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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

MARK PARISOT,)
Individually and On Behalf of All)
Others Similarly Situated,)
)
Plaintiff,)
)
v.)
)
U.S. TITLE GUARANTY COMPANY,)
)
Defendant.)

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Case No. 0822-CC09381

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION**

I. INTRODUCTION

This action arises out of the routine and uniform practice of Defendant, U.S. Title Guaranty Company ("U.S. Title" or "Defendant"), of charging a fee for a service that it does not provide. Specifically, Plaintiff alleges that U.S. Title charges consumers fees for filing releases of mortgages with county clerks in connection with real estate transactions, but does not actually file the releases and retains the money as ill-gotten profit. Pursuant to 407.025(3) R.S.Mo. (2001) and S.Ct. Rule 52.08 R.S. Mo. (2001), Plaintiff, Mark Parisot ("Plaintiff" or "Parisot"), seeks certification of a class consisting of:

All persons or entities who, from October 1998 to the present were charged fees on HUD-1 Forms in connection with real estate transactions in Missouri by U.S. Title for recording releases of mortgages and on whose behalf U.S. Title did not record the release.

Excluded from the proposed Class is Defendant, its officers, directors and employees, and the Judge assigned to this action and any member of the Judge's immediate family or staff.

As discussed more fully below, certification of this Class is appropriate under S.Ct. Rule 52.08 R.S.Mo. (2001).¹ First, the Class is sufficiently numerous that joinder is impracticable. Second, the claims and defenses of the Class representative are typical of the claims and defenses of the Class as a whole. Third, the Class representative will fairly and adequately protect the interests of the Class. Fourth, there are numerous issues of law and fact common to the members of the Class, and these common questions of law and fact predominate over any individual issues, making the class action superior to all other methods of litigation.²

¹ The requirements of § 407.025(3) R.S.Mo. (2001) and S.Ct. Rule 52.08 R.S. Mo. (2001) are "virtually identical." *State of Missouri, ex rel. Leader Motors, Inc. v. Koehr*, 1992 WL 151844, at *1 (Mo. Ct. App. July 7, 1992). Accordingly, the analysis under either will be identical and, therefore, in order to conserve judicial resources, Plaintiff's Counsel's analysis for both will be combined in this Memorandum of Law.

² Plaintiff's Petition alleges that U.S. Title violated the Missouri Merchandising Practices Act, V.A.M.S. § 407.010 *et seq.* ("MMPA"), and asserts causes of action for breach of contract, breach of the contractual duty of good faith and fair dealing and unjust enrichment.

Indeed, as discussed fully below, courts have routinely certified precisely the type of claims asserted here. In fact, significantly, this is not the first time this precise conduct has been the subject of a class action lawsuit under Missouri law. See *LeRose v. Stewart Title of Kansas City, Inc.*, Case No. 03CV211568 (Jackson County), March 7, 2005.

Based upon the foregoing, all prerequisites are met for certification and, therefore, Plaintiff's Motion for Class Certification ("Motion") should be granted.

II. STATEMENT OF FACTS

A. Background

U.S. Title operates numerous branch offices throughout Missouri, including St. Louis County, and serves as the settlement agent in thousands of real estate closings each year. (Petition at ¶ 13.) U.S. Title provides numerous services in its capacity as escrow agent, including holding funds and documents in real estate transactions for delivery upon closing as settlement (or escrow) agent, pursuant to the instructions of the respective parties to an escrow. (Petition at ¶ 14.) In connection with the sale or refinance of a home, U.S. Title, utilizing the HUD-1 contract, charges customers fees for acting as their settlement agent, as well as collecting fees for other services related to real estate transactions. (Petition at ¶¶ 15-17.) These fees include "Government Recording and Transfer Charges," which include fees for recording the release or satisfaction of existing mortgages or liens. (*Id.*) U.S. Title agrees that, as part of its services, in exchange for customers' payments under the contract, it will record the release of lien and pay the fee to the appropriate city or county. (*Id.*) The HUD-1 contract confirms U.S.

