IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

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

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PLAINTIFF'S REPLY TO DEFENDANT'S SUGGESTIONS
IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

COMES NOW Plaintiff and pursuant to Missouri Rule 52.08, submits the following Suggestions in Reply to Defendant's Suggestions in Opposition to Plaintiffs' Motion for Class Certification.[1]

I. COMMON ISSUES OF LAW AND FACT PREDOMINATE IN THIS ACTION.

A. Each of Plaintiff's Claims Involves Common Questions of Fact and Law.

In its Suggestions in Opposition to Plaintiffs' Motion for Class Certification, Defendant United Financial Casualty Company d/b/a Progressive Insurance Company ("Progressive") asserts that Plaintiff's claims are unsuitable for certification because they "depend on contract ambiguity" and thus, "require inquiry into extrinsic evidence" unique to each member of the putative class. (*See* Defendant's Suggestions In Opposition to Plaintiffs' Motion for Class Certification," hereinafter referred to as "Defendant's Suggestions," at pgs. 1-17). Defendant is wrong.

[1] Plaintiff conceded to Defendant's Motion to Dismiss Dennis Lagares as a named plaintiff and class representative.

First, Plaintiff's claims do not depend on contract ambiguity. Plaintiff claims that Defendant's Form 6912 Missouri Commercial Auto Policy is a valued policy by application of Missouri's valued policy statute, Mo.Ann.Stat. § 379.160, and/or by the intent of the parties *as expressed in the contract. Huth v. Gen. Acc. & Life Assur. Corp., Ltd.*, 536 S.W.2d 177, 181 (Mo. App. E.D. 1976). Of course, the question of whether Missouri's valued policy statute applies to Defendant's Form Commercial Auto Policy is a question common to all putative class members. So too, however, is the question of whether the contract is expressly a valued policy.

In determining whether an insurance contract is a valued policy, even without application of Missouri's valued policy statute, courts look to policy itself, and not to individual and unique *extrinsic* evidence: "If there is anything *in the policy* which clearly indicates an intention on the part of the insurer to value the risk and loss, in whatever words expressed, the policy is valued." *Huth*, 536 S.W.2d at 181 (emphasis added). *See also Grantham v. Shelter Mut. Ins. Co.*, 721 S.W.2d 242 (Mo. App. W.D. 1986).

Second, as articulated in Plaintiff's Suggestions in Opposition to Defendant's Motion for Summary Judgment, *even if* Plaintiff's claim *did* depend on an ambiguity in the form insurance policy, resolution of the ambiguity does not require individual inquiry into extrinsic evidence. In adhesion insurance contracts, ambiguities are always resolved in favor of the insured. *Shelter Mutual Insurance Co. v. Brooks*, 693 S.W.2d 810, 812[2] (Mo. banc 1985). In this case, all members of the putative class are favored by the same construction—that Progressive agreed to pay, in the event of a total loss, the Stated Amount as shown on the declaration page on the date the policy was issued or last renewed. Thus, resolution of an ambiguity, even if one exists, is

resolved universally and not by extrinsic evidence unique to the individual members of the putative class.[2]

Moreover, *even if*, as Progressive maintains, the terms of its form insurance policy *are not* ambiguous, that "no more ends inquiry than to have found them ambiguous." *Estrin Const. Co., Inc. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 420 (Mo. Ct. App. 1981); *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 381 (Mo. 1991) (describing the objective reasonable expectations doctrine as a "rule providing the objective reasonable expectations of adherents and beneficiaries to insurance contracts will be honored even though a thorough study of the policy provisions would have negated these expectations.")(internal quotation omitted)). The law protects the *objective* expectations of the insured, and in a form insurance contract, "those expectations do not reside altogether in the words ambiguous *or unambiguous*, but in the total transaction." *Estrin*, 612 S.W.2d 420. (emphasis added). Significantly, the question of reasonable expectations is resolved *without resort to individual inquiry*. The Western District Court of Appeals in *Estrin*, stated the principle:

> (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.

(citing Restatement (Second) of Contracts 2d s 237(2) (Tent.Draft 1973)) (emphasis added).

