

IN THE
SUPREME COURT OF MISSOURI

NO. SC 88273

BRENNAN AND KIMBERLY VANDYNE,
INDIVIDUALLY AND AS CLASS REPRESENTATIVES,
Plaintiffs/Respondents,

v.

ALLIED MORTGAGE CAPITAL CORPORATION
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
HONORABLE JOHN J. RILEY
CIRCUIT COURT JUDGE

**SUBSTITUTE BRIEF OF DEFENDANT/APPELLANT
ALLIED MORTGAGE CAPITAL CORPORATION**

David M. Harris, # 32330
dmh@greensfelder.com
Timothy M. Huskey, # 44129
tmh@greensfelder.com
James J. Zych, # 52061
jz@greensfelder.com
Kirsten M. Ahmad, # 52886
km@greensfelder.com
GREENSFELDER, HEMKER & GALE, P.C.
10 South Broadway, Suite 2000
St. Louis, MO 63102
Telephone: (314) 241-9090
Facsimile: (314) 345-5465

*Attorneys for Defendant/Appellant Allied
Mortgage Capital Corporation*

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JURISDICTIONAL STATEMENT

This is an appeal by Defendant/Appellant Allied Mortgage Capital Corporation (“Allied”) of an Order in favor of Plaintiffs, Brennan and Kimberly Vandyne, rendered in the Circuit Court of the City of St. Louis. The trial court granted Plaintiffs’ Motion for Class Certification and certified for class treatment Plaintiffs’ claim that Allied violated the Missouri Merchandising Practices Act by allegedly “overcharging” Plaintiffs for third-party services in connection with their loan transaction. Appellant successfully petitioned the Court of Appeals for the Eastern District under Mo. Rev. Stat. § 512.020(3) and Mo. Sup. Ct. R. 84.035 for permission to appeal the trial court’s Order granting class certification. After the Eastern District issued its memorandum opinion affirming the trial court, Appellant moved for transfer to this Court. Under this Court’s Order sustaining Appellant’s motion, dated March 20, 2007, and under Mo. Const. art. V, §§ 3 and 10, jurisdiction is proper in this Court.

SUMMARY OF THE ARGUMENT

This case presents the issue of whether a class action may be certified where the class definition requires a substantive, merits-based inquiry of each potential class member's claim to identify who may participate in the class. The court below erred by certifying a class defined to include all persons in Missouri who, in connection with a loan transaction with Allied, (1) "paid charges for credit reports and/or other loan related services for mortgage loans that exceeded defendant's actual cost for those services"; and (2) paid those charges based upon "nondisclosures and false, unfair, deceptive or misleading disclosures."

The fundamental deficiency with this definition is that the identity of the class cannot be determined without a detailed, individual analysis of some 5,000 loan transactions. As Plaintiffs admit, class membership – and whether a particular person may be considered to be a member of the class – is dependent on two merits-based determinations. The first involves a detailed, merits-based conclusion that is also the paramount factual issue in this case: Did Allied charge that particular customer more for a particular service than it paid for that service? Then, second, even assuming that the evidence suggests a particular customer was "overcharged," he or she can only be a member of the class if the ultimate question of legal liability is answered in the affirmative: Was the "overcharge" the result of a "nondisclosure" of a material fact, or a "false, unfair, deceptive or misleading disclosure" by Allied?

Plaintiffs readily acknowledge that not all of Allied's customers would meet these two tests. To the contrary, they allege that between 40 and 50 percent of Allied's

customers may be included within this class definition. But more importantly, they also admit that the only way of determining which of Allied's customers is in the class will involve a manual review of each of the 5,000 Missouri transactions Allied brokered in 50 different branch offices during the relevant time period, and a mini-trial as to the merits of each individual customer's claim. Indeed, Plaintiffs maintain it will be the trial court's burden to determine class membership – and identify those individuals who did, in fact, pay charges that “exceeded defendant's actual cost” for those services – by engaging in a manual, merits-based review of each of the 5,000 loans at issue. Even after that detailed inquiry, Plaintiffs expect that less than half of Allied's customers will be considered within the class.

The problem inherent with the class as defined, and the reason that the trial court abused its discretion in certifying it, lies in the evidence adduced regarding the procedures necessary for determining the answers to both of these key questions. There is simply no evidence in the record suggesting that any manageable process exists to determine which Allied customers paid more than Allied's costs for loan services; nor is there any indication in the record regarding the manner of determining what representations, if any, an individual customer received, and whether the representations were material to their transaction with Allied.

In fact, it is undisputed that Plaintiffs' proposed methodology would not be easily accomplished. Indeed, after manually reviewing all of the 5,000 loan files during the relevant time period, Plaintiffs were able to identify just 29 transactions that they contend support their contention that class treatment was appropriate.

Moreover, the process proposed by Plaintiffs to determine class membership represents more than a mere administrative burden or an inconvenience, but rather amounts to nothing short of a final determination on the merits of each individual potential class members' claims – at a stage of the case normally reserved for making only the threshold determination of class membership. Courts have repeatedly held that class definitions that place the proverbial “cart before the horse” are invalid because 1) they require inquiry into the paramount facts and legal issues that are properly reserved for trial; and 2) they fail to provide the class and absent class members notice of the action and opportunity to exercise their rights of participation. The next step in this case is to send out notice to class members and give them the opportunity to “opt-out” of the class, yet it is undisputed that it is impossible under the current class definition to know to whom notice should be sent – short of an evidentiary hearing on each potential class member's claim.

Plaintiffs inability to craft a valid class definition flows from the paucity of competent evidence at the hearing below and the highly individualized nature of the elements of Plaintiffs' claim. In turn, it is apparent that the evidence below does not support even the most basic elements of Plaintiffs' burden regarding numerosity, commonality, typicality, and adequacy. For example, although Plaintiffs made sweeping allegations regarding “widespread” and “uniform” practices of Allied's overcharges, when it came time to meet their burden of proof regarding class treatment, their own evidence demonstrated that the conduct at issue was anything but uniform or applied to more than a handful of Allied's customers.

The reality of the trial court's order is this: Rather than require Plaintiffs to meet their burden of meeting all elements under Rule 52.08, the trial court certified the class based not on evidence of widespread practices of overcharging, but on allegations of the practice. Moreover, in granting Plaintiffs' Motion for Class Certification, the trial court failed to address the apparent deficiencies in the class definition. Nor did the court address the fact that it will require more than 5,000 "mini-hearings" simply to determine whether each potential class member has a meritorious claim and is, therefore, entitled to participate in the class. The trial court's certification of a class that requires a merits-based determination simply to identify class membership, and its failure to require Plaintiffs to meet their required burden of proof constitutes an abuse of discretion.

STATEMENT OF FACTS

I. Procedural History

In 2001, Plaintiffs refinanced their existing home mortgage loan. Allied acted as the mortgage loan broker in that transaction. (R. 31.) Plaintiffs allege that Allied improperly represented to them that certain fees – charged by Allied and voluntarily paid by Plaintiffs – for services provided by third-parties were “costs” when, they contend, the charges actually contained a profit component.

Plaintiffs originally asserted three claims: First, Plaintiffs asserted that Allied’s alleged conduct in charging more than its costs for these third-party services constitutes an “unfair practice” in violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 *et seq.*, by charging them fees greater than Allied’s costs for certain loan related services; second, Plaintiffs alleged that this same conduct entitled them to “restitution at law,” or unjust enrichment; and third, Plaintiffs alleged that Allied’s conduct constituted a violation of the implied covenant of good faith and fair dealing. (See SR. 126-133.) Plaintiffs later asserted a fourth claim for breach of fiduciary duty.

By Order dated May 3, 2004, the trial court dismissed Plaintiffs’ second and third claims. (SR. 126-133.) In a separate order, the court also dismissed Plaintiffs’ claim for breach of fiduciary duty, leaving the single count for violation of the MPA. (SR. 150-162.) This was the only count pending at the hearing on class certification. (R. 12 at p. 9:3-5.)

On March 23, 2006, the trial court issued an Order granting Plaintiffs’ Motion for Class Certification. (R. 1-9.) In its Order, the trial court certified the following class:

All persons in Missouri who, since March 18, 1997 through December 31, 2002, based on nondisclosures and false, unfair, deceptive or misleading disclosures of Defendant Allied Mortgage Capital Corporation paid charges for credit reports and/or other loan related services for mortgage loans that exceeded defendant's actual cost for those services.

(R. 8.)

Notwithstanding the fact that the trial court had previously dismissed Plaintiffs' claims for restitution and breach of the covenant of good faith and fair dealing, it specifically noted that issues common to the class – those that predominate over individual issues such that class treatment is appropriate – included “whether Defendant violated the Merchandising Practices Act, Breach of the Covenant of Good Faith and Fair Dealing, and whether class members are entitled to Restitution or a Declaratory Judgment.” (R. 7.)

II. The Parties: Allied's Brokerage Services and Plaintiffs' Loan Transaction

Allied is a privately held mortgage broker, headquartered in Houston, Texas. Allied brokers primarily residential mortgage loans through branch offices located throughout the United States, including Missouri. (R. 25 at p. 59:7-18.) Although Allied's branch offices operate under certain centralized guidelines, they are independently managed. In other words, each branch office has the authority to implement its own procedures in conducting business and maintaining files. (R. 26 at p. 64:1-25.)