Title's obligation in that it affirmatively represents that the HUD-1 "is a true and accurate account of [the] transaction" and that "[U.S. Title has] caused or will cause the funds to be disbursed in accordance with this statement." (Petition at ¶ 18.) The HUD-1 contract is used in nearly all of U.S. Title's closings. (Deposition of Nancy LoRusso ("LoRusso Dep.") pp. 26:18-25; 27:1-7, which, in relevant part, is attached as Exhibit "1".)³ Notwithstanding this representation, U.S. Title routinely fails to perform the service and has no mechanism in place to ensure that it complies with its contractual obligation to file the release of liens. (*Id.*)

B. Plaintiff's Transaction

Plaintiff sold his residence, situated in St. Louis, Missouri, in March 2006. (Petition at ¶ 19.) U.S. Title acted as the settlement agent at the real estate closing and, utilizing a HUD-1 contract, charged Plaintiff sixty-six dollars (\$66.00) to record the releases of the liens on his two existing mortgages.⁴ (*Id.*) (*see also* LoRusso Dep. at p. 24:18-21.) At the time of closing, one of Plaintiff's mortgages was held by First Integrity Mortgage Services, Inc. ("First Integrity"), and the other mortgage was held by St. Louis Postal Credit Union NKA Neighbors Credit Union ("St.

³ Nancy LoRusso ("LoRusso") is U.S. Title's President, and has served in that capacity since September 2003. (LoRusso Dep. at pp. 20:22-25; 21:1-4.) In addition, LoRusso was designated by U.S. Title as its corporate designee with "the most knowledge about the imposition, collection and disposition of release fees. (LoRusso Dep. at p. 24:1-18.)

⁴ A true and correct copy of Pariost's HUD-1 is attached as Exhibit "2."

Louis Credit”). (Petition at ¶ 20.) Although U.S. Title collected the release fees, it never filed the First Integrity release on behalf of Plaintiff.⁵ (LoRusso Dep. at p. 42:14-18.) Instead, the release was filed by Plaintiff’s lender, First Integrity. (*Id.*) Nevertheless, U.S. Title retained the thirty-three dollar (\$33.00) fee that it collected from the Plaintiff for the purpose of filing that release. (*Id.*) U.S. Title never offered to return the release fee to the Plaintiff and, in fact, has no mechanism in place for reimbursing Class members, such as the Plaintiff, from whom it collects a release fee but on whose behalf it never performs the service. (*Id.* (*see also* LoRusso Dep. at p. 51:16-20.)) As a result of the Defendant’s actions, Plaintiff and the putative Class members have been injured.

C. U.S. Title’s Uniform Recording Policy

In the rare instances where U.S. Title actually files a release, it is (and has been during the entirety of the Class period) Defendant’s policy to make a handwritten notation of Defendant’s file number on the release before transmitting the release to the appropriate county clerk for filing:

Q: Ms. LoRusso, I’m handing you a document that’s been marked as Exhibit 5. Can you identify this document?

A: It’s a full deed of release.

Q: And this is a deed of release that relates to one of the mortgages

⁵ A true and correct copy of the First Integrity Deed of Release is attached as Exhibit “3.”

A true and correct copy of the St. Louis Credit Release is attached as Exhibit “4.”

that was outstanding in connection with Mr. Parisot's transaction, correct?

A: Correct.

Q: Okay. And the handwriting on the top left, 6-02585?

A: That would be our file number.

Q: And the 3/15/2006 notation, do you have an understanding as to what that would be?

A: The day it was represented for filing.

Q: And do you have an understanding as to how the US Title file number would have been placed on this document?

A: We would have handwritten it.

Q: And at what point in time in the process would US Title have handwritten that?

A: When the document was received prior to recordation.

Q: And is that a procedure that would be done within US Title in connection with the receipt of any full deeds of release?

A: Correct.

Q: And is that true from 1998 to the present?

A: Yes.

(LoRusso Dep. at pp. 40:18-25; 41:1-24.) As a result, it is a simple and straightforward matter to determine which releases were actually filed by U.S. Title, as they would have handwritten notations on them containing the U.S. Title file number. Similarly, if a release has no such

handwritten notation, it was not filed by U.S. Title:

Q: Ms. LoRusso, I'm handing you a document that's been marked as Exhibit 6. Can you identify this document?

A: Full deed of release.

Q: And this also relates to Mr. Parisot, correct?

A: It does.