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[2] In its Suggestions, Defendant states: "When an insurance policy is ambiguous, the plaintiff must provide extrinsic evidence regarding the meaning of the policy." Defendant cites *West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 16 (Mo. Ct. App. 2010), as support for this assertion. *West* involved interpretation of a bail bond contract, not an insurance contract, and is therefore wholly inapplicable. Not only that, *West* does not hold that in the event of an ambiguous policy, a plaintiff must provide extrinsic evidence regarding the meaning of the policy. Other Missouri cases cited by Defendant for the proposition that extrinsic evidence must be used by Plaintiff to resolve an ambiguity were decided long before *Estrin* and its progeny and are not relevant here.

> If 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.

Estrin, 612 S.W.2d at 426 (Mo. Ct. 1981) (*citing* Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv.L.Rev. 961, 974 (1970)). *See also Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri*, 992 S.W.2d 308, 317 (Mo. App. E.D. 1999) ("[W]ords in an insurance contract are to be construed in accordance with the principle that the test is not what the insurer intended the words to mean, but rather what a *reasonable layperson* in the position of the insured would have thought they meant." (emphasis added)). Thus, *for all members of the class*, the insurance policy provisions at issue are construed in favor of the reasonable expectations of the policyholders, including against those hypothetical class members who knew of the restrictive terms. As a result, individual inquiry into each class member's understanding is unnecessary and unwarranted.

Defendant, however, relies on *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300 (Mo. Banc. 1993), in asserting at page 9 of its Suggestions that "the general rules for interpretation of other contracts apply to insurance contracts as well." While this is true of insurance contracts arrived at through negotiation, it is not true of adhesion insurance contracts. *Peters* involved a negotiated contract as opposed to an adhesion contract.[3] *Peters*, 853 S.W.2d at 301. Indeed, the

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[3] As stated in *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 697 (Mo. 1982):

> An adhesion contract is a form contract created by the stronger of the contracting parties. It is offered on a "take this or nothing" basis. *See Estrin,* 612 S.W.2d at 418 n. 3. Consequently, the terms of the contract are imposed upon the weaker party who has no choice but to conform. 3 Corbin on Contracts, § 559 (1960). *These terms unexpectedly or unconscionably limit the obligations and liability of the drafting party. See* Corbin on Contracts, § 559 (Kaufman Supp. 1980). *Because of these circumstances, some courts look past the wording of the contract*

Supreme Court in *Peters* specifically distinguished between adhesion insurance contracts and negotiated insurance contracts in its ruling:

> Because the College drafted the insurance proposal, took bids, and switched insurance companies, this insurance contract was negotiated and not an adhesion contract. Defendant's heavy reliance on *Estrin Construction Co., Inc. v. Aetna Casualty & Surety Co.,* 612 S.W.2d 413 (Mo.App.1981) and *Spychalski v. MFA Life Insurance Co.,* 620 S.W.2d 388 (Mo.App.1981) is misplaced, because ***these cases apply only to adhesion contracts and not to negotiated contracts.*** *Rodriguez v. General Accident Ins. Co.,* 808 S.W.2d 379, 382 (Mo. banc 1991); *Robin v. Blue Cross Hospital Service, Inc.,* 637 S.W.2d 695, 698 (Mo. banc 1982).

Peters, 853 S.W.2d at 301. Since Defendant's Form 6912 Missouri Commercial Auto Policy is an adhesion contract, *Estrin*, not *Peters*, applies. Thus, under all of Plaintiff's theories, there are common questions of fact and law.

In its discussion of commonality, Defendant also relies heavily on *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes*, female employees of Wal-mart sued the retail chain alleging sexual discrimination. *Id.* Notably, *Dukes* did not involve insurance policies, breach of contract claims, or valued policy statutes. In any event, the plaintiffs in *Dukes* unsuccessfully sought certification of a class of *all women employees* of the huge retail chain. *Id.* at 2544. The Supreme Court, in deciding that the plaintiffs could not show that there were questions of law or fact common to the class, stated the following:

> Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." *Falcon, supra,* at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law.

> *and consider the entire transaction in order to effectuate the reasonable expectations of the parties.* 3 Corbin on Contracts, §§ 534–542 (1960); Restatement (Second) of Contracts, §§ 226–227 (Tentative Draft 1973).

(emphasis added).

> Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

Dukes is inapplicable and bears no resemblance to the case at bar. Nevertheless, Plaintiff acknowledges, as Defendant states in its Suggestions, that the commonality prong Rule 52.08(a) and its Federal counterpart, Rule 23, is not always "an easily-met speed bump." (*See* Defendant's Suggestions at pg. 11). However, in this case, unlike in *Dukes*, the members of the putative class have all suffered the same common injury—Progressive's breach of contract when it paid policyholders based on the actual cash value rather than based on the agreed upon stated amount. *See State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 488 (Mo. 2003) ("American Family breached its contracts with each prospective class member when it made payment on policyholders' claims based upon estimates either specifying the use of non-OEM crash parts or omitting particular repairs. This *common issue* is the predominant issue." (emphasis added)); *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 689 (Mo. Ct. App. 2009) ("The Supreme Court ruled that the predominate issue—whether American Family breached its contracts with the Class when it paid policyholders based on the cost of aftermarket parts—was the common issue."). Thus, Plaintiff submits that in this case, the commonality prong *is* easily met.

B. Common Questions Predominate.

At page 12 of its Suggestions, fn. 4, Defendant observes that that Missouri Supreme Court, in *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483 (Mo. 2003), acknowledged that the commonality prong and the predominance prong of Rule 52.08 are "qualitatively the same, even it they differ in degree." (Defendant's Suggestions at pg. 12, fn.4). Plaintiff agrees. *Clark*, in fact, is particularly germane to this case. With respect to both the commonality prong and the predominance prong, *Clark* is illustrative of Plaintiff having satisfied both.

In *Clark*, Plaintiffs sued American Family Mutual Insurance Company ("American Family") for breach of contract on behalf of themselves and similarly situated plaintiffs. 106 S.W.3d at 485. The plaintiffs were American Family auto insurance policy holders who had suffered a loss under a policy that promised to "pay loss in money or repair or replace damages or stolen property." *Id.* At the time of their loss, American Family had established guidelines that adjusters followed when writing estimates for replacement parts. *Id.* For vehicles in the latest three model years, adjusters were instructed to specify Original Equipment Manufacturer ("OEM") replacement parts for repairs. When writing estimates for vehicles of an earlier model year, adjusters were encouraged to specify the use of non-OEM crash parts or salvage OEM parts.[4] *Id.* American Family also used computer software to write the estimates. *Id.* The software automatically specified non-OEM crash parts for automobiles of certain model years. *Id.*

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[4] OEM parts are those parts made by the original automobile manufacturers or suppliers; non-OEM parts are made by outside companies without access to the design specifications of the OEM parts.

Plaintiffs claimed that American Family breached its contracts with Missouri policyholders to restore their vehicles to pre-loss condition by devising and implementing a practice that resulted in payment of claims based on (1) the systematic specification of "inferior" non-OEM crash parts for repairs and (2) the systematic omission of specific "necessary" repairs from estimates. *Id.* Plaintiffs brought the action on behalf of themselves and all others in the state of Missouri,[5] who were insured by American Family, made a claim for vehicle repairs pursuant to their policy, and received payment based on an estimate prepared or approved by American Family that included non-OEM crash parts. *Id.* After an eight-day hearing, the Honorable Thomas C. Clark and Edith L. Messina, Judges of the Sixteenth Judicial Circuit, certified the class. *Id.* at 485. American Family sought relief by way of writ of prohibition. *Id.*

In opposing class certification, American Family contended that the class of Missouri plaintiffs did not meet the "predominance" element outlined in Rule 52.08(b)(3). *Id.* at 488. "American Family's position [was] that the action consist[ed] of individual breach of contract claims with varying factual circumstances that 'swamp' common issues." *Id.* As a demonstration, American Family pointed to two factual premises plaintiffs had to prove in order to establish liability: "(1) that all of the damaged parts at issue in this case for all class members were OEM parts in good condition immediately prior to the respective covered losses, and (2) that all the non-OEM crash parts specified by American Family for repair are inferior to all OEM crash parts." *Id.* American Family argued that these and other individual inquiries precluded class certification. *Id.* The Missouri Supreme Court disagreed:

[5] While plaintiffs had sought certification of a nationwide class, that was rejected by the Court. *Clark*, 106 S.W.3d 483. The class ultimately consisted of only Missouri policyholders. *Id.*

> The "predominance" requirement ... does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which "predominate" over the individual issues. The predominant issue need not be dispositive of the controversy or even be determinative of the liability issues involved. The need for inquiry as to individual damages does not preclude a finding of predominance. A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.
>
> Under plaintiffs' theory, American Family breached its contracts with each prospective class member when it made payment on policyholders' claims based upon estimates either specifying the use of non-OEM crash parts or omitting particular repairs. *This common issue is the predominant issue.* If it is established at trial that American Family did not breach its contracts with policyholders by making payments based upon non-OEM crash parts or the omission of particular repairs, then the claims of all the prospective class members fail without further factual analysis. If it is determined that American Family's payment of claims based upon the inclusion of non-OEM parts or exclusion of particular repairs constitutes breach of contract for some or all of the prospective class members, then the trial court can proceed in the most expeditious and efficient way possible relative to any individual circumstances or issues that may exist. The predominance of the common issue is not defeated simply because individual questions may remain after interpretation of the contract—questions of damages or possible defenses to individual claims.