As a mortgage broker, Allied does not originate or fund a significant number of loans; instead, it assists customers in locating the best loan available for their particular situations. (R. 481 at ¶ 5.) Typically, Allied will provide its customers with various options through different lenders with which it does business. (*Id.*) Through relationships with lenders, Allied attempts to offer a customized loan option that will best serve a particular customer's needs. (*Id.*) It also processes preliminary paperwork for the transaction, and obtains such items as appraisals and credit reports, before passing the loan on to a lender to be funded. (R. 27 at p. 69:23 to 70:21.) In exchange for these services, Allied charges its customers certain fees.

In September or October of 2001, Plaintiffs came to Allied to refinance their existing mortgage. (R. 87.) Allied charged – and Plaintiffs paid – certain fees in connection with its brokerage services. (R. 90-91.) Included in those fees were the charges at issue in this lawsuit, namely charges for services Allied obtained from third-party vendors on Plaintiffs' behalf. In connection with their loan, Plaintiffs agreed to pay Allied \$50.00 for credit reporting services, \$90.00 for a flood certification letter, and \$65.00 for courier services. (*Id.*)

Plaintiffs do not contend that Allied misrepresented the nature or amount of these “third-party fees.” Nor do they dispute that they voluntarily agreed to pay these fees. Instead, Plaintiffs contend only that Allied was obligated to disclose what – if any – profit it received from the payment of these fees.

Plaintiffs were charged a total of \$655.00 for services provided by Allied in connection with their loan.¹ (R. 91.) That figure includes all three of the third-party fees alleged to be at issue in this case, and a \$200.00 fee that Plaintiffs paid to their title company when they requested that it re-draw the transaction documents. (*Id.*) At their closing, however, Plaintiffs received a credit of \$650.00 of the fees they paid to Allied. (*Id.*; *see also* R. 259 at p. 80:18-21.) Thus, in the end, Plaintiffs were credited for all but \$5.00 of all their closing costs, a fact that Plaintiffs have acknowledged. (*Id.*)

III. The Undisputed Evidence Relating to “Third-Party Fees” Generally

The court below received extensive evidence relating to Allied’s business practices and the third-party fees at issue. That evidence was admitted without objection, nor was it otherwise disputed by Plaintiffs.

The number and amount of third-party fees Allied collects from its customers varies from loan to loan. (R. 48 at p. 152:18-25.) In short, Allied does not require its customers to pay any particular third-party fee – there is no “standard” third-party fee. Nor is there a uniform process that assesses the same third-party fees to all customers; instead, a determination of what fees are necessary depends on the nature and circumstances of the particular loan at issue, and the requirements of the lender with which Allied is working. For example, depending on the location of the property, a lender might require certification that the property is in a flood plain for insurance purposes. (R. 26 at p. 62:2-19.) Similarly, depending on the type of the loan and its timing, different types or numbers of credit reports may be necessary for a loan. (R. 30 at

¹ This figure is exclusive of Plaintiffs’ origination fee.

p. 78:14-25.) Moreover, depending on factors particular to the lender in question, some customers or loans do not require credit reports at all; others may require more than one before a loan may be closed. (R. 28 at p. 73:2-12; R. 29 at p. 74:9-23.)

Likewise, the nature of the third-party fees in a particular transaction varies depending on which of Allied's approximately 50 branches throughout Missouri actually brokers the loan. As is their prerogative, some branches choose not to collect any third-party fees from customers. (R. 48 at p. 152:19-20.) Those branches absorb the fees as a cost of doing business. In that situation, the entire cost of providing the third-party services is charged as a branch expense; in other words, the customer pays nothing for those services. (R. 48 at p. 153:24 to R. 49 at p. 154:7.) The evidence below was that this practice is not uncommon – indeed, the trend is actually toward more branches refraining from collecting third-party fees at all, primarily to avoid the complicated accounting reconciliation associated with third-party fees. (R. 49 at p. 156:5-11.)

IV. The Undisputed Evidence Relating to Credit Reporting Fees

Although the term “third-party fee” might encompass a number of charges that a customer could incur, Plaintiffs’ evidence at the hearing below centered on just one third-party fee in particular: Plaintiffs’ credit report. Allied has contracts with approximately 30 credit reporting agencies and, depending on the circumstances, an individual branch may choose to obtain customer credit information from any of them. (R. 26 at p. 63:19-25.) Thus, the agency used may differ from branch to branch, although some lenders who fund the mortgage loans specify the particular agency that it will accept. (R. 26 at p.

63:19-64:7.) In sum, the credit agency a particular branch elects to use will vary depending on the lender with which it places the particular loan. (R. 26 at p. 64:1-7.)

Similarly, it is undisputed that Allied's cost for a credit report will vary depending on the circumstances of the particular loan – and that the actual cost of a particular credit report is often difficult to identify. The charges assessed by credit reporting agencies are not uniform, but negotiated on a regional basis by Allied. (R. 26 at p. 64:8-15.) Thus, even Plaintiffs acknowledge that the only way to determine the actual cost of a credit report is to manually review invoice information that may or may not be contained in the applicable loan file. (R. 29 at p. 75:17-24.)

And, the actual cost of credit reports can vary significantly from loan to loan. Some agencies do, in fact, charge Allied \$50.00 for a credit report. (R. 30 at p. 78:5-10.) And, evidence adduced below showed that Allied's cost for a single credit report may run as high as \$115.00. (R. 30 at p. 78:5-13.) In many circumstances, Allied will obtain more than one credit report for a customer; in that situation, Allied's costs may only be determined by reference to multiple invoices from the appropriate vendors. (R. 28 at p. 73:2-12.) Indeed, although it is virtually impossible to discern with certainty, it appears that more than one credit report was issued for Plaintiffs' loan – even though only one report is actually contained in the file. (R. 33 at p. 92:1-20.)

At the hearing on class certification, Plaintiffs argued that whether a customer is “overcharged” for credit reporting services may be determined by a simple comparison of the charges assessed on the customer's settlement statement (also known as the “HUD-1”) against the actual credit report contained in the customer's loan file. (R. 16 at p.

25:19 to R. 17 at p. 26:1.) However, as the undisputed evidence makes clear, this contention is not accurate. Nor was it even a realistic possibility. (R. 31 at p. 82:1-13.)

No regulation requires Allied – or any broker, for that matter – to maintain all credit reports obtained from third-parties for its loans, or the invoicing information relating to the credit reporting services. (R. 29 at p. 74:24 to 75:16.) As such, Allied’s loan files may not necessarily contain copies of all credit reports run on each loan it brokered or invoicing information relating to those services. (R. 29 at p. 74:24 to 75:16.) As a result, it is not unusual to find a particular loan file that does not contain all the credit reports related to it; indeed, many credit reports will likely be missing from Allied’s files. (R. 29 at p. 74:24 to 75:16.)

Thus, it is not possible to simply examine a particular loan file and be assured that it will provide a complete picture of Allied’s costs. (R. 29 at p. 75:17-24.) If, for instance, multiple credit reports were obtained and not all of the credit reports are located in the loan file, an examination of Allied’s file would not actually reveal Allied’s true costs. In fact, reviewing the loan documents under such circumstances would make it appear that Allied’s costs were less than it actually incurred, and make it appear that the customer was charged more than Allied’s costs for the third-party fees at issue. (R. 29 at p. 74:24 to 75:24.) In many situations, a final determination of third-party fees cannot be reached without inquiry into documentation held by an entity other than Allied. In fact, when Allied audits individual loan files to determine its costs for credit reports, it frequently obtains documents directly from the lender or the credit reporting agency, so it may determine the actual cost of the credit reports. (R. 31 at p. 84:3-11.)

Allied's accounting system, the "Plus-Minus System," tracks third-party fees on a limited, aggregate basis; however, it cannot track whether a particular customer was overcharged for third-party fees relating to a particular transaction. (R. 51 at p. 162:21 to 164:5.) Indeed, during the relevant time period, Allied did not have a procedure by which it could accurately track costs and revenue for third-party fees on a loan-by-loan basis. (*Id.*; *see also* R. 50 at p. 160:6-17.) Thus, the Plus-Minus System does not allocate Allied's costs for providing a particular third-party service on a per-loan basis. As a result, the system may very likely indicate that there was an overcharge when, in fact, there was no such overcharge. (R. 54 at p. 176:7-25.)

In sum, the undisputed evidence below makes it clear that the only way to accurately determine whether an individual was "overcharged" for third-party fees, is to undertake at least a three-step process, for each individual customer or loan. First, the loan file must be located and examined – by hand – to determine what documentation is available. Only this manual review will identify which third party services were purchased and, if the information is contained in the file, how much the individual customer may have been charged for those services. (R. 54 at p. 177:1 to R. 55 at p. 178:22.)

Second, a review of records maintained by Allied's accounting department is necessary. The accounting department, in turn, would be required to work with each individual branch to obtain the invoices from various third parties to accurately determine Allied's costs for providing the third-party services to the particular customer. (*Id.*)

And third, if necessary, the lender's copy of the loan file may need to be obtained to determine whether there were additional credit reports issued which were retained by the lender, but not by Allied. (R. 31 at p. 82:19 to 83:10.)