Q: And this would be the other exiting mortgage in connection with this transaction, correct?

A: Correct.

Q: Okay. And nowhere on this document does the US Title file number, is that marked, is that correct?

A: Correct.

Q: And it is your understanding that the lienholder, not US Title, sent this full deed of release for recordation.

A: Well, it is my belief that US Title did not present it. I don't know who presented it.

(LoRusso Dep. at p. 42:3-18.) As such, based on U.S. Title's uniform practice, during the entirety of the Class period, one can readily determine if a particular release was filed by U.S. Title or by another person or entity altogether.

III. ARGUMENT

A. Standard of Review

"The Missouri Rules of Civil Procedure provide a mechanism for the certification and

conduct of class action lawsuits.” *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 794 (Mo. 1995) (citing S.Ct. Rule 52.08 and 507.070 R.S.Mo. 1994). The class certification determination lies within the sound discretion of the trial court. *Doyle v. Fluour Corp.*, 199 S.W.3d 784, 787 (Mo. Ct. App. 787 2006). In that a class determination can be modified as a case progresses, courts should err in favor of, and not against, certifying a class. *Doyle v. Fluour Corp.*, 199 S.W.3d 784, 787 (Mo. Ct. App. 787 2006). Furthermore, the determination of whether a proper class exists does not depend on the merits of the causes of action. *Craft*, 190 S.W.3d at 377.

This case is particularly well suited for class certification. As set forth more fully below, Plaintiff seeks certification of a Class that consists of consumers who were charged the same fee for the same service that was not performed by U.S. Title. As demonstrated by the certifications of other essentially identical cases in Missouri and throughout the country, the facts before the Court here unquestionably satisfy the requisite elements for class action status under Missouri law.

B. Courts Have Routinely Certified Classes In Similar Cases

In *LeRose v. Stewart Title of Kansas City, Inc.*, Case No. 03CV211568, March 7, 2005, Circuit Court of Missouri, Jackson County, the trial court certified the following class:

All persons or entities who from 1995 to the present were charged fees in connection in real estate transactions in Missouri by Stewart Title of Kansas City, Inc. or its agents for recording releases of

liens and for whom Stewart Title of Kansas City, Inc. or its agents did not record the release.

Similar conduct has also been challenged in other states and, likewise been deemed amenable to classwide treatment. In *Blass v. Fidelity National Title Insurance Company*, Docket No. GLO-2116-01, June 27, 2003, the Superior Court of New Jersey, Law Division, Gloucester County, certified a New Jersey class nearly identical to the class proposed here:

All persons or entities who from 1995 to the present were charged recording fees in connection with real estate transactions in New Jersey through Fidelity's Congress Title Division and for whom Fidelity did not record the release.

Similarly, in *Chin v. Chicago Title Insurance Company and Chicago Title and Trust Company*, No. 01 CH 09890 (January 28, 2002), the Chancery Division of the Circuit Court of Cook County, Illinois, certified an Illinois class alleging the same wrongful conduct at issue here:

All persons from whom Defendants collected a recording fee that was supposed to be used for recording a mortgage release in Illinois and Defendants did not use the entire fee for that purpose.⁶

For the same reasons that the aforementioned cases were certified, the proposed Class unequivocally should be certified.

⁶ A true and correct copy of the class certification orders are attached, respectively, as Exhibits "5 - 7."

C. **The Prerequisites For Class Certification Have Been Satisfied**

“As soon as practicable after the commencement of an action brought as a class action, the court shall determine. . .whether it may be so maintained.” S.Ct. Rule 52.08 R.S.Mo. (2001).

Certification is appropriate in Missouri where, as here, the requirements of the applicable

Missouri class action statute are met:

(A) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(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; or
- (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; or
- (3) the court finds that the questions of law or fact common to the members of the class

predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (d) the difficulties likely to be encountered in the management of a class action.

S.Ct. Rule 52.08 R.S.Mo. (2001) (emphasis in original).

Here, Plaintiff has satisfied all prerequisites and requirements set forth in Rule 52.08 and, as such, Plaintiff's Motion should be granted.

