IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DENNIS LAGARES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 1016-CV38265
UNITED FINANCIAL CASUALTY COMPANY d/b/a PROGRESSIVE INSURANCE COMPANY,	)	Division No. 2
	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

COMES NOW Plaintiff and pursuant to Missouri Rule 52.08, submits the following Suggestions Support of Plaintiff's Motion for Class Certification.

Plaintiff brings this action as a putative class action on behalf of himself and others similarly situated to him by virtue of their purchase of a "Missouri Commercial Auto" policy of insurance, Form 6912, underwritten and sold by the Defendant United Financial Casualty Company d/b/a Progressive Insurance Company. All members of the proposed Class insured one or more vehicles using the same Form 6912, a form written by and/or for[1] the Defendant.

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[1] Form 6912 was drafted by Patricia Corwin, an in-house lawyer for and employee of Progressive RSC, Inc. Progressive RSC, Inc., is a subsidiary of the "Progressive Group of Insurance Companies," as is Defendant United Financial Casualty Company d/b/a Progressive Insurance Company. Ms. Corwin, acting through a series of "inter-company agreements," provided legal services for all of the Progressive companies, including the Defendant. While employed in that capacity, she was the principal drafter of Form 6912, a form used by the Defendant to insure commercial automobiles and light trucks.

Form 6912 is the Defendant's "standard," commercial auto insurance form.[2] It is, by Defendant's admission, a policy "contract." It is, also by Defendant's admission, an "adhesion contract." Insureds are not allowed to alter or vary the terms of Form 6912. Therefore, all of the members of the Class defined in Plaintiff's Motion for Class Certification are insured using the exact same form, containing the exact same language. It is this form language, identical for each and every Class member, which gives rise to the definitional issues in this case. Therefore, such issues exist in common for every member of the Class.

Form 6912 provides, inter alia, so-called "physical damage" coverage.[3] In virtually every instance wherein the Defendant has sold such physical damage insurance using Form 6912, the insured has been required to declare a "Stated Amount" for each insured vehicle.[4] According to the Defendant, this "Stated Amount" is synonymous with the vehicle's current retail value.[5]

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[2] Form 6912 had two iterations, Form 6912(02/04), which Defendant began work on in February, 2004, and Form 6912(03/05) which Defendant began work on in March, 2005. The latter form replaced the former. On current information and belief, neither form differs from the other in any aspect material to these proceedings.

[3] "Physical damage" encompasses "collision coverage," "comprehensive coverage," and "fire and theft and combined additional coverage" for damage to the insured vehicle.

[4] Since January 1, 2006, Defendant has written 16,891 commercial auto policies using form 6912. Of those 16,891 policies, Defendant believes that approximately 84 policies did not contain Stated Amount information. No explanation has been given as to the basis for this belief.

[5] "Using stated amount provides a superior value by allowing our insureds to customize their policy to accurately capture a vehicle's true value." See, Exhibit 9, Defendant's "Commercial Auto Product Guide" and testimony of corporate representative Michael Miller, at page 103, line 6: "stated amount is equivalent to market value according to this document? A. A vehicle's current retail value."

In turn, the Stated Amount is used to compute the insurance premium which the insured pays for the coverage. Indeed, the Defendant states that:

> When a commercial insured purchases physical damage coverage for an auto, they (sic) are required to declare a stated amount for that vehicle. The stated amount . . . represents the amount upon which the physical damage premium will be based.

Thus, by requiring the insured to declare the Stated Amount, i.e., the insured's estimate of the retail value of the insured vehicle, and thereafter computing the premium off of the Stated Amount, Defendant establishes a nexus between the Stated Amount and the premium. The logical expectation is thus that in the case of a "total loss" of the vehicle, the amount of insurance will be the Stated Amount. However, it turns out that while insureds pay premiums based upon the Stated Amount, in the majority of cases, they do not receive that amount of insurance. Indeed, Defendant concedes that "The basic measure of damages in most total losses is Actual Cash Value (ACV). Exceptions may exist in the case of: stated amount, stated/agreed value, (and) replacement cost provisions."[6] These exceptions are truly that: exceptions. In most cases, insureds do not get the Stated Amount of insurance for which they paid.