Plaintiffs do not dispute that this procedure is necessary to properly determine third-party costs; to the contrary, it is this very procedure that Plaintiffs posited as the manner in which class membership would be determined in this case. (R. 17 at p. 28:4-15.)

V. The HUD-1 Settlement Statement

The "HUD-1 Settlement Statement" is the standard real estate settlement form used in virtually all real estate transactions in the United States. The HUD-1 form is used by the closing agent to provide each party an itemized listing of the funds that were paid at closing. Items appearing on the statement include, for example, real estate commissions, loan fees, points, third-party fees, and initial escrow payments. Each type of expense is included on a specific numbered line and the totals at the bottom define the seller's net proceeds and the buyer's net payment at closing. Plaintiffs maintain that their HUD-1 is the key document in this case. (R. 15 at p. 18:21-19:2.)

The HUD-1 is not created by Allied. (R. 27 at p. 69:1-3.) Rather, as the mortgage broker, Allied typically sends written instructions to the lender regarding the fees to be charged on its behalf when a loan closes. (R. 27 at p. 68:13-16.) The lender then transmits Allied's instructions to the settlement company, (normally a title company,) and that settlement agent prepares the final HUD-1. (R. 27 at p. 68:17-22.)

Because the HUD-1 is not prepared by Allied, it has no way of ensuring that the numbers presented on the document accurately depict the charges involved on a particular loan. (R. 33 at p. 93:22 to R. 34 at p. 94:9.) Nor does Allied have the authority to make changes to the settlement statement. (R. 27 at p. 69:1-3; R. 28 at p. 70:22 to 71:5.) The uncontroverted evidence below was that mistakes are commonly made in preparing the HUD-1 and, during Allied’s standard review of loan files, Allied regularly detects mistakes in documentation on loans. (R. 33 at p. 93:2-11; R. 34 at p. 94:1-9.)

VI. Evidence at the Hearing

A. Plaintiffs’ proffered “random sampling” evidence

Plaintiffs did not proffer any witnesses at the class certification hearing; instead, they relied solely upon certain of Allied’s loan files to meet their evidentiary burden. (R. 12 at p. 7:14-16.) The manner in which they presented that evidence and how they selected which loans upon which they would focus, however, is crucial to this appeal.

Plaintiffs admitted that, during discovery, they did not review all of Allied’s loan files for the State of Missouri. As Plaintiffs noted, the loan files for Missouri customers were not segregated “in any one place, so [counsel] couldn’t easily just go down and pull all the Missouri files.” (R. 14 at p. 15:12-14.) Instead, Plaintiffs requested access to – and reviewed – files relating to transactions in all states in which Allied does business.²

² At the time they served their discovery requests and at the time of their review of Allied’s files, Plaintiffs purported to represent a class comprised of Allied’s customers

It was during the course of their review of those files that they reviewed some files relating to Missouri customers and attempted to draw conclusions from that limited review applicable to all customers throughout the State.

The conclusions drawn by Plaintiffs were based on counsel's limited review of Allied's files, not on any statistical or scientific methodology. Indeed, Plaintiffs did not even retain an expert to determine selection criteria or analyze a statistically significant sample of Allied's 5,000 or more Missouri loan files. (R. 14 at p. 15:7-8.) Instead, counsel for Plaintiffs explained simply that he alone "chose randomly files from Allied's headquarters in Dallas,"³ although he did not shed additional light on the methodology by which his selections were made. (R. 14 at p. 15:9-10.)

Counsel then attempted to offer an affidavit as to the information he said he gleaned from the documents he chose to review. And, in submitting his "evidence" on class certification, Plaintiffs' counsel explained to the trial court below how he went about "selecting" the files upon which he relied:

The files that I pulled for Missouri were approximately 90 files that I pulled. Some of them did not close, meaning the loan never came to fruition so there were no charges. All in all there were 59 loans that I looked at. And then of those 59 loans that I looked at, I made – I looked at

throughout the United States. It was after this review that Plaintiffs amended their Petition and class allegations to a Missouri-only putative class.

³ Allied's headquarters, and the loan files, are actually located in Houston, Texas.

the credit report⁴ which had a dollar amount and I looked at the amount of the HUD-1 Settlement Statement. And based on those, I determined which I believed were upcharged. And I have that set forth in an affidavit that I filed with the Court.

(R. 14 at p. 15:17 to 16:3.)

Counsel asserted that, based on his review of the documents, he believed that 29 of the 59 loans he reviewed – or 49 percent – contained information that suggested the customer was overcharged for his or her credit report. (R. 14 at p. 16:7-19.) Then, relying completely on these 29 loan files (the “exemplar” loans), and without any additional foundation, counsel extrapolated that ratio to all of Allied’s business in the State of Missouri during the relevant time period. To obtain the number of loans Plaintiffs ultimately contend were overcharged for third-party fees, counsel explained that “basically if you apply the percentages on the random sampling of 49 percent or 50 percent, there should be over 1800 loans in those three years that were [overcharged] and another like amount for the two years before that.” (R. 14 at p. 17:19-23.)

Counsel cited this purported “random sampling” of Allied loan files as meeting Plaintiffs’ required burden regarding numerosity, as well as other elements of Rule 52.08. (R. 15 at p. 18:15-18.)

⁴ Although Plaintiffs’ proposed class definition, which was adopted by the trial court, includes “other loan related services,” the only third-party fee Plaintiffs addressed at the class hearing was credit report. They did not discuss any other “loan related services.”

B. Defendant's offer of proof and the withdrawal of class counsel's affidavit

In light of the readily apparent deficiencies in counsel's qualifications as an expert, and the unorthodox methodology used in submitting Plaintiffs' evidence through lead counsel's affidavit, Defendant sought to *voir dire* counsel regarding his analysis of the loan files. (R. 24 at p. 56:5-15.) The trial court refused to permit the *voir dire* and, at the conclusion of the evidentiary hearing, admitted counsel's affidavit. (R. 58 at p. 193:20-25.) Allied then made an offer of proof, illustrating its position that the affidavit was incompetent evidence, and counsel was not qualified to prepare the purported analysis contained therein. (R. 59 at p. 194:1 to 197:25.)

The offer of proof explained that, had it been permitted to examine Plaintiffs' counsel, Allied would have established that there were numerous flaws in counsel's reliance on the exemplar loans and the methodology allegedly employed. (R. 59 at p. 196:14-21.) For example:

- Plaintiffs' alleged "random" sampling did not include any files from 1997 or 2002, two of the five years in the proposed class definition; indeed, the vast majority of the files were selected from a brief period of time in 2000 and 2001. (*Id.*; *see also* R. 34 at p. 96:10-19 (testimony of Ms. Seach).)
- All of the 29 files that Plaintiff offered emanated from just six branches – out of approximately 50 – in Missouri, and all were within

a very brief period of time that did not span the entire proposed class period. (R. 59 at p. 196:14-21; *see also* R. 34 at p. 96:1-9.)

- At least 13 of the 29 exemplar loan files examined by Plaintiff came from one branch, and some were actually sequentially numbered, indicating that they all were generated at the same time, and were thus not distributed across time or geography. (R. 59 at p. 196:22 to 197:5.)

Defendant further offered to prove that the exemplar files were not randomly selected, but were instead hand-picked by Plaintiffs' counsel alone, and that the "random selection" actually occurred only after counsel had examined all of Allied's files and determined which ones may serve his needs best. (R. 59 at p. 197:6-15.)

Faced with the offer of proof, Plaintiffs' counsel withdrew his contested affidavit from the record. (R. 60 at p. 198:14 to 199:3.) In doing so, counsel explained, "I have no problem withdrawing the affidavit. I have the evidence in and the evidence can be analyzed without my affidavit." (R. 60 at p. 199:4-6.)

C. Plaintiffs' assertions regarding the exemplar loans and the withdrawal of counsel's affidavit

Other than the affidavit from class counsel – that was ultimately withdrawn – Plaintiffs offered no testimony to establish the foundation, relevance, or significance of the 29 exemplar loan files offered into evidence. They did not, for example, offer evidence relating to each of the 29 exemplars, or produce any analysis of the loans

completed by anyone but counsel. Plaintiffs counsel simply selected a single one of the loan files, marked as Exhibit 14, and offered his own “testimony” as to the foundation and relevance of the documents within that loan file. (R. 17 at p. 27:15 to 28:3.) Counsel then argued – again without foundation or support in the record – that each of the other 29 loan files he claimed to contain evidence of overcharges, contained documentation that was virtually identical to that in Exhibit 14. (*Id.*) Counsel contended, then, that the documentation in Exhibit 14 could be extrapolated to all of Allied’s customers generally.

Then, based on this single example, counsel argued that the 29 exemplar loans, combined, demonstrated that 51 percent of Allied’s Missouri customers are properly considered members of the class:

[E]ach of these 1 through 29 has similar documents which is how we would propose to identify class members in this case . . . is to go through each of the loan files in Missouri through this time period and see whether or not certain of them – see which ones have the actual upcharge on the credit reports. And as to people who don’t have upcharges and there are, you know, in our random sampling, 51 percent don’t. They are simply not part of the class.