1. **The Class Is Numerous And Joinder Is Impracticable**

Certification is appropriate where the proposed class is so numerous that joinder of all class members is impracticable. S.Ct. Rule 52.08 R.S.Mo. (2001). A court must review the facts and circumstances of each case in making a determination as to whether a class is sufficiently large to render joinder of all of its members impractical. *Rentschler, et al. v. Mel Carnahan*, 160 F.R.D. 114, 116 (E.D. Mo. 1995). It is important to note that impracticality does not mean impossibility, but only that the joinder of all members of the class would be difficult or inconvenient. *Jackson v. Rapps*, 132 F.R.D. 226, 230 (W.D. Mo. 1990). Although there is no bright line rule regarding the necessary size of a class for certification purposes, forty (40) Class

members is often a benchmark. *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), *cert. denied*, 515 U.S. 1122 (1995) (“numerosity is presumed at a level of 40 members.”)

Here, Plaintiff has specifically alleged that the Class consists of thousands of members. (Petition at ¶ 8.) U.S. Title has acknowledged that between November 1, 2003, and December 31, 2008 (which constitutes less than one-half of the Class period, it was involved in approximately 85,153 real estate closings in Missouri. (*See* Defendant’s Objections and Amended and Supplemental Answers to Plaintiff’s First Set of Interrogatories, at page 2, a true and correct copy of which is attached as Exhibit “8.”) Moreover, even a cursory sampling of the limited number of HUD-1 forms produced by U.S. Title to date (approximately 250) reveals numerous instances in which U.S. Title collected one or more release fees and failed to perform the corresponding service. By way of example, attached as Exhibit “9” hereto, collectively, are twenty-four (24) HUD-1 forms from Class members who were charged release fees by U.S. Title, along with the corresponding releases, demonstrating that U.S. Title did not record a release. In that these twenty-four (24) examples were but a few drawn from a sample of only several hundred HUD-1 forms provided in discovery, it is beyond cavil that the Class numbers in the thousands. *See Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 168 (Mo. Ct. App. 2006) (to support a finding of the numerosity prerequisite for certification of a class action, the trial court can accept common sense assumptions).

Accordingly, the numerosity element is easily met here.

2. There Are Questions Of Law And Fact Common To The Class

The second prerequisite is whether there are questions of law or fact common to the class. S.Ct. Rule 52.08 R.S.Mo. (2001). The commonality requirement is met where a plaintiff and the members of the proposed class share a single common question of law or fact. *Morgan v. United Parcel Service*, 169 F.R.D. 349, 355 (E.D. Mo. 1996). The commonality requirement does not require the plaintiffs to demonstrate that the class members' claims are identical. *Renstcher v. Carnahan*, 160 F.R.D. 114, 116 (E.D. Mo. 1995). Instead, the commonality element requires only that the harm complained of be common. (*Id.*)

With respect to the requirement that common issues predominate over individual issues, it is well-settled that the presence of some individual issues will not defeat certification. 1 Hebert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.25 (3d ed 1992) (“[T]he very definition of the requirement of the predominance of common questions contemplates that individual issues will usually remain after the common issues are adjudicated.”).

In the instant action, there is a well-defined community of interest and common questions of law and fact which predominate over any questions affecting only individual members of the Class. These common legal and factual questions, which do not vary from one Class member to another, and which may be determined without reference to the individual circumstances of any Class member, include, but are not limited to the following:

1. Whether U.S. Title's conduct constituted unlawful, unfair and/or deceptive practices, in violation of the MMPA;

2. Whether U.S. Title was unjustly enriched from the receipt of fees for services not performed;
3. Whether U.S. Title participated in and pursued the common course of conduct and fraudulent scheme complained of herein;
4. Whether U.S. Title breached its contract with Plaintiff and members of the Class;
5. Whether Plaintiff and members of the Class are entitled to punitive damages and, if so, the amount of such damages;
6. The amount and nature of disgorgement and restitution to be imposed for Defendant's improper conduct;
7. Whether U.S. Title breached its contractual obligation of good faith and fair dealing with Plaintiff and members of the Class; and
8. The nature of additional relief to which Plaintiff and the Class are entitled.