Form 6912 contains a Limits of Liability provision which reads as follows:

> LIMIT OF LIABILITY . . . 1. The most we will pay for loss to your insured auto is the least of: . . . c. the amount necessary to repair the damaged property to its pre-loss physical condition, however if we determine that the insured auto is a total loss, we may, at our option, pay the lesser of the actual cash value, Stated Amount, or the cost to replace, rather than repair the insured auto; . . .

Form 6912 defines "total loss" as follows:

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[6] Quoting Defendant's "Physical Damage Standards," 2008-2009, page 19, "Vehicle Valuation." (Bates PRO 003661)

> "Total Loss" means any loss to the insured auto that is payable under this Part II if the cost to repair the damage (including parts and labor), when combined with the salvage value, exceeds the actual cash value of the insured auto at the time of the loss.

Thus, the term "actual cash value" is used in Form 6912 in two important provisions: The Limits of Liability provision and in the definition of "Total Loss." However, these usages are circular. Moreover, in neither usage is the term defined. Thus, we must look outside the contract for Defendant's practice in applying this contract term for Defendant's definition of the term.

Defendant implements an internal claims adjustment policy which defines "Actual Cash Value" as "the *market value* of the vehicle at the time of the loss."[7] Yet, "market value" is reasonably viewed as "retail value," Defendant's own definition of the Stated Amount. Indeed, Defendant concedes that the two terms, "Stated Amount" and "Actual Cash Value," are synonymous: "A proper Stated Amount should closely match an ACV."[8]

Nevertheless, Defendant now contends that "actual cash value" has no meaning until the time of a total loss. This is absurd. A vehicle may indeed have a an actual cash value, or retail value, at the time of the loss, but it may also have an actual cash value at any other time. This is clear when we examine the Defendant's procedure for determining "actual cash value."

In order to establish actual cash value at the time of a total loss claim, Defendant's policies and procedures require reference to the "N.A.D.A. Official Used Car Guide."[9] A visit to the

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[7] Defendant's "Missouri Physical Damage Standard Operating Procedures," page 29, section B. (Emphasis added.) (Bates PRO 002715)

[8] Defendant's "Commercial Auto and Truck." (PRO 001745-49)

[9] "To determine the ACV, a final detailed NADA Evaluator/VAR report is required. The NADA evaluation should include additions or reductions for all relevant considerations (mileage, options, condition, etc.)." Defendant's "Missouri Physical Damage Standard

"N.A.D.A." website shows that by keying in a zip code and checking the appropriate box for the year, make and model of the vehicle, N.A.D.A. will provide a "rough trade-in" value, an "average trade-in" value, a "clean trade-in" value, and a "clean *retail*" value. In other words, putting aside the irrelevant trade-in values, ("ACV is based on *retail value*, not the dealer trade-in value [also referred to as the wholesale value]."[10]), N.A.D.A. provides the *retail* value, which Defendant says should be the "Stated Value."

Here's the problem: Defendant does not disclose its own reliance upon the N.A.D.A. guide at the front end of the consumer transaction and relationship, when the Form 6912 policy is purchased. Rather, Defendant requires the insured to declare the Stated Amount[11] without disclosing that it will not use that amount to "value" the vehicle at the time when the insurance is actually being paid. The implication, and the "reasonable person's" expectation which Defendant's actions and policies create, is that the Stated Amount is the amount of insurance being purchased. Indeed, it is the amount being paid for. The ACV is not factored into the premium computation. The Stated Amount is. Moreover, on its website, Defendant specifically provided the following guidance to insureds: "Stated Amount for Commercial Vehicles. A stated amount is the value that you place on your vehicle and provide to Progressive. If you sold your vehicle today, the stated amount is the

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Operating Procedures," page 29, section B. (Bates PRO 002715)

[10] Quoting Defendant's "Commercial Auto and Truck" (PRO 001745-49).

[11] Quoting Defendant's answer to Interrogatory No. 6, which states in pertinent part: ". . . If (physical damage) is part of the coverage, then the customer is asked for the *current value* of the vehicle . . . ." Thus, the Stated Amount"[r]eflects the insured's declared value of their (sic) vehicle; . . ." (PRO 004025)

price you would ask the buyer to pay."[12] Internally, Defendant states: "Using stated amount provides a superior value by allowing our insureds to customize their policy to accurately capture a vehicle's true value."[13] The question is: a "superior value" for whom?