(R. 17 at p. 28:4-15.)

In short, instead of offering evidence to support any of the required elements of Rule 52.08(a) and (b), Plaintiffs relied on conclusory statements of counsel arising from a single loan transaction, statements that were not supported by citations to evidence in the record. (*See, e.g.*, R. 15 at p. 19:3 to 20:1 (commonality); R. 15 at p. 20:2-15 (typicality);

R. 15 at p. 20:16 to 21:19 (adequacy); R. 16 at p. 22:9 to 24:16 (predominance); R. 16-17 at p. 24:17 to 26:5 (superiority).)

D. Allied's undisputed evidence regarding Plaintiffs' exemplar loans

Although Plaintiffs proffered no testimony to provide a foundation for their 29 exemplar loans, Allied offered the testimony of two witnesses regarding the files. (*See* R. 24 at p. 57:11 (testimony of Ms. Jeanne Seach); R. 44 at p. 137:23 (testimony of Ms. Michele Taylor).) The vast majority (if not all) of that testimony was undisputed by Plaintiffs, and that undisputed evidence makes it clear that Plaintiffs' effort to extrapolate a uniform trend across all of Allied's files, based on their 29 exemplars, is unsupported by the record. Indeed, the evidence submitted through the documentation contained in the exemplar loans calls into question the veracity of Plaintiffs' assertions of commonality among the putative class.

1. Undisputed evidence demonstrates that at least six of the customers identified by Plaintiffs as "exemplar" loans were not charged for any third-party fees.

For example, Ms. Jeanne Seach testified that, in three of the loans offered as exemplars of overcharging by Plaintiffs, no credit report fee was, in fact, charged to the borrower. (*See* R. 136-148; R. 149-163; R. 164-172; *see also* R. 34-35 at p. 96:20 to 98:4.)

In two other loans, a party other than the borrower paid the closing costs incurred on the loan. (*See* R. 103-111 and R. 112-122.) As Ms. Seach testified, it is not uncommon for a seller or builder to pay the buyer's closing costs; in such a circumstance,

the buyer does not incur any third-party fees, is not harmed, and would not be a member of the class. (R. 35 at p. 98:5 to 99:15; R. 36-37 at p. 105:17 to 106:13.)

Additionally, for two of the loans identified by Plaintiffs as exemplars of the class, Ms. Seach explained that the documentation clearly indicates that the borrower received a credit for their closing costs. (*See* R. 112-122; R. 204-219; *see also* R. 35 at p. 98:5 to 100:13.)

Thus, based on Ms. Seach's undisputed testimony, even Plaintiffs would acknowledge that at least 6 of Plaintiffs' 29 exemplar loans, relied on in support of class certification (R. 103-111; R. 112-122; R. 136-148; R. 149-163; R. 164-172; and R. 204-219), cannot be considered as a part of Plaintiffs' proposed class – because they did not incur the overcharges that are essential to class membership. (R. 17 at p. 28:4-15) (“And as to people who don't have upcharges They are simply not part of the class. They do not fit within the class definition and would not be part of the class.”) Nonetheless, the court's class certification order makes no distinction for these various categories of Allied customers and, short of a hearing on the merits of each individual putative class member, offers no mechanism by which the parties might identify who is (and who is not) within the class.

2. *Documentation in other loans identified by Plaintiffs demonstrates that the borrower agreed to arbitrate their dispute with Allied.*

Ms. Seach further testified that three (3) additional loans of the 29 exemplars submitted by Plaintiffs contain arbitration riders, signed by the customer. As such, the customer has agreed that all “disputes, claims or controversies arising from or related to

the loan . . . shall be resolved by binding arbitration and not by court action” (See R. 93.10; R. 102 and R. 135; *see also* R. 34-35 at p. 96:20 to 98:4.)

3. *Undisputed evidence further establishes that many of the “exemplar” loans contain written acknowledgements regarding the disclosure of fees.*

In 13 of Plaintiffs’ 29 loans, customers signed “Mortgage Loan Origination Agreements” (the “MLOA”) and/or a “Missouri Loan Brokerage Disclosure Statement and Agreement” (the “MLBDSA”), a form generally used in Allied’s loans. (See SR. 71, 72, R.111, SR. 73-75, R. 148, SR. 76, 77, R. 161, SR. 78, 79, R. 181-183, R. 203, R. 219; *see also* R. 38 at p. 111:7-19, 111:24 to 112:1.) A customer who executes these forms expressly acknowledges Allied’s representation that “the retail price which we offer you, your interest rate, total points, and fees will include our compensation.” (R. 38 at p. 111:17-19.)

4. *Based on the documents in the “exemplar” loans, it is impossible to tell whether certain loans closed and, thus, whether any fees were actually incurred.*

Ms. Seach further explained that a number of the loans relied on by Plaintiffs do not contain any signed documents indicating whether or not the loan actually closed. (See R. 35 at p. 100:14 to R. 36 at p. 102:1 and R. 36 at p. 103:4-23 (discussing four such loans); *see also* R. 164-172; R. 173-183; R. 220-236; R. 237-246). Such uncertainty is fatal to the determination of class membership – as Plaintiffs acknowledge, if the loan did not close, it cannot be said that the customer paid any fees. (See R. 14 at p. 15:18-20

(stating that some of the loans counsel reviewed “did not close, meaning the loan never came to fruition so there were no charges.”). Therefore, such a customer cannot be included in the class. Yet, again, the uncontroverted testimony was that there is no way to determine whether such a loan even closed without resorting to other documentation outside the loan file. (R. 35-36 at p. 100:14 to 101:3; 101:21 to 102:1; 103:8-14.)

5. Other undisputed evidence demonstrates that some of the exemplars were charged exactly the same amount for third-party services as Allied paid the vendors providing those services.

In addition, Allied introduced evidence at the hearing that, of the loans brokered in Missouri during the time period at issue, many show plainly that the customer paid exactly the same amount for third-party services as Allied was charged. For instance, Ms. Seach testified that for one of the loans identified by Plaintiffs, the HUD-1 showed that \$15.00 was paid to Allied for a credit report, and the loan file contained an invoice for a credit report with a \$15.00 charge on its face. (R. 31 at p. 85:11-87:4; *see also* SR. 19-26.) By Plaintiffs’ admission, customers like this would certainly not be a part of the class they sought to certify.

6. Yet other loan files brokered in Missouri contain documentation showing that the customer was actually undercharged by Allied for third-party services.

Other loan files introduced by Allied at the hearing showed that oftentimes Allied actually collected less from its borrowers than it paid for third-party services. (SR. 29-65.) Ms. Seach testified that an examination of one particular loan file showed that,

while Allied had incurred charges totaling \$65.00 for credit reports, it had only charged the borrower \$50.00. (R. 32-33 at p. 87:5-90:22; *see also* SR. 29-65.) Ms. Seach further testified that Allied charged borrowers less for credit reports than it paid the service provider “quite often.” (R. 33 at p. 90:17-19.) This illustrates yet another set of Allied’s customers that, as Plaintiffs’ concede, would not be part of their proposed class.

Thus, it is undisputed that Plaintiffs proposed mechanism – of examining each loan file to determine class membership (R. 17 at p. 28:4-15) – is unworkable in practice. Quite simply, even if it were physically possible, Plaintiffs’ proposed manual review of more than 5,000 loan files will not accurately identify those Allied customers who properly belong in the proposed class. Plaintiffs have not offered any method to differentiate among these various “categories” of Allied’s customers – and identify which customers are, in fact, class members and which are not. Such an unworkable class definition cannot be sustained.

POINTS RELIED ON

- I. The Trial Court Erred In Certifying The Class Because, On Its Face, The Class Definition Requires The Resolution Of A Paramount Liability Question, In That The Court Must Determine Whether Any Individuals Paid Third-Party Fees in Excess of Allied’s Cost Based on Allied’s “Nondisclosures and False, Unfair, Deceptive or Misleading Disclosures” To Identify Class Members.**

Craft v. Philip Morris Cos., 190 S.W.3d 368 (Mo. Ct. App. E.D. 2005).

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. Ct. App. W.D. 2006),
transfer denied, No. SC88007 (Mo. Nov. 21, 2006).

Intratex Gas Co. v. Beeson, 22 S.W.3d 398 (Tex. 2000).

- II. The Trial Court Erred In Certifying The Class Because The Proposed Class Definition Violates the Implied Definiteness Requirement of Rule 52.08, In That the Proposed Class Is Not Readily Ascertainable at the Outset of the Litigation Without Conducting Extensive Individualized Fact-Finding.**

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151, 177 (Mo. Ct. App. W.D. 2006),
transfer denied, No. SC88007 (Mo. Nov. 21, 2006).

Gibbs Props. Corp. v. Cigna Corp., 196 F.R.D. 430, 442-43 (M.D. Fl. 2000).

Sanneman v. Chrysler Corp., 191 F.R.D. 441, 446 (E.D. Pa. 2000).

Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981).

III. The Trial Court Erred In Certifying The Class Because The Class as Presently Defined Cannot Receive Adequate Notice as Required Under Principles of Due Process, in that the Proposed Class Is Not Readily Ascertainable by Reference to Objective Criteria.