The above preliminary list of common questions of law and fact unquestionably satisfies the criteria of Rule 52.08, as the answers to these fundamental questions are dependent upon a standard, unitary set of operative facts concerning Defendant's conduct, which are central to the resolution of the claim of the representative Plaintiff and each member of the proposed Class. These questions can be answered for the Class as a whole, and clearly predominate in this litigation. Moreover, all of these claims arise under the same core of operative facts. The same evidence that proves Plaintiff's claims will prove the claims of all Class members, making the case ideally suited for class action treatment. Accordingly, the commonality element has been satisfied.

3. **Plaintiff's Claims Are Typical**

A class representative must be “part of the same class and possess the same interest and suffer the same injury as the class members.” *Harris v. Union Electric Co.*, 766 S.W.2d 80, 86 (Mo. banc 1989) (citing *East Texas Motor Freight System, Inc.*, 431 U.S. 395 (1977) (additional citations omitted)). Class members have similar grievances or injuries if they have been subjected to the same allegedly unlawful treatment. *Rentschler*, 160 F.R.D. 114, 116 (E.D. Mo. 1995). This burden is easily met so long as other class members have similar claims as to the named plaintiff. Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theories. *Alpern v. UtiliCorp. United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996); *see also Dale, supra*, 204 S.W.2d at 168 (typicality element satisfied as long as underlying facts are not markedly different).

Plaintiff’s claims and defenses are typical of the claims and defenses of the Class. Indeed, Plaintiff’s claims are not only typical, they are essentially identical to the claims of the other Class members from a liability standpoint. Defendant utilized the same form (HUD-1 form) to collect the same fee (release recording fee), in connection with the same service (recording the release) that it failed to perform. Thus, all Class members were injured by the same wrongful practices in which Defendant engaged and all claims arise from the same practice and course of conduct that gives rise to the claims of the Class members, and are based on the

same legal theories.⁷

Accordingly, the typicality element is readily satisfied here.

4. Plaintiff Will Fairly And Adequately Represent The Class

To satisfy the adequacy requirement, Plaintiff need only establish that (1) the class representative's interest is coextensive with and not antagonistic to those of the unnamed class members; and (2) Plaintiff's counsel must be fully competent to prosecute this action as a class action. *Lindquist v. Brown*, 633 F.Supp. 846, 859 (W.D. Mo. 1986). The requirement of adequate representation tends to merge with the commonality and typicality prerequisites, which serve as guideposts for determining whether the maintenance of a class action is economical and whether the representative party's claims and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

In order for differences in views among the representatives and class members to constitute a conflict sufficient to defeat class certification, there must appear to be a real probability of a conflict which goes to the very heart of the litigation. *In Re Tetracycline Cases*, 107 F.R.D. 719, 730 (W.D. Mo. 1985). In this case, however, Plaintiff's claims are identical to

⁷ The only potential difference is the amount of damages sustained, which can be determined readily, and does not impede class certification. *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, at *4 (Mo. 2003) (slip op.)

those of the Class members, and he seeks no preferential treatment. Plaintiff seeks to demonstrate that Defendant's course of conduct (1) violated the MMPA; (2) breached contractual provisions; (3) breached of the contractual duty of good faith and fair dealing; and (4) unjustly enriched Defendant, to the detriment of Plaintiff and the Class. There is no conflict between the proposed Class representative and the other Class members.

Additionally, Plaintiff's counsel in the case at bar are experienced and competent to handle complex class action litigation. In fact, Plaintiff's counsel have successfully litigated many class actions, including similar class actions in other venues. Plaintiff's attorneys will responsibly and vigorously prosecute this suit on behalf of Plaintiff and Class members.

Accordingly, each of the requirements of Rule 52.08(a) have been satisfied.⁸

5. Questions Of Law And Facts Common To The Class Predominate Over Individual Issues

The common questions of law and fact set forth above predominate over any questions affecting individual members. Furthermore, a class action lawsuit in the instant action is superior to all other available methods for the fair and efficient adjudication of the controversy.