Clark, 106 S.W.3d at 488-89 (internal citations and quotations omitted) (emphasis added).

Thus, in *Clark*, despite American Family's insistence that individualized issues would swamp common issues, "[t]he Supreme Court ruled that the *predominate issue*—whether American Family breached its contracts with the Class when it paid policyholders based on the cost of aftermarket parts—*was the common issue*. *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d at 689.

After trial, American Family filed an appeal claiming, *inter alia*, that the circuit court erred in overruling its motion to decertify Class because, in violation of Rule 52.08(b), the evidence at trial established that the common issues of fact and law did not predominate over the individual issues of fact and law. *Id.* at 687-88. "Specifically, American Family claim[ed] that

the common issues did not predominate over the individual issues at trial because, in order to establish that American Family breached its insurance contracts with each class member, the plaintiffs would be required to show the pre-loss condition of each vehicle." *Id.*

The Missouri Court of Appeals, Western District, disagreed with American Family: "[T]he predominant issue in the case was the common issue of whether or not American Family breached its contract when it made payments based on an estimate that included the cost of aftermarket parts or omitted particular repairs." *Id.* at 688. "The question of whether American Family breached its contracts with its policyholders remained the predominant issue throughout the trial." *Id.* The Court further held that the inquiry into the pre-loss condition of an automobile was "an issue to be addressed after the jury passed judgment on the predominant issue" and that "post-loss condition is immaterial to the issue of whether or not American Family breached its contracts by failing to pay its policyholders a sum sufficient to return the car to pre-loss condition." *Id.* at 689.

Just as the predominant issue in *Clark* was the common issue of whether or not American Family breached its contract when it made payments based on an estimates that included the cost of aftermarket parts or omitted particular repairs, *id.* at 688, the predominate issue in the case at bar is the common issue of whether or not Progressive breached its contract when it made payments based on actual cash value as opposed to the Stated Amount.[6] And, just as inquiry into

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[6] In its discussion of the "predominance prong" in Section C of its Suggestions, Progressive curiously cites *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 86 (Mo. Ct. App. 2011), a case involving the alleged breach of an express warranty, in asserting that individual issues necessarily predominate in this since the case requires inquiry in each policyholders' understanding of the contract. In this case, Plaintiff is not asserting a claim for breach of an express warranty. Indeed, Plaintiff agrees that if he were, each class member's claim would depend on an individual determination of whether each class member had in fact read or seen the

the pre-loss condition of an automobile was "an issue to be addressed after the jury passed judgment on the predominant issue" in *Clark*, inquiry into the damages in this case is an issue to be addressed after judgment on the predominant issue.[7] Thus, just as in *Clark*, this case involves a common, predominate issue appropriate for class certification. *Clark* controls.

However, *even if* this Court were not bound to follow *Clark*, the Court would nevertheless certify on the separate ground which is, unarguably, common to class—interpretation of Missouri's valued policy statute, Mo.Ann.Stat. § 379.160, and Defendant's Form Commercial Auto Policy. Mo. Sup. Ct. R. 52.08(c)(4). *See also* Deposition of Patricia Corwin at 125:10-17, 126:4-13 (attached as Exhibit A). When appropriate, an action may be brought or maintained as a class action with respect to particular issues or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this Rule 52.08 shall then be construed and applied accordingly.

II. Plaintiff Donald Armon, Sr., is an Adequate and Typical Class Member.

A class representative's claims must be typical of the claims of the class. Rule 52.08(a)(3). "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

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marketing materials, brochures, catalogs, or advertisements that establish the basis for their claim. In this case, however, inquiry into each policyholders' understanding of the contract or intent is not only unnecessary but improper. *Supra* at Part IA.