Division of Employment Sec. v. Smith, 615 S.W.2d 66 (Mo. 1981)

Intratex Gas Co. v. Beeson, 22 S.W.3d 398 (Tex. 2000).

Manual for Complex Litigation § 30.14 (3d. ed. 1999)

State ex rel. Am. Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. 2003).

IV. The Trial Court Erred In Certifying The Class Because The Record Does Not Demonstrate That The Elements Required By Rule 52.08(a) Have Been Met In That There Is Nothing In The Record To Support The Court's Findings Regarding Commonality, Numerosity and Typicality.

Beatty v. Metro. St. Louis Sewer Dist., 914 S.W.2d 791 (Mo. banc 1995).

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. Ct. App. W.D. 2006),
transfer denied, No. SC88007 (Mo. Nov. 21, 2006).

Koger v. Hartford Life Ins. Co., 28 S.W.3d 405 (Mo. Ct. App. 2000).

State ex rel. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729
(Mo. banc 2004).

Mo. Sup. Ct. R. 52.08(a)

V. The Trial Court Erred In Certifying The Class Because The Record Does Not Demonstrate That The Elements Of Rule 52.08(b) Have Been Met, In That There Is Nothing In The Record To Support The Court’s Findings Regarding Predominance and Superiority.

Craft v. Philip Morris Cos., 190 S.W.3d 368 (Mo. Ct. App. E.D. 2005).

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. Ct. App. W.D. 2006),
transfer denied, No. SC88007 (Mo. Nov. 21, 2006).

Grosser v. Kandel-Iken Builders, Inc., 647 S.W.2d 911, 917 (Mo. Ct. App. 1983)

Mo. Sup. Ct. Rule 52.08(b)

Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.,
213 F.R.D. 537, 547 (W.D. Mo. 2002).

VI. The Trial Court Erred In Certifying The Class Because The Required Element Of Adequacy Of Class Counsel Cannot Be Met In That Class Counsel Has A Direct, Familial Relationship With The Named Plaintiffs And, Thus, Has A Financial Interest In The Outcome Of The Case That Is Antagonistic To Absent Class Members.

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. Ct. App. W.D. 2006),
transfer denied, No. SC88007 (Mo. Nov. 21, 2006).

State ex rel. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729
(Mo. banc 2004).

Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977).

Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978).

STANDARD OF REVIEW

A trial court's order certifying a class under Missouri Supreme Court Rule 52.08 is reviewed for abuse of discretion. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). "The trial court abuses discretion if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002).

Plaintiffs assume the burden to meet each of the elements of class certification under Rule 52.08. It is an abuse of discretion for the trial court to certify a class based on an erroneous conclusion of law, or where there is no rational basis in the evidentiary record demonstrating that the requisite elements for a class action have been met. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 177 (Mo. Ct. App. W.D. 2006), *transfer denied*, No. SC88007 (Mo. Nov. 21, 2006) (citing *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 795 (Mo. banc 1995)). Where the trial court abused its discretion in certifying a class, appellate review of that decision is "appropriate to prevent unnecessary, inconvenient, and expensive litigation." *Id.* (citing *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001)).

All of the points raised in this appeal are governed by this standard of review.

ARGUMENT

Points Relied On I, II, and III all address the deficiencies in the class definition. Specifically, Point I addresses the fact that on its face, the class definition requires the resolution of a “paramount liability question” in order to ascertain the class membership. It is not even necessary to look at any portion of the record to understand this issue because, under Plaintiffs’ theory, the class is comprised of those persons who have paid third-party fees in excess of Allied’s costs, based upon Allied’s alleged nondisclosures and false, unfair deceptive or misleading disclosures. Under this definition, only those that possess a meritorious claim may participate in this class proceeding. Abundant authority provides that such a definition – which puts the cart before the horse – constitutes an abuse of discretion.

Like Point I, Point II also addresses the deficiency of the class definition. Unlike Point I, however, Point II relies upon a detailed review of the record, which establishes that there is no methodology for determining the identity of the class without undertaking a detailed review of over 5,000 individual transactions in the State of Missouri during the relevant time period. Both Plaintiffs’ proposed methodology for ascertaining the class, which actually requires a file-by-file analysis, and the undisputed evidence submitted by Allied, establish that there is absolutely no method of determining class membership – short of holding an individual, evidentiary hearing on each of the 5,000 loans. Certification of a class like this one, in the absence of an objective methodology for determining class membership, constitutes an abuse of discretion, because it effectively

shifts the hearing on disputed fact issues from the trial on the merits to the pre-trial procedure of class identification.

Point III establishes that the deficiencies addressed in Points I and II prevent the trial court from providing adequate notice to members of the class, which deprives both the parties and absent class members of due process. Because the composition of the class on its face requires the resolution of paramount liability questions, and because disputed facts need to be resolved just to identify class membership, neither the trial court nor the parties will be able to identify the class members with any degree of objective certainty at the outset of this litigation. This begs the question: If the court and the parties cannot identify the class, how could the absent class members possibly understand that this proceeding might affect their interests? Without a suitable method for providing notice to the absent class members, no res judicata effect will attach to the resulting verdict, thereby eviscerating any of the putative benefits of class treatment. The certification of a class that impinges upon such fundamental rights of due process constitutes an abuse of discretion.

Points IV and V illustrate how the deficiencies outlined in Points I through III infect the remaining requirements under Rule 52.08. For example, the failure to provide an objective definition renders identify of the class unknowable. Based on the evidence below, Plaintiffs have, therefore, failed to meet their required burden of showing a class so numerous that joinder is impractical. Similarly, the definition of the class – premised on paramount issues of liability and contested issues of fact – renders it impossible for there to be common questions across the class. Likewise, it is apparent that Plaintiffs’

claims are atypical of the claims held by the remainder of the class they seek to represent. Furthermore, even if there were common questions within the class, the individualized issues presented will overwhelm such issues. Plaintiffs bear the burden of meeting every element of Rule 52.08; however, it is apparent that they have not carried that burden on the record below. Accordingly, certification of the present class constitutes an abuse of discretion.

Finally, Point VI addresses the fact that Plaintiffs have failed to meet the adequacy requirement of Rule 52.08, because class counsel is related to the named Plaintiffs, and thus has a financial interest in the outcome of the case. Because this financial interest may constitute a conflict with the interests of the class, the trial court abused its discretion by certifying the present class.

I. The Trial Court Erred In Certifying The Class Because, On Its Face, The Class Definition Requires The Resolution Of A Paramount Liability Question, In That The Court Must Determine Whether Any Individuals Paid Third-Party Fees in Excess of Allied’s Cost Based on Allied’s “Nondisclosures and False, Unfair, Deceptive or Misleading Disclosures” To Identify Class Members.

Without question, the class definition is central to class action litigation. It forms the foundation upon which the trial court may evaluate the requirements of Rule 52.08 before reaching a determination as to whether class treatment is appropriate. Thus, it is well-settled that, at the outset of class litigation, it must be determined that a properly-defined class exists. And, a class is properly defined only if it may be identified in objective terms, by which membership may be presently ascertained. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 177 (Mo. Ct. App. W.D. 2006), *transfer denied*, No. SC88007 (Mo. Nov. 21, 2006); *see also Hispanics United v. Village of Addison*, 160 F.R.D. 681, 686 (N.D. Ill. 1995)⁵; *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) (“It is axiomatic that for a class action to be certified, a ‘class’ must exist.”).

⁵ Because Missouri’s Rule 52.08 and Federal Rule 23 are identical, “federal interpretations of Rule 23 may be considered in interpreting Rule 52.08.” *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 n.5 (Mo. banc 2004).

Thus, under Rule 52.08, Plaintiffs bear the burden of defining a class objectively. In other words, the class may not be defined “by criteria that are subjective or that require an analysis of the merits of the case,” because this would defeat the purpose of class litigation. *See Dale*, 204 S.W.3d at 178. Such imprecise definitions do not permit the court, the parties, or the class to identify with any precision who is – and who is not – included in the class.

Likewise, a merits-based membership requirement “undermines judicial economy and efficiency, thereby interfering with one of the primary purposes of class action suits.” *Id.* (quoting *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404 (Tex. 2000)). This is because, with a merits-based definition, “the trial court has no way of ascertaining whether a given person is a member of the class until a determination of ultimate liability as to that person is made.” *Id.* at 179. In turn, the trial court is left with the nearly impossible task of holding “mini-trials” on individual class member liability at the preliminary stage of identifying class membership, a determination that should only be made at a trial on the merits.

A properly defined class is also essential for due process reasons. Asking the trial court to reach a finding on the merits of each class member’s claims deprives all parties of protections traditionally afforded them by the rules of evidence and civil procedure. Similarly, a class definition that is not rooted in objective criteria does not provide potential class members with adequate notice – notice that they may have a claim, or notice that they have the right and opportunity to opt out of the class and pursue their own claims. *Id.* at 178 (quoting *Intratex*, 22 S.W.3d at 403).