The term "predominate" does not mandate that "every single issue in the case be common to all class members, but only that there are substantial common issues which 'predominate' over the individual issues." *State ex rel. Am. Family Mut. Ins. Co.*, 106 S.W.3d, at *12. Moreover,

⁸ The firm resumes of Plaintiff's counsel are attached, collectively, as Exhibit "10."

the predominate issue need not be dispositive of the entire action, or “even determinative of the liability issue involved.” (*Id.*)

Courts have regularly found that common issues predominate over individual issues in circumstances similar to those presented in this case. In *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 96, 43 N.Y.S.2d 698 (2d. Dept. 1980)⁹, a case in which plaintiffs, as is the case here, challenged the imposition and collection of a fee at real estate closings, the court concluded that the predominance element was satisfied and held as follows:

The paramount issue, then, is the propriety of Vanguard’s conduct at the closing. The fact that there may have been differences in the manner in which Vanguard exacted money from sellers at each closing does not mean that individual questions predominate: the rule requires predominance, not identity or unanimity among class members. Similarly, the fact that the questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. The entire matter of liability can be easily disposed of once it is determined how Vanguard passed the tax on and why. To litigate this issue 300 times would be an obvious waste of judicial resources; to deprive a potential group of 300 litigants of a practical means to recover would frustrate the intent of the statute by continuing its constrictive interpretation.

⁹ In *Friar*, plaintiffs moved for certification pursuant to New York’s CPLR article 9 governing class actions which, like C.R.C.P., was modeled upon Rule 23 of the Federal Rules of Civil Procedure. See *Naftulin v. Sprint Corporation*, 16 Misc.3d 1131(A), 847 N.Y.S.2d 903 (2007).

(*Id.* at 98 (internal citations omitted).)¹⁰

Additionally, common questions of law predominate notwithstanding differences in the specific amounts of damages each Class member may be entitled to recover. *See State ex rel. Am. Family Mut. Ins. Co., supra* at *4; *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.*, 122 F.R.D. 251, 254 (C.D. Cal. 1988) (“Although the amount of damages suffered is generally an individual matter, this issue should not preclude a finding of predominance.”).¹¹

As discussed above, there are a multitude of factual and legal questions common to the Class, any one of which would be sufficient to meet the “predominance” requirement. Again, if

¹⁰ The certification in *Friar* highlights just how well suited the instant claims are for certification. In *Friar*, the predominance element was deemed to be satisfied even though class members ultimately had to demonstrate that they paid the fee at issue as a result of economic duress. The Class definition proposed by Plaintiff here, however, has no such requirement and, instead, merely focuses on the collection of a fee for a service not performed. Thus, if certification was warranted under the circumstances in *Friar*, it is most certainly warranted here.

¹¹ In addition, because Plaintiff seeks to represent a Missouri only class, Missouri law will apply to his claims and those of Class members. Accordingly, no argument can be made that there are possible variations in state law that would predominate over the common questions of law and fact applicable to the entire Class.

Plaintiff and every Class member were to bring thousands of individual actions, each would rely upon the same acts by Defendant and interpret the same statutory and contractual language in order to establish their respective cases. Common questions of law and fact dwarf any individual issues, if there are any at all, which may exist. Accordingly, common questions clearly predominate and this element is satisfied.

6. **A Class Action Is Superior To All Other Methods of Litigation**

Rule 52.08(b)(3) also requires a finding that a “class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Rule 52.08(b)(3) lists the following factors for a court to consider in determining the superiority of the class action to individual law suits:

- (1) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;
- (2) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (3) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (4) The difficulties likely to be encountered in the management of a class action.

Here, the class action procedure is undoubtedly the superior method of adjudication. First, joinder or wholesale intervention, the alternatives to class treatment, would prove wholly unmanageable and result in a great multiplicity of actions, one of the primary evils Rule 52.08

seeks to prevent. Neither the parties nor the judicial system would benefit by numerous duplicative, expensive, and time-consuming lawsuits. Further, Plaintiff's counsel are experienced in litigating complex class actions and do not anticipate any problems in the management of this case.

As the United States Supreme Court has held, concerns of fairness and efficiency make a class action superior to hundreds of separate individual trials:

The policy at the very core of the Class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A Class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); accord *Tenney v. Miami Beach*, 152 Fla. 126, 129, 11 So. 2d 188, 189 (1942) ("The very purpose of a Class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist.").