[7] Progressive concedes at pgs. 18-19 of its Suggestions that evidence of deprecation or diminution in value, if any, is an issue left to be resolved during the damages determination stage of the case. *See Dale v. DaimlerChrysler Corp*, 204 S.W.3d 151, 176 (Mo. App. W.D. 2006) ("[F]or determining the propriety of class action certification, under Rule 52.08(b)(3), as to the satisfaction of the predominance requirement, 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.")

by the defendant, (2) the conduct and facts give rise to same legal theory, and (3) the underlying facts are not "markedly different." *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 715 (Mo. App. W.D. 2009) (citation omitted). "Speculative variations in the class claims are not enough to defeat typicality, and the named representative does not have to show a likelihood of individual success on the merits." *Id.*

Progressive insists that Mr. Armon is inadequate as a class representative because "he admits the Policy is unambiguous and that he was not entitled to receive the Stated Amount after the property's total loss. (*See* Defendant's Suggestions at pg. 20). As Defendant's Ex. B itself reveals, Mr. Armon did not admit nor was he asked whether the policy was unambiguous or, more importantly, what the reasonable expectations of the great majority of policyholders was. *See supra* Part IA; *Estrin*, 612 S.W.2d at 426 ("If 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."). Mr. Armon simply stated at his deposition that he figured, prior to talking with his attorney, that there was nothing he could do about Progressive paying him "the value of the truck according to what Progressive said." (*See* Defendant's Ex. B, at pp. 147-48). In effect, Mr. Armon was conceding only that he had no bargaining power and that his reasonable expectations had been defeated.

Moreover, even assuming Mr. Armon found certain provisions of the policy unambiguous, since Plaintiff claims that the contract is unambiguously a valued policy contract, any provisions to the contrary, ambiguous or not, are void. *Marti v. Econ. Fire & Cas. Co.*, 761 S.W.2d 254, 259 (Mo. Ct. App. 1988) ("[A]ny exclusionary provision which attempts to limit the

insurer's liability to less than the face value of the policy in a case of total loss is contrary to the valued policy statute and void.").[8]

Finally, since resolution of the predominate question, common to all members of the class, including Mr. Armon—whether Progressive breached its contract when it made payments based on actual cash value as opposed to the Stated Amount—does not depend on *any* issue that is the subject of individual inquiry, including the policyholders' independent, subjective understanding of the policy, Mr. Armon, as well as all other putative class members, are appropriate, typical and adequate representatives of the Class. *See supra* Part IA.

III. Plaintiff's Putative Class is Properly Defined.

Progressive argues that Plaintiff's class definition is unworkable because it may include policyholders who, ultimately, may be unable to prove damages because they understood the policy. (*See* Defendant's Suggestions at pg. 27). This argument is disposed of in Part IA of this brief. Plaintiff will not repeat his arguments here nor dwell on Defendant's erred reasoning.

Defendant also argues that varying deductible amounts render the class definition unworkable. Plaintiff is perplexed by Defendant's reasoning in this regard. The class definition describes all those whose recovery from Progressive, after a total loss, was based upon a value of the insured auto other than the Stated Amount. The class definition is substantially similar to that which was certified in *Clark*, supra. That the amount ultimately paid to insureds, based upon the Stated Amount, may vary depending upon deductibles does not render the class

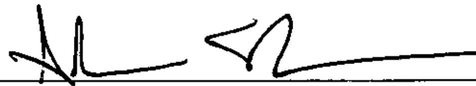
[8] The fact is, even if Mr. Armon, after having read the policy during the course of this litigation, arrived at an interpretation of the policy favoring Progressive, that would not make him an inadequate or atypical class member. In a contract of adhesion, the terms are not expected to be read and, even if read, understood. *Estrin*, 612 S.W.2d at 419.

unworkable in any regard. The amount that each class member is entitled to recover is unquestionably going to vary. This does not render the class uncertifiable.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's Motion for Class Certification.

Respectfully Submitted,



Andrew Schermerhorn #62101
John M. Klamann #29335
THE KLAMANN LAW FIRM, PA
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, LC
503 One Main Plaza
4435 Main Street
Kansas City, MO 64111
Phone: (816) 444-8500
Fax: (816) 444-8508
mmeyers@meyerslaw.com

ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

A true and accurate copy of the above and foregoing was e-mailed and mailed, via regular U.S. Mail, this ~~18th~~ 19th day of February, 2013 to:

Brian C. Fries, Esq.
bfries@latrhopgage.com
Lathrop & Gage, LC
2345 Grand Blvd.
Suite 2200
Kansas City, Missouri 64108-2618

Andrew Schermerhorn