In short, allowing an action to proceed with a class definition premised on a determination of merits-based liability effectively turns the lawsuit upside down, creating an unacceptable, one-sided result: A certified class based on resolving the ultimate liability issue will be bound only by a final judgment (following trial) that is favorable to plaintiffs, but not by a judgment favorable to defendants. *Id.*

A trial court must, therefore, determine at the outset of the litigation whether the proposed class definition includes a merits-based inquiry – in other words, whether it rests on a “paramount liability question” – before the case may proceed as a class action. *Id.* In making this threshold determination, the court must ask, “will the class still exist even if the defendant of the class action lawsuit wins at trial?” *Id.* at 178.

A comparison of the present case to *Dale* readily illustrates how this inquiry should work, and reveals the fatal flaw in the class definition certified below. The trial court in *Dale* approved a class definition that included individuals in the State of Missouri who met all of the following objective elements: 1) They purchased a new Dodge Durango; 2) within the four years prior to the complaint; 3) they had returned to their dealer for service for a failed electric window regulator; but 4) they did not receive the correct motor window regulator; and 5) they still own the car. *Id.* at 160-61.

The defendant in *Dale* argued that, by certifying this class definition, the trial court had improperly required an individualized finding on the merits concerning the issue of whether the Bosch motor window regulator was the only adequate fix for failed window regulators. *Id.* But the *Dale* court held that this class definition did not rest on a “paramount liability question,” because even if it was found at trial that the defendant

was not liable for its failure to install Bosch motor power window regulators, a class of individuals would still exist, who met the class definition and who would be bound by the judgment below. *Id.* The class definition, therefore, contained objective criteria – namely, whether a particular Durango purchased during a particular time period contains the particular power window regulator – for determining membership in the proposed class. *Id.*

In contrast, the trial court in this case approved a definition that, on its face, plainly turns on a question of paramount liability:

All persons in Missouri who, since March 18, 1997 through December 31, 2002, based on nondisclosures and false, unfair, deceptive or misleading disclosures of Defendant Allied Mortgage Capital Corporation paid charges for credit reports and/or other loan related services for mortgage loans that exceeded defendant's actual cost for those services.

(R. 8.)

Without question, this definition requires a merits-based finding before class members may be identified. Indeed, the definition itself is circular in nature, and is actually framed in terms of a legal conclusion: An individual can only be a member of the class if it is shown 1) that he or she was charged an amount greater than Allied's cost for certain "loan related services;" and 2) that such charges were based upon Allied's

“nondisclosures and false, unfair, deceptive or misleading disclosures.”⁶

This language precisely mirrors the language of the Merchandising Practices Act, Mo. Rev. Stat. § 407.020(1) (the “MPA”). Therefore, the definition itself requires the court to determine the paramount issue of liability in the case – whether Allied violated the MPA in connection with a particular transaction – even before an individual knows whether he or she may be within the class. But by requiring that this tentative finding be made at the outset of the lawsuit, the trial court has placed an unfair burden on Allied, because such a finding will not be “accompanied by the traditional rules and procedures applicable to civil trials,” and yet, would necessarily “color the subsequent proceedings.” *Dale*, 204 S.W.3d at 178; *see also Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 377 (Mo. Ct. App. E.D. 2005) . At this preliminary stage in the litigation, the question “is not whether the individuals have stated a cause of action or will prevail on the merits, but rather whether plaintiff has met the requirements for a class action.” *Dale*, 204 S.W.3d at 178.

The definition in this case squarely and indisputably rests on a question of “paramount liability.” If the case is allowed to proceed, any result of this litigation will inevitably be one-sided against Allied. On one hand, if the finding at trial is that Allied is liable as alleged, then the class will be ascertainable – and the litigation will terminate

⁶ Notably, at oral argument before the Court of Appeals, Plaintiffs’ counsel acknowledged that this portion of the definition does, in fact, require a merits-based determination and conceded that it should be removed.

with a judgment against Allied in favor of the class. On the other hand, if the finding at trial is that any alleged overcharges were not based on Allied's "nondisclosures and false, unfair, deceptive or misleading disclosures," it would obviate the existence of the class, thereby precluding any of the class members from being bound by a final judgment. *Cf. Dale*, 204 S.W.3d at 179-80. Although Allied might have nominally prevailed, absent class members would not be bound by the ruling, and would actually be free to relitigate their individual claims. This result is fundamentally at odds with the policy behind class actions, because "[the class action device] was never meant to be an exception to the rules of res judicata or to provide a risk-free method of litigation." *Dafforn v. Rousseau Assocs., Inc.*, 1976 U.S. Dist. LEXIS 13910, 1976-2 Trade Cases P61, at 219 (N.D. Ind. 1976).

Thus, Allied is faced with a "heads-you-win; tails-I-lose" proposition. If this case is allowed to proceed as currently certified – with the merit-based class definition certified by the trial court – it becomes a case against which Allied may defend, but cannot prevail. This fundamental deprivation of due process can only be rectified by a reversal of the trial court certification order.

Although the *Dale* case may be among the only Missouri precedent to directly examine the rule, the proscription against defining the class in terms of "paramount liability questions" is not new, and enjoys widespread acceptance. Indeed, courts in other jurisdictions routinely refuse to certify class actions where the proposed definitions require a merits-based finding prior to the identification of class members. *See, e.g., Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262 (S.D. Fla. 2003) (denying certification of

class defined as “[a]ll persons in the State of Florida who ingested Metabolife 356 at the dosage levels recommended by the Defendant,” because definition required determination on ultimate issue as to whether ingestion of fewer than two or three pills a day could result in increased risk of injury); *Baker v. Sunny Chevrolet, Inc.*, 2002 U.S. Dist. LEXIS 26947 (D. Mich. 2002) (definition including only consumers “who were not given a copy of the contract to keep prior to consummation of the transaction” required merit-based analysis because it parroted the language in the TILA regulation which Defendant allegedly violated); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Penn. 1995) (rejecting proposed class of “all residents and businesses who have received unsolicited facsimile advertisements” because definition required court to address “central issue of liability to be decided in the case”); *Ind. State Employees Ass’n, Inc. v. Ind. State Highway Comm’n*, 78 F.R.D. 724, 725 (S.D. Ind. 1978) (denying certification of class consisting of three groups of injured persons because, with definition framed as a legal conclusion, “it would be impossible for the court to ascertain whether or not a given person is a member of the class until a determination of ultimate liability as to that person is made”); *Dafforn*, 1976 U.S. Dist. LEXIS 13910, 1976-2 Trade Cases P61, at 219 (refusing to certify class defined as persons who paid “an artificially fixed and illegal brokerage fee”).

In *Intratex Gas Co. v. Beeson*, for example, plaintiffs alleged that the defendant did not take natural gas in ratable proportions from the wells of more than 900 producers. 22 S.W.3d 398, 400 (Tex. 2000). The trial court certified the class as consisting of

“producers of natural gas whose gas was taken by Intratex between 1978 and 1988 in less than ratable proportions.” *Id.*

Characterizing the class definition as a “fail-safe” class, the Texas Supreme Court held that the trial court abused its discretion by defining the class as producers “whose natural gas was taken by the defendant in quantities less than their ratable proportions.”

That analysis, the court held, required a decision on the ultimate issue in the case:

Under the trial court’s definition, the parties will have to await the outcome of the litigation to determine who, if anyone, is in the class because whether Intratex took nonratably is the central issue to be determined at trial. If judgment is rendered for Plaintiffs, the various producers’ ability to exercise their right to opt out of the class action will have been compromised because the judgment will bind those producers who were taken from nonratably. But if Intratex wins at trial, there is no class because its existence is dependent on a finding that Plaintiffs were taken from nonratably. Plaintiffs cannot be bound by such a judgment because without a class, there is no way to ascertain class membership.

Id. at 405. The court thus held that “certification of the class under these circumstances is clearly impermissible.” *Id.*

Like the definition in *Intratex*, the definition approved by the trial court below is framed as a legal conclusion, which requires the court to make tentative findings on the merits. In so doing, it creates the exactly the sort of “fail-safe” class that both *Dale* and *Intratex* warned against. In effect, by requiring a determination of paramount liability at

the preliminary stage of certification, the trial court has improperly allowed plaintiffs to secure the benefits of proceeding with a class-action suit without first satisfying the requirements for maintaining one. *Intratex*, 22 S.W.3d at 404. Those preliminary determinations, once made, cannot be undone. And, they will color the nature of these proceedings until final judgment. Accordingly, the trial court's certification of this class definition was an abuse of discretion.

II. The Trial Court Erred In Certifying The Class Because The Proposed Class Definition Violates the Implied Definiteness Requirement of Rule 52.08, In That the Proposed Class Is Not Readily Ascertainable at the Outset of the Litigation Without Conducting Extensive Individualized Fact-Finding.

Even if the paramount liability questions were not present on the face of the class definition, the definition still impermissibly requires intensive factual inquiries to ascertain the members of the class. In other words, even setting aside the issue that membership in the class is contingent upon resolution of the merits of the class claims, it cannot be disputed that the only way to ascertain the identity of the class is through an intensive inquiry into the facts of each transaction at issue. Not only is this undisputed but, in fact, Plaintiffs' own proposed method to ascertain the identity of the class actually requires the very type of detailed factual analysis that class action litigation is designed to avoid. The certification of a class in the absence of any objective methodology for determining membership constitutes an abuse of discretion.