The insureds' declaration of the Stated Amount is directly linked by the Defendant to the amount of coverage being provided. "The customer is responsible for determining *the appropriate amount of coverage*." (Emphasis added.)[14] Indeed, insureds are supposed to be told

> . . . you are encouraged to review the stated amount on each vehicle listed on your policy documents. A stated amount should reflect a vehicle's *current retail value* including any special or permanently attached equipment (PAE). . . . By actively monitoring the *market value* of your vehicles, you can be assured that you have purchased *the right level of coverage* and are *being charged the appropriate premium*." (Emphasis added.)[15]

In this case, Plaintiff will show that Defendant's requirement that insureds declare a Stated Amount in their Application for coverage is a device which is knowingly used to inflate insurance premiums above the actual amount of coverage being provided in the commercial auto insurance setting. Plaintiff will show that commercial auto insurance premiums are expressly and directly related to the Stated Amount and not the Actual Cash Value of the insured vehicle. By the use of data and statistics from Defendant's own records and files, Plaintiff intends to show that only rarely,

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[12] http://www.progressivecommercial.com/basics/stated-amount.aspx (PRO 001754-56)

[13] Quoting Exhibit 9, Defendant's "Commercial Auto Product Guide"

[14] Quoting Defendant's "Commercial Auto Product Guide," page 10. (Bates PRC 001586-1613)

[15] "Important Information regarding stated amount and your policy:" (Bates PRO 001742)

if ever, does the defendant pay the Stated Amount at the time of a total loss and that in the vast majority of cases, the amount paid has no relation to the "level of coverage" purchased.

This case is brought on behalf of all of those Form 6912 insureds whose claims were adjusted to pay a level of coverage determined by the ACV, and not the Stated Amount, and who thus did not receive what, by the applicable "reasonable person standard," was the reasonable expectation of the insured and what, under Missouri law, was the "stated value" of their policies.

Application of Missouri Rule 52.08

A. In General.

Class actions in Missouri are governed by Rule 52.08. Although there are differences between Missouri's application of this rule and Federal Rule 23 upon which it is based, where applicable, Federal Rule 23 may be used and is cited herein as a guide. *See Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 161 (Mo. App. W.D. 2006); *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 378 (Mo. App. W.D. 1997); *Ralph v. American Family Mut. Ins.*, 809 S.W.2d 173, 174 (Mo. App. E.D. 1991), *aff'd* 835 S.W.2d 522 (1992). Thus, Plaintiff's Suggestions rely principally upon Missouri cases discussing Rule 52.08, but where appropriate and helpful to the Court, Plaintiff may refer to supplemental citations to federal cases and authorities which discuss FRCP Rule 23

B. The Class Definitions.

A preliminary step in addressing class certification is to determine whether there is an identifiable class. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 156 (1982)(citing cases). A class exists where the general outlines of the membership of the class can be determined. C. Wright & A. Miller, 7A *Federal Practice and Procedure* § 1760, p. 118 (1986); *see also Dale v.*

DaimlerChrysler Corp., 204 S.W.3d 151, 178 (Mo. App. W.D. 2006). Plaintiff proposes the following definition of the Class:

> All individual persons, corporations, partnerships, associations and other entities insured during the Class Period January 1, 2006 to the present under a "MISSOURI COMMERCIAL AUTO POLICY," Form 6912, who suffered a "total loss" as defined in said Form 6912 and whose recovery from the Defendant thereon was based upon a value of the insured vehicle other than the "Stated Amount" for said vehicle.
>
> Excluded from the Class are those persons who have lawsuits pending against, or who have settled their claims against, United Financial Casualty Company for the same or similar claims as set forth herein, Members of the Missouri state judiciary, Defendant, Defendant's employees, any entities in which either Defendant has a controlling interest, and the parents, subsidiaries, affiliates, and their officers and directors of Defendant and the members of their immediate families.

This class definition is proper because it provides an ascertainable group of plaintiffs during a specific time frame. This definition of the class properly defines who its members are and enables the parties to identify those who need to receive notice in order to protect their rights which will be affected by the class action. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 156 (1982). This Class identifies a group of similarly situated persons and entities who suffered "total losses" of their insured vehicles and who seek damages for the difference between what was paid by the Defendant upon actual total loss and the level of coverage purchased.