In the context of commercial practices affecting large groups of consumers, it is frequently the unfortunate reality that there will be relatively few cases filed compared to the number of injured parties because of the relatively small size of individual claims. Fairness to the compensatory and deterrent goals of the class action device requires courts to presume that relatively small claims may have merit and are entitled to be heard and resolved by our legal

system. *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100, 115 (E.D. Va. 1980). The consumer class action is the most beneficial device in such circumstances. "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the Class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *McCastle v. Rollings Environmental Services, Inc.*, 456 So. 2d 612, 619 (La. 1984) ("[s]ince the claims do appear to be small, it is probable that a Class action would open the courts to many claims which would not ordinarily be litigated because they could not be prosecuted economically as individual actions."); *Broin*, 641 So. 2d at 891-92 ("[I]f we were to construe the rule to require each person to file a separate lawsuit, the result would be overwhelming and financially prohibitive.").

A class action is especially appropriate in cases like the instant one in which a large number of people seek a relatively small amount in monetary relief per individual. While the amount of damages each individual Class member may recover from Defendant is not wholly insubstantial, neither is it sufficiently large to offset the probable cost of prosecuting a complex case on an individual basis. Thus, absent class treatment, thousands of meritorious claims may go unredressed. In *Lake v. First Nationwide Bank*, 156 F.R.D. 615 (E.D. Pa. 1994), a mortgage overcharge case, the court explained:

The Court has little difficulty in finding that the Class action form is the superior method of resolving the claim that the Lakes seek to prosecute. The alternative to pursuing a Class action is a series of state court actions by a large number of scattered Plaintiffs, an inefficient allocation of

judicial and public resources. . . . Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the Class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action. As Professors Wright, Miller and Kane have discussed in analyzing consumer protection Class actions such as the instant one, "typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis. These financial barriers may be overcome by permitting the suit to be brought by one or more consumers on behalf of others who are similarly situated."

The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a Class action form. . . . Given the difficulties inherent in individual resolution of the claims the Lakes seek to prosecute on behalf of the proposed Class, the Court finds that the Class action form presents the superior method resolving the instant litigation.

(*Id.* at 626 (citations omitted).)

As a "society. . . growing in complexity, there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the Class action but who could with all regard to due process be protected by it." *Eisen*, 417 U.S. 156, 185-86. In the instant action, a class action is the only practical means for Plaintiff and Class members to receive redress, particularly as their individual claims are relatively small.

Other factors considered are the difficulty that may be encountered in maintaining a class action, and the desirability of concentrating the litigation in a single forum so as to avoid a multiplicity of suits. S.Ct. Rule 52.08(b)(3)(8) and (D) R.S.Mo. (2001). This case presents no problems with manageability. The proceedings can be structured so that common issues are resolved in a single trial. *See W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 780. The Court has the flexibility to manage claims by creating a subclass or subclasses, (*id.*), and by deferring individual claims to subsequent proceedings. *See Engle*, 672 So. 2d at 41; *State ex rel. Am.*

Family Mut. Ins. Co. at *12. Furthermore, concentrating this action in a single forum is desirable and beneficial to both the Missouri court system and the Class members. As stated above, there are thousands of potential claimants that may file suit if the Class is not certified, thereby overloading our already busy judicial system.

Accordingly, the requirements set forth in Rule 52.08(b)(3) have been satisfied and this Court should grant Plaintiff's Motion.

IV. CONCLUSION

The requirements of Rule 52.08(a) and (b) are clearly satisfied and the only alternative to certification is a multiplicity of suits involving the same factual and legal issues. Absent class certification, a common wrong perpetrated upon thousands of individuals will likely go unredressed.

For the foregoing reasons, Plaintiff respectfully requests that this Court certify the aforementioned Class.

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By: _____


Eric Holland (39935)
Steven Stolze (39795)
HOLLAND, GROVES, SCHNELLER
& STOLZE, LLC
300 N. Tucker, Ste. 801
St. Louis, MO 63101
Telephone: (314) 241-8111
Facsimile: (314) 241-5554

James C. Shah
Nathan C. Zipperian
SHEPHERD, FINKELMAN, MILLER

& SHAH, LLP
35 East State Street
Media, PA 19063
Telephone: (610) 891-9880
Facsimile: (610) 891-9883

James E. Miller
SHEPHERD, FINKELMAN, MILLER
& SHAH, LLP
65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (860) 526-1120

Attorneys for Plaintiff