A. It is an abuse of discretion to certify a class that cannot be objectively ascertained.

Just as a class may not be defined by criteria requiring analysis of the merits of each particular claim, a class may not be defined by criteria that are subjective or that require extensive individualized factual inquiry. *Dale*, 204 S.W.3d at 167; *Intratex*, 22 S.W.3d at 404. This prohibition ensures that the class is readily ascertainable, long before trial, without the need to conduct individualized hearings or “mini-trials” just to determine who might be a member of the class. Such an undertaking is incongruous with

the efficiencies expected by class litigation, and effectively renders a class action inappropriate for addressing the claims at issue. *Dale*, 204 S.W.3d at 166 (quoting *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. 2000)).

Thus, the proposed class therefore cannot be amorphous, vague, or indeterminate. *Id.* at 178 (citing *Craft*, 190 S.W.3d at 387). Instead, “[t]he requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Id.* at 178 (citing *Hagen*, 108 F.R.D. at 63).

Where, on the other hand, the class definition requires the court to sift through countless individual files to determine class members, the class definition does not fulfill the definiteness requirement because “there is no way to determine whether an individual is a member of the class without a prolonged and individual struggle.” *See Gibbs Props. Corp. v. Cigna Corp.*, 196 F.R.D. 430, 442-43 (M.D. Fl. 2000). In *Gibbs*, plaintiffs sought to certify a class consisting of:

All persons who (i) reside or do business in the state of Florida, (ii) purchased or renewed either a commercial general liability policy or commercial automobile policy from any of the Defendants from January 1, 1990 through December 31, 1992 and (iii) were charged a premium inconsistent with the applicable rates as modified by the misapplication of Defendants’ schedule rating plan, under Florida law.

Id. The *Gibbs* found the proposed definition improper, reasoning that the resolution of the factual questions necessary to determine class identify, even if practicable, would

amount to “taking factual questions away from the jury and entrusting the same to a few experts or special masters.” *Gibbs*, at 442.

Identification of the class through objective means serves at least two obvious purposes in the context of certification. First, it alerts the court and parties to the burdens that such a process might entail. *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981). In this way the court can decide whether the class device simply would be an inefficient way of trying the lawsuit for the parties as well as for its own congested docket. *Id.* Second, identifying the class insures that only those actually harmed by defendants’ wrongful conduct will be the recipients of the relief eventually provided – and bound by the resolution of the case. *Id.* In contrast, a class definition that requires extensive individualized factual inquiries to identify class members will frustrate both of these purposes, and is therefore untenable. *Id.*; *see also Cook v. Rockwell Intern’l Corp.*, 151 F.R.D. 378, 382-83 (D. Colo. 1993).

B. It is undisputed that the class certified below requires extensive individualized factual inquiries regarding costs and charges for over 5,000 transactions in Missouri.

By defining the class in terms of those individuals who paid for undefined “loan-related services” in excess of Allied’s costs for those services, both the Plaintiffs and the court have effectively conceded that an individualized factual inquiry is absolutely necessary to determine who is (and who is not) included in the class. And, in turn, the factual inquiry necessary to identify class members – just like the inquiry necessary to adjudicate the claims of the representative plaintiff – will necessarily involve factual

disputes.

Indeed, even Plaintiffs acknowledge that a detailed “mini-trial” on the facts of each customer’s circumstances is necessary at the definitional threshold. For instance, even under Plaintiffs’ proposed method to determine class membership, the court will first need to make at least two, fact-intense inquiries: (1) What are “loan-related service” fees, and what “loan-related service” fees must an individual incur to be considered a part of the class; and (2) assuming that the court can even identify what “loan-related service” fees are at issue in this case, the second factual inquiry it must make is whether or not the amount each individual paid Allied for those services exceeded Allied’s costs.

The answer to the first question is not apparent from the face of the class definition. Nor is it identifiable from the trial court’s Order certifying the class. Instead, it can only be reached through a detailed analysis of each, individual potential class member’s transaction documents. Indeed, the use of this generic term – “loan-related services”⁷ – in the class definition creates precisely the type of overly broad, indeterminate class definition Missouri courts have counseled against. *See Craft*, 190 S.W.3d at 387.

⁷ Although Plaintiffs’ proposed class definition, which was adopted by the trial court, includes “other loan related services,” Plaintiffs only discussed credit reports at the class hearing.

1. Plaintiffs' proposed methodology for ascertaining the identity of the class requires a fact-intensive inquiry.

To answer the second question – whether a customer's charges exceed Allied's cost – Plaintiffs have proposed a manual review of each of the 5,000 or more loan files potentially at issue. Only then can the identity of class membership be made. And that inquiry, as Plaintiffs' readily admit, may only be made by hand:

And I am also -- each of these 1 through 29 has similar documents which is how we would propose to identify class members in this case, if the Court certifies it, is go through each of the loan files in Missouri through this time period and see whether or not certain of them -- see which ones have the actual upcharge on the credit reports. And as to people who don't have upcharges and there are, you know, in our random sampling, 51 percent don't. They are simply not part of the class. They do not fit within the class definition and would not be part of the class.

(R. 17 at p. 28:4-15.)

Both Plaintiffs and Defendant agree, then, on at least two key propositions: (1) Even Plaintiffs' so-called "random" sampling of loan files reveals that at least 51 percent of Allied's customers do not meet the class definition and cannot be class members; and (2) the only way to determine which of Allied customers are class members – and which are not – is to individually review by hand each of the 5,000 or more Missouri loan files and compare each loan's finally-executed HUD-1 (assuming it is available) to available invoice data (if any) relating to the third-party fees.

2. *All of the evidence before the trial court established that there is no way to determine the identity of the class without an intensive factual inquiry.*

Ms. Seach provided insight into the individualized fact-finding process that the court will need to perform to identify each class member under the certified class definition. Her testimony, which was not disputed, revealed that, to determine whether an individual class member was “overcharged” for third-party fees it is necessary to review his or her loan file to determine what third-party services the customer received. (R. 54 at p. 177:1 to R. 55 at p. 178:9.)

Next, if the requisite information regarding third-party fees is not contained in the loan file, then the lender’s loan file must be obtained by subpoena to determine whether additional fees were incurred by Allied specific to a given loan. (R. 31 at p. 82:19 to 83:10.) Then, Allied’s accounting department would work with each individual branch to obtain the invoices from the third parties to determine Allied’s costs for providing the third-party services to the particular customer. (R. 54 at p. 177:1 to R. 55 at p. 178:9.)

Moreover, it was not disputed that the process of allocating Allied’s costs for a specific loan would likely entail procuring documents from third parties by way of subpoena; in fact, when Allied audits individual loan files to determine its costs for credit reports, it is common to obtain documents from the lender or the credit reporting agency in order to determine the actual costs of the credit reports to Allied. (R. 31 at p. 84:3-11.) After gathering those requisite documents, additional individual inquiries must then be made concerning whether the amounts charged to each individual “exceeded” Allied’s

costs for those services, or whether the individuals otherwise meet the elements of the proposed definition.

3. *The class certification hearing provides a preview of the type of disputed facts that will need to be resolved to identify the class.*

The complexity of the inquiry required by the present class definition is plainly demonstrated by the fact that not even Plaintiffs could successfully identify their proposed class members at the class certification hearing. Although Plaintiffs purported to rely on 29 loan files as “exemplars” of class membership, the undisputed testimony regarding these exemplars was that many could not, in the end, qualify for class membership even under Plaintiffs’ definition.

Ms. Jeanne Seach, Allied Executive Vice President, testified at the hearing that a number of the 29 loans identified by Plaintiffs as “exemplars” could not be members of the putative class because:

- In six loans, the customer was not charged for any third-party services, had their third-party services paid by others, or received a credit for third-party services at closing. (*See* R. 103-111; R. 112-122; R. 136-148; R. 149-163; R. 164-172; R. 204-219; *see also* R. 34-35 at p. 96:20 to 98:4 *and* R. 35 at p. 98:5 to 100:13.)
- In 13 of the loans, customers signed documents acknowledging that their total fees would include Allied’s compensation. (*See* SR. 71, 72, R.111, SR. 73-75, R. 148, SR. 76, 77, R. 161, SR. 78, 79, R. 181-183, R. 203, R. 219; *see also* R. 38 at p. 111:7-19, 111:24 to

112:1.)

- Three of the exemplar loans contained arbitration riders, whereby the customer agreed to arbitrate their disputes with Allied. (*See* R. 93.10; R. 102; R. 135; *see also* R. 34 at p. 96:20 to R. 35 at p. 98:4.)
- At least four of the 29 loans did not contain any signed documentation indicating whether the loan had closed. (*See* R. 35 at p. 100:14 to R. 36 at p. 102:1 and R. 36 at p. 103:4-23; *see also* R. 164-172; R. 173-183; R. 220-236; R. 237-246 (loan files)).

Ms. Seach further testified that other loans relied on by Plaintiffs in support of class certification evidenced even more subsets of customers who could not be members of the proposed class. Those subsets include customers who paid exactly the same amount – or even less – for third-party services than Allied’s costs for the same service. (R. 31 at p. 85:11-87:4; *see also* SR. 19-26 (exactly the same amount); R. 32-33 at p. 87:5-90:22; *see also* SR. 29-38 (less).) Certainly, those individuals cannot be considered to be members of a class defined to include those who paid fees that exceeded Allied’s costs.