C. The Elements of Class Certification Are Satisfied.

The determination of whether a case is amenable to class action treatment under Rule 52.08 is a two-part inquiry. The Court must first decide that the four interrelated elements of Rule 52.08(a) are satisfied. *See Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 877 (Mo. 2008). If these four

elements are present, the Court must then find whether plaintiffs have satisfied one of the sections of Rule 52.08(b), which delineates the types of permissible class actions. *See Id.*

In determining whether a class should be certified, the Court is to accept the substantive allegations of the pleadings as true and the analysis under Rule 52.08 should not look into the underlying merits of the causes of action. *See Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 222 (Mo. App. W.D. 2007). The Court may certify the class on the pleadings alone. See *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 132-33 (Mo. banc 1979). Further, in its decision whether to certify a class, the trial court should resolve any doubts in favor of class certification. *Dale*, 204 S.W.3d at 164; *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968) ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.") Cert. denied, 394 U.S. 928 (1969).

Finally, "[t]he prerequisites of commonality, typicality, adequacy of representation, and predominance need be satisfied only as to those particular issues for which certification is proposed" and not all issues need be certified for class action treatment. *In re: Tetracycline Cases*, 107 F.R.D. 719, 726-27 (W.D. Mo 1985). Thus, in this case, the court may certify all, or merely some, of the substantive issues.

1. Numerosity. The Class Is Numerous and Joinder of All Class Members Is Impractical.

It is estimated that the Class consists of about 573 members.[16] Such a class is so numerous that joinder of all its members is impractical.

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[16] Defendant's Answers to Plaintiff's First Interrogatories, Interrogatory No. 3.

The Rule 52.08(a) numerosity requirement "does not require that joinder of all the class members be impossible, only that it be impracticable." *DaimlerChrysler Corp.*, 204 S.W.3d 151, 167 (Mo. App. W.D. 2006) (citation omitted). Joinder is impractical if it would be inefficient, costly or time-consuming. *Id.*

Court's have determined that the size of the Class alone may render joinder impractical and a good faith estimate of the class size is sufficient to satisfy Rule 52.08(a)'s numerosity requirement. *See* Newberg on Class Actions §§ 3.03-.05, at 3-21-22 ("While the plaintiff has the burden of showing that joinder is impracticable, a good faith estimate should be sufficient when the number of class members is not readily ascertainable."); *DaimlerChrysler Corp.*, 204 S.W.3d 151, 167 (Mo. App. W.D. 2006). Further, there is no magic number of class members required to meet the numerosity test. *See Bradford v. AGCO*, 187 F.R.D. 600, 604 (W.D. Mo. 1999) ("This Court finds that a class of twenty to sixty-five members is sufficiently numerous under Rule 23."); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 54 (8th Cir. 1977); Newberg, at §3.05 (A presumption arises that over 40 plaintiffs cannot be practically joined).

Considering that at least 573 Missouri residents who insured one or more vehicles for a "Stated Amount" under Progressive's "MISSOURI COMMERCIAL AUTO POLICY" suffered a "total loss" as defined in Form 6912, Plaintiff respectfully asserts that the numerosity requirement is satisfied and common sense dictates that the joinder of all putative class members is impracticable.

2. There Are Questions of Law and Fact Common to the Class

Rule 52.08(a)(2) requires that there be "questions of law or fact common to the class." However, this rule only requires only one (or more) common questions of fact or law; it does not require that all questions of law and fact be common. *Esler v. Northrop Corp.*, 86 F.R.D. 20,34

(W.D. Mo. 1979) (citing 7 C. Wright & A. Miller, Federal Practice and Procedure § 1763, at 603 (1972)). *See also Jordan v. County of Los Angeles*, 669 F.2d 1311,1320 (9th Cir. 1982); *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982)(Commonality may be satisfied "even though the class members are not identically situated."); *Bradford v. AGCO*, 187 F.R.D. 600, 603 (W.D. Mo. 1999)(citing cases); *In re Asbestos School Litigation*, 104 F.R.D. 422, 429 (D. Pa. 1984); Newberg §3.10, at 3-50; Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 25 (1977) ("Rule 23(a)(2) is relatively easy to satisfy. Therefore it is not surprising that very few cases have been dismissed for failing to meet the common question requirement.").

In addition, rule 52.08 provides that an action may be brought or maintained as a class action with respect to particular issues which are common, and not necessarily all issues, some of which may not be common. Thus, partial class certification is appropriate and possible under Missouri law in some circumstances. In this case however, Plaintiff contends that the entirety of the case should be certified as a class action for the reason that class issues predominate.

Here, there is a "common" form contract of insurance, containing common language and terms, and a common practice by Defendant interpreting and applying that language and those terms which affect all class members. These commonalities present the following core legal and factual issues, any one of which would be sufficient to satisfy Rule 52.08 (a)(2):

(a) Whether Defendant's Missouri Commercial Auto Policy is a policy of insurance against loss or damage by fire under R.S.Mo. sections 379.140 and/or 379.160;

(b) Whether Defendant's Missouri Commercial Auto Policy, Form 6912, indicates an intention on the part of Defendant to value the risk and loss (*See Huth v. General Accident & Life Assurance Corp., LTD.*, 536 S.W.2d 177 (Mo. App. E.D. 1976));

(c) Whether the premium charged by Defendant with regard to its Missouri Commercial Auto Policy is based upon the percentage of the total insurance provided (*See Huth*, 536 S.W.2d at 181);

(d) Whether the scheduling of items covered by Defendant's Missouri Commercial Auto Policy lists an "amount of insurance" for the item(s) covered (*See Huth*, 536 S.W.2d at 181);

(e) Whether the term "stated amount" listed in the schedule indicates a specific value (*See Huth*, 536 S.W.2d at 181);

(f) Whether premium amounts are based upon the "stated amount," declared by the insured as required by the Defendant;

(g) Whether Defendant agreed in its Missouri Commercial Auto Policy that an insured's loss will be determined according to what he or she provides as the "Stated Amount", less depreciation to reflect the age or wear and tear of the "total loss" automobile;

(h) Whether Defendant's Missouri Commercial Auto Policy is ambiguous with regards to the terms "actual cash value" and/or Stated Amount";

(i) Whether Defendant owed to each member of the putative class the duty to *insure* each automobile insured under Progressive's "Missouri Commercial Auto Policy for the "Stated Amount," less depreciation;

(j) Whether Defendant owed to each member of the putative class the duty to charge premium amounts in relation to the amount of coverage actually provided;

(k) Whether the insuring contract, Form 6912, is a contract of adhesion, drafted by Defendant; and

(l) Whether Defendant breached its common duty to the members of the class by interpreting the contract for insurance in favor of itself and contrary to the reasonable expectations of an objective purchaser concerning the level of coverage being provided.

The common issues identified above are the most significant part of the class claims against Defendant and can be resolved in a single class action. *See In re Asbestos School Litigation*, 104 F.R.D. at 431 (citing 7A Wright & Miller, Federal Practice and Procedure, § 1778 at 53 (1972)).

3. Plaintiffs Claims Are Typical Of the Claims of the Class

The Rule 52.08(a)(3) "typicality" requirement directs the Court to focus on whether the named representative's claim has the same essential characteristics as the claims of the class at large. *See Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir. 1982); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596-597 (7th Cir. 1993); Newberg §3.13, at 3-71-72. The requirement is met, even if there are variances in the underlying facts if: (1) the representative's and the class members' claims arise from the same event or course of conduct by the defendant, (2) the conduct and facts give rise to [the] same legal theory, and (3) the underlying facts are not 'markedly different.'" *Plubell v. Merck & Co., Inc.*, 2009 Mo. App. W.D. 69808, ¶ 21 (quoting *Dale*, 204 S.W.3d at 169).

Here, the common insuring contract and the common interpretative practices by Defendant affect all class members in the same general manner. The language of Policy Form 6912 and Defendant's interpretation and application of the same give rise to the class members' and Plaintiff's rights and claims relating the reasonable expectations about the level of coverage and Defendant's obligations to pay upon the occurrence of a total loss. The class representative's experience is typical of the experiences and claims of the unnamed class members on these issues and their claims and legal theories of liability are the same. Defendant operated in a standardized manner with respect to the use of its form Missouri Commercial Auto Policy and the injuries suffered by the Plaintiff and the class members differ only in the liquidated amount of damages. This requirement is met.

4. Plaintiffs Will Fairly and Adequately Represent the Class.

The focus of Rule 52.08(a)(4) goes to whether the class representative (1) has interests in common with, and not antagonistic to, the members of the class, and (2) will vigorously prosecute the action for the benefit of the Class through qualified counsel. *See* Newberg on Class Actions at §3.22.

When the class and its representative are in the same or substantially similar positions, the representative plaintiff's interests are "coextensive" with those of the class members. *See Rentschler v. Carnahan*, 160 F.R.D. 114, 117 (E.D. Mo 1995). Here, the core issues of the case focus on Defendant's authorship and use of a form commercial auto policy containing fixed, vague, and immutable terms. Plaintiff's interest in receiving insurance coverage in the "Stated Amount" upon which he paid his premiums and at a level of coverage defined by the Stated Amount is identical to the interest of each Class member having the same coverage under Form 6912. Only irrelevant and meaningless differences exist between the representative and the putative class members and the differences relate only to damage amounts and matters unrelated to the contract language and terms at issue. Irrelevant differences, such as monetary damage amounts, alone do not defeat the adequacy of representation factor. *Dale*, 204 S.W.3d at 164 (stating that "it matters not that there may be a multitude of individual questions of fact that would have to be resolved for the putative class members to recover"); *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 787-788 (Mo. App. E.D. 2006) (affirming certification of class even though separate inquiry would be required at the proof stage).

As in the case at bar, "[i]f the enforcement of a policy provision would defeat the reasonable expectations of the great majority of policyholders to whose claims it is relevant, it will not be enforced even against those who know of its restrictive terms." *See Estrin Const. Co., Inc. v Aetna*

Cas. and Sur. Co., 612 S.W.2d 413, 426 -427 (Mo. App. W.D. 1981) (quoting Keeton, Insurance Law Rights at Variance With Policy Provisions, 83 Harv.L.Rev. 961, 974 (1970)). Moreover, "(A standardized agreement) is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." *Id.*, quoting Restatement (Second) of Contracts 2d s 237(2) (Tent.Draft 1973)). Thus, the class representative has common interests with the class members and class-wide resolution, therefore, is the most proper method of resolving this controversy.

Finally, proposed Class Counsel have extensive experience managing complex litigation and class actions and are qualified to, and will, pursue this action zealously. Resumes reflective of counsels' experience and qualifications are attached.

D. Plaintiff seeks to certify a Class under Rule 52.08(b)(1).

Missouri Rule 52.08(b) defines a variety of class actions which may be pursued in this jurisdiction, once the elements of Rule 52.08(a) have been satisfied. Rule 52.08(b) thus provides in pertinent part:

> b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications

> or substantially impair or impede their ability to protect their interests; . . .

Clearly, where the meaning, interpretation and application of certain terms of an adhesion contract of insurance are at issue, the prosecution of separate actions concerning such meaning, interpretation and applications creates a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the insurance company. Moreover, an adjudication by one policy-holder could have the effect of disposing of the interests of other, non-present policyholders, or could impede their separate abilities to protect their interests in light of the principles of stare decisis. In this case, where a contract form is at issue and applicable to thousands of individuals, class treatment of the relevant issues of interpretation and application is appropriate to avoid the possibility of disparate, conflicting, and confusing results. Therefore, Plaintff urges the Court to grant class certification under Rule 52.08(b)(1).

E. Plaintiff seeks to certify a Class under Rule 52.08(b)(2).

Missouri Rule 52.08(b) also provides that a class action may be maintained where "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . . ." Here, Defendant has acted, and refused to act, in ways and on grounds described above as generally applicable to all members of the Class, to wit: all persons and entities who have owned and/or who presently own a commercial auto policy of insurance set forth in Defendant's Form 6912. The Plaintiff seeks, on behalf of all such affected persons and entities, injunctive relief alternatively, and among other things, prohibiting the Defendant from implementing the policy in ways defeating the reasonable expectations of the insureds, and prohibiting the

Defendant from implementing such policies in such a way as to violate Missouri law concerning valued policies and/or stated value policies. Such injunctive relief will benefit all Class Members who own, re-purchase, and/or renew coverages using Form 6912.

F. Plaintiff seeks to certify a Class under Rule 52.08(b)(3).

For an action to be maintainable as a Rule 52.08(b)(3) class action, two prerequisites must be satisfied. First, the common questions of law and fact must "predominate," and second, a class action must be superior to other forms of litigation available for fair and efficient adjudication of the controversy.

1. Common Issues of Law and Fact Predominate In This Action.

"A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *State ex rel. Am. Family. Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 488 (Mo. Banc 2003). Indeed, in certifying a class brought under the same statutory provision, the Missouri Court Appeals has held that "it matters not that there may be a multitude of individual questions of fact that would have to be resolved for the putative class members to recover [...] [t]he question is whether the record supports the fact that there is at least one significant fact question or issue, dispositive or not, that is common to each putative class with respect to each count." *Dale*, 204 S.W.3d at 176. Thus, where standard forms and routine procedures are employed, the common issues will clearly predominate. *See, e.g., Hamilton v Ohio Savings Bank*, 694 N.E.2d 442, 455 (1998)(citing cases).

At its core, this case involves a requirement by the Defendant that all insureds purchasing COMMERCIAL AUTO INSURANCE, using Form 6912, declare the value of their vehicle by providing a "Stated Amount." Use of the term "Stated Amount" without definition and in certain

contexts within the policy Form and related documents creates the expectation that it refers and relates to an amount of coverage, or a stated amount of coverage. This inference and expectation is created by Defendant when it ties the Stated Amount not only to the premium amount but also when it represents that the Stated Amount is related to the determination by the insured of the appropriate level of coverage.

Defendant admits that the "Stated Amount" represents the amount upon which the physical damage premiums are based. Thus, the implication of this requirement for a declaration by the insured of a "Stated Amount" is that the insurance being purchased is for a stated amount of coverage as reflected by the "Stated Amount" figure.

Moreover, the "Stated Amount, according to Defendant, is supposed to reflect the class members' declared value of the insured vehicle, i.e., its retail value, its market value, its actual cash value, and the amount the insured would ask a buyer to pay were the vehicle for sale. Thus, "Stated Amount" is another way of stating the actual cash value of the property, a legitimate measure of property value under Missouri law. Indeed, Defendant concedes that by some interpretations and circumstances, the terms are synonymous. Yet, as Defendants uses the terms in adjusting claims, they are not. Thus, not only are the terms vague, and confusing, and reasonably susceptible of two or more meanings, they are deliberately so in order that Defendant can use one meaning and set of inferences in order to charge a premium and another set of meanings to adjust a claim. These practices by the Defendant in creating vagueries in the policy Form (Defendant removed the definition of "actual cash value" from the predecessor Form 1050) have given rise to injury and damage to the Class for which recovery is sought in a collective action under Rule 52.08(b)(3).

Specifically, Defendant has acted on the proposition that despite its requirement of a statement of the "Stated Amount" from the insured at the time of purchase of the policy, and despite the direct connection between the "Stated Amount" and the premium amount, it may pay an actual cash value amount, as defined in ways not set forth in the policy form and inconsistent with the Stated Amount, to resolve claims for total loss. Defendant does this as a matter of policy and procedure in every case and there are no relevant distinctions between class members in regard for the core issues involving the interpretation and implementation of payment terms under the policies in which "Stated Amount" is used to insure the property.

Plaintiff gets at these core issues by asserting three (3) theories of action. First, Plaintiff alleges that Defendant's form Missouri Commercial Auto Policy is a "valued" policy within the meaning of R.S.Mo. 379.140, thereby entitling Plaintiff and members of the putative class to the full face amount of the policy, i.e., the "Stated Amount," less depreciation. Second, Plaintiff asserts that Defendant breached its duty to Plaintiff and the other members of the proposed class by interpreting its form Missouri Commercial Auto Policy to favor profitability and contrary to the reasonable expectations according to a reasonable person standard. Finally, Plaintiff asserts that the policy is vague and requires a declaration by the court of the meaning of its terms and language. (Here, the meanings of the terms "actual cash value" and "Stated Amount" are both synonymous and distinct, depending upon the point in time and circumstances under which Defendant uses them.)

In summary, the central issues of this entire case are: (1) whether Defendant's form Missouri Commercial Auto Policy, Form 6912, is a "valued" contract for insurance under R.S.Mo. section 379.140; (2) whether Defendant's form Commercial Auto Policy, Form 6912, is being and has been interpreted by Defendant in such a way as to defeat the reasonable expectations of an objective

reasonable person insured by the contract, and (3) whether the language and terms of the aforesaid form contract are vague giving rise to a breach of contract when interpreted under Missouri's contract construction rules. Because these ultimate issues are common to all the class members, and because they form the core of the case, the predominance requirement is satisfied.

2. Class-wide Treatment Is Superior to Other Available Methods for the Fair and Efficient Adjudication of the Litigation.

Rule 52.08(b)(3) requires that a class action be superior to other available methods of claim resolution. In determining whether a class action is a superior method for adjudicating the claims of the Plaintiff and the Class, the Court considers whether the action is manageable as a class action and whether the claims are complex. This action is both manageable and complex. It is obviously complex in that the interpretation of contract terms is required as a matter of law. Yet, because many of the central issues in the case are legal issues and because the fact issues inherent in resolution of the ultimate issues relate to the acts, errors and omissions of a single party — the Defendant — the issues are manageable. The Court will not be required to apply the different laws of multiple forums; it will not be required to consider or compare fault; it will not even be required to consider complex damage matrices or formulations. The case is complex only in ways which the court can easily address without resort to unique or complex management techniques. With regard for manageability, the case is straight forward.

In addition, in the context of the "superiority" factor, the Court considers whether the claims of the individual class members are too small to make it economically feasible to prosecute individual lawsuits. In this context, the Court also considers whether individual plaintiffs' recoveries in individual lawsuits would justify the expense of pursing individual actions instead of a class

action. Finally, the Court considers whether the class members have interests in controlling their own actions.

Here, the class action device offers the efficiency, uniformity and consistency, and conclusiveness which would not be available in a myriad of individual actions. *See Ouellette v. International Paper Co.*, 86 F.R.D. 476, 483 (D. Vt. 1980). Absent certification of the Class defined herein, Plaintiffs are left with the unattractive and impractical alternative of trying the same issues over and over again in diverse courts where divergent opinions and rulings are possible, inconsistent results are likely, and incompatible standards of behavior may emerge. Moreover, individual actions will be an option, as a practical matter, only as to those who have the means available to pursue such actions on principle and despite the fact that they are not likely to produce verdicts large enough to cover the costs of the action. Here, the differences between the amounts paid and the amounts owed are insufficient individually to cover the costs to prosecute those claims. The policy of promoting class treatment is thus particularly strong given that it is not economically feasible to prosecute individual actions on those claims. *See Rosenblatt v. Omega Equities Corp.*, 50 F.R.D. 61, 64 (D. N.Y. 1970); *see also Phillips Petroleum, Inc.*, 472 U.S. at 809 ("Class actions . . . permit plaintiffs to pool claims which would be uneconomical to litigate individually."). From a practical viewpoint, no alternative is preferable to the collective action sought herein.

Plaintiff suggests that in any event, regardless of whether he prevails or the Defendant prevails at a class action trial, there will be an enormous savings of judicial resources and expense to the parties by implementing the class action device to resolve the issues at the heart of this dispute. Such a universal outcome on the common core issues offers substantial economies, certainty, uniformity, and predictability, even if some individual questions on individual claims remain.

CONCLUSION

The classes defined by Plaintiff meet all the requirements for certification under Rules 52.08(a) and (b). Class Certification will "best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *In re A.H. Robins Co., Inc.*, 880 F.2d at 740. Class-wide adjudication of the common issues affords Plaintiff, as well as the class members and their families, the best opportunity to litigate their claims and serves the interests of judicial economy. The class action mechanism also serves the interests of finality, judicial economy and efficiency, consistency, predictability and uniformity.

Plaintiffs respectfully request the Court to certify the class action as defined herein, to appoint Dennis Lagares as class representative and The Klamann Law Firm and The Meyers Law Firm as Class Counsel, and to direct Plaintiff and Class Counsel to prepare written and publishable Notices to be approved by the Court for issuance to all class members to apprise them of the pendency of this class action.

WHEREFORE, Plaintiff moves the Court's Order as requested above.

Respectfully submitted,

John M. Klamann #29335
Andrew Schmerhorn #62101
The Klamann Law Firm
929 Walnut Street, Suite 800
Kansas City, MO 64106
Phone: (816) 421-2626
Fax: (816) 421-8686
jklamann@klamannlaw.com

Martin M. Meyers #29524
The Meyers Law Firm

222 W. Gregory Blvd., Suite 340
Kansas City, MO 64114
Phone: (816) 444-8500
Fax: (816) 444-8508
mmeyers@meyerslaw.com

ATTORNEYS FOR PLAINTIFF
AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served by electronic mail and U.S. First-Class Mail, postage prepaid, this 15th day of November, 2011, on the following counsel:

Brian C. Fries
bfries@lathropgage.com
James Moloney
jmoloney@lathropgage.com
Rachel E. Stephens
rstephens@lathropgage.com
2345 Grand Blvd, Suite 2200
Kansas City, Missouri 64108-2618
Telephone: (816) 292-2000
Fax: (816) 292-2001

ATTORNEY FOR DEFENDANT

Attorney for Plaintiff