do compel the result All Star seeks, the Court should take this opportunity to overrule them and restore the rule of *Adams*: Statutory limits on damages do not interfere with the constitutional right of trial by jury. That remains the rule in the vast majority of states that have enacted such statutes, *see Siebert*, 485 P.3d at 1277 n.3, and there is certainly nothing peculiar to Missouri's Constitution that compels a different result. It makes particularly little sense, moreover, for *Watts* and *Lewellen* to continue to control a relatively narrow subset of common-law claims when the Court just reiterated that the legislature may eliminate common-law causes of action entirely—even ones that, unlike those at issue here, existed in 1820—and replace them with statutory actions with limits on damages without offending the right to trial by jury. *See Ordinola*,

625 S.W.3d at 449. The legislature should not have to engage in such "form over substance maneuvering," *id.* at 455 (Draper, J., dissenting), just to effectuate the people's considered judgment about the appropriate measure of punitive or noneconomic damages.

Just as in *Watts*, then, "[t]he only remaining reason to uphold [*Watts* and *Lewellen*] would be *stare decisis* considerations." 376 S.W.3d at 644. But as *Watts* explained, *stare decisis* carries less forces where constitutional questions are at stake, for "'if a decision construes the constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote.'" *Id.* (quoting *Mountain Grove Bank v. Douglas Cnty.*, 47 S.W. 944, 947 (Mo. 1898)). The reasoning of *Watts* and *Lewellen* has not stood the test of time, and they have mistakenly tied the people's hands for long enough. The Court should restore to the legislature its power to effectuate the people's evident desire to impose reasonable limits on the recovery of punitive and noneconomic damages.

II. *Response to All Star's Points Relied On Nos. 3 and 4.* The trial court did not reduce the jury's punitive damages award for constitutional due process reasons or as an exercise of discretionary remittitur, but such actions would have been appropriate and, indeed, remain necessary because both the initial and partially reduced awards are unconstitutionally excessive.

As All Star acknowledges, All Star Br.31, the trial court reduced the punitive damages award from $5.5 million to $2,627,709.40 based on application of §510.265, not as an exercise of discretionary remittitur pursuant to its authority under Mo. Rev. Stat. §537.068, or based on constitutional due process concerns under the U.S. or Missouri Constitutions. *See* D.116 (App.141-42). There is thus no need to address All Star's third or fourth points relied on. In all events, for the reasons already explained, *supra* Part III, All Star is wrong on the merits. Even the reduced award is grossly excessive and violates

due process; the jury's $5.5 million award is unsustainable *a fortiori*. The trial court thus erred by failing to reduce the award even further, not by cutting it in half.

CONCLUSION

The trial court erred by permitting All Star to admit legally insufficient evidence of lost-profit damages, denying HALO's judgment on All Star's tortious-interference claim, and entering judgment on unsubstantiated and grossly excessive compensatory and punitive damages awards. This Court should grant HALO judgment on All Star's tortious-interference claim, remand for a new trial, or at the very least vacate or reduce the grossly inflated damages awards. To the extent punitive damages may be sustained at all, this Court should affirm the trial court's holding that Missouri's statutory limit on punitive damages applies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b) and contains 15,324 words, as determined by the word-processing system used to prepare the brief.

/s/ *Patrick J. McAndrews*
Patrick J. McAndrews

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on this 2nd day of November, 2021, the foregoing instrument was electronically filed with the Clerk of Court to be served on registered attorneys of record and relevant parties by operation of the Court's electronic filing system.

/s/ *Patrick J. McAndrews*
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