In short, after an opportunity to review thousands of individual customer loans and hand-select the loans they believed exemplified membership in their proposed class, Plaintiffs struggled to identify even a modicum of suitable class members – customers who paid fees for credit reports and “other loan related services” in excess of Allied’s actual costs for those services. Indeed, the two days of evidence received below is nothing but a preview of the difficulties presented by the trial court’s order and the

detailed factual inquiry that will be necessary to meet the elements of class membership. Plaintiffs' own "evidence," therefore, plainly establishes that the trial court cannot identify class membership without an individualized and complicated "mini-trial" for each and every one of the 5,000 potential class members, merely to establish membership in the class.

C. By denying Allied the right to resolve the issues of fact at a full trial on the merits, the present definition infringes Allied's rights of due process and thus constitutes an abuse of discretion.

It has long been established that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Similarly, "[d]ue process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner." *Moore v. Bd. of Educ. of Fulton Pub. Sch. No. 58*, 836 S.W.2d 943, 947 (Mo. 1992).

The fact that the present class definition requires the resolution of numerous questions of fact prevents Allied from receiving an opportunity to be heard at a meaningful time, and in a meaningful manner. This constitutes much more than a simple inconvenience or an administrative burden. Although principles of due process mandate that disputes of fact be resolved after a hearing (and in the present case, by a jury), the class action as presently constituted will necessarily "resolve" many disputed facts long before the venire panel is even summoned.

The approved class definition thus places an unfair burden on Allied because it essentially puts "the cart before the horse" by requiring Allied to assert and prevail on its

defenses to individual claims before class membership is determined. *Dale*, 204 S.W.3d at 178. This problem is best exemplified by the evidence submitted below. Plaintiffs hand-selected 29 loans that they *believed* represented examples of their class's claims. In turn, Allied produced undisputed testimony establishing that many of the 29 exemplars did not meet the class definition because, for example, they had agreed to arbitrate their disputes; they had signed a document acknowledging that Allied's charges may contain a profit component; or, loan documentation was inconclusive as to whether any third-party fees were incurred. It is precisely these issues that will be raised as a defense to each, individual class member's claim when considering whether a particular individual should be included in the class.

Ultimately the finder of fact may agree – or disagree – with Allied's defenses with regard to a particular class member. The point is, however, that Allied is entitled under principles of due process to assert such defenses before a finder of fact, with the usual evidentiary rules and procedural protections that present during trial, but absent during the threshold determination of class membership. In short, the class as certified effectively forecloses this inquiry, and presumes liability at the threshold determination of class membership. Certification of this definition violates principles of due process and was therefore an abuse of discretion.

III. The Trial Court Erred In Certifying The Class Because The Class as Presently Defined Cannot Receive Adequate Notice as Required Under Principles of Due Process, in that the Proposed Class Is Not Readily Ascertainable by Reference to Objective Criteria.

Yet another reason that a properly-defined class is imperative in class action litigation is that the definition provides the mechanism for identifying the individuals affected so they may be notified of the pending action. The definition determines who is entitled to notice, and provides each member the opportunity to opt out of the class. *Intratex*, 22 S.W.3d at 403; *see also Nudell v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 1543725, at *1 (D. N.D. 2002), (citing *Manual for Complex Litigation* § 30.14 (3d. ed. 1999)); *Bostick v. St. Jude Med.*, 2004 WL 3313614, at *16 (W.D. Tenn. 2004); *Kent v. Sunamerica Life Ins. Co.*, 190 F.R.D. 271, 278 (D. Mass. 2000). Thus, a critical purpose of a well-defined class is to ensure that those members actually within the class receive adequate notice of the proceeding. *See, e.g., Nudell*, 2002 WL 1543725, at *1 (citing *Manual for Complex Litigation* § 30.14 (3d. ed. 1999)); *Kent*, 190 F.R.D. at 278; *see also In re Paxil Litig.*, 212 F.R.D. 539, 545-46 (D. Cal. 2003) (when class members cannot know they are part of a class, they cannot be provided “notice adequate to allow them to make an informed decision whether to opt out”).

Of course, the notice requirement is not specific to class actions, but constitutes a more general requirement for *any* action. As this Court has noted in other contexts, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objection.” *Division of Employment Sec. v. Smith*, 615 S.W.2d 66, 68 (Mo. 1981).

Yet, in class proceedings, the notice element is unique, because failure to provide adequate notice prevents decisions adverse to the class from having res judicata effect. *See State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 496 (Mo. 2003) (Wolff, J., concurring) (noting that “A ruling adverse to the plaintiffs, on a motion to dismiss or for summary judgment, would not have res judicata effect as to the class, in the absence of notice . . .”). As noted by Judge Wolff in *American Family*, “[t]he theory of the modern class action rule is that class members ‘ought to be informed as well as represented.’” *Id.* at 490.

Absent intervention of this Court, the next step in this litigation is for the trial court to send notice to all class members, advising them of their right to participate in (or opt out of) the class. Plaintiffs do not contend that *all* Allied customers are properly included in the class; instead, they readily acknowledge that *at least* fifty percent of Allied’s customers during the relevant period should be excluded from the class. But does the trial court’s order provide any guidance as to how it might determine which fifty percent of Allied’s customers are entitled to notice of this lawsuit? Certainly not: the glaring deficiency with the class as presently certified is that it provides absolutely no mechanism by which the court might notify the members of the class that this case may affect their interests and impact their rights.

For example, the class certified below includes all persons in Missouri who paid Allied charges “for credit reports and/or other loan related services for mortgage loans

that exceeded defendant's actual cost for those services." As previously discussed, the factual disputes necessary to resolve the various questions presented by the class definition will also prevent potential class members from actually understanding whether they satisfy these criteria and from receiving notice that they are members of the class. Similarly, the putative members of the class will have no reasonable way to determine whether they have paid charges to Allied based upon "nondisclosures and false, unfair, deceptive or misleading disclosures," given that this portion of the definition cannot be resolved until after a full trial on the merits of each, individual claim.

In sum, there is simply no way for the court to determine who may participate in this class, or receive notice of the proceeding, without first conducting a detailed "mini-trial" on each individual claim. Only after those proceedings will class membership be apparent. More importantly, if the court cannot ascertain the class, there is no way for an individual to determine, merely from reading the approved class definition, whether he or she is a member of the class and properly exercise his or her right to opt out of or remain in the suit before being bound by a class judgment.

The deficient class definition constitutes more than an inconvenience or an administrative burden. Failure to provide adequate notice will actually prevent class members from being bound by any resulting judgment, by preventing them from making an informed decision regarding whether to opt-out of the present class action. In turn, this will prevent Allied from obtaining any finality to the present litigation: Even if Allied prevails, there will always be the potential for further claims by persons who did

not receive adequate notice. For this reason, the certification of the class constitutes an abuse of discretion.

IV. The Trial Court Erred In Certifying The Class Because The Record Does Not Demonstrate That The Elements Required By Rule 52.08(a) Have Been Met In That There Is Nothing In The Record To Support The Court’s Findings Regarding Commonality, Numerosity and Typicality.

“In order for [a] case to be certified as a class action, all the requirements of Rule 52.08 must be met.” *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. Ct. App. 2000). Under Rule 52.08(a), Plaintiffs must demonstrate that:

- (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 interest of the class.

These requirements are generally referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.

In Missouri, “[t]he party seeking class action certification bears the burden of proof” on each of these elements under Rule 52.08. *Craft*, 190 S.W.3d at 379 (citing *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994)). The requirements of Rule 52.08 “are not merely technical or directory, but mandatory.” *Beatty*, 914 S.W.2d at 795 (citing *State ex rel. Niess v. Junkins*, 572 S.W.2d 468, 470 (Mo. 1978)); *Moore v. City of Pacific*, 534 S.W.2d 486, 493 (Mo. Ct. App. 1976). Furthermore, instead of merely reciting the provisions of the class action rule, “a convincing argument must be made for each

requirement” before certification is appropriate. *Hopper v. Schweiker*, 596 F. Supp. 689, 691 (M.D. Tenn. 1984) (emphasis added).

Thus, Plaintiffs’ burden of proof at the certification stage is heavy, and it cannot be met with simple, conclusory averments. *See Adams v. Kansas City Life Ins. Co.*, 192 F.R.D. 274, 277 (W.D. Mo. 2000) (because class considerations “are enmeshed in the factual and legal issues” of the underlying claim, the court must “probe behind the pleadings before coming to rest on the certification question”). In short, a certification order must be supported by evidence in the record. *Dale*, 204 S.W.3d at 163; *Beatty*, 914 S.W.2d at 795. And, where a court certifies a class without a “rational basis in [the] evidence for the ruling” or “if the record does not demonstrate that the requisites for class action have been met, the trial court has abused its discretion.” *Dale*, 204 S.W.3d at 163.

Certainly, the infirmities inherent in the trial court’s class definition in this case inform the remaining elements of Rule 52.08. Indeed, Plaintiffs suggest that an individualized analysis of each Allied customer’s transaction must be made before that customer may even be identified as a class member. That admittedly complex inquiry makes it clear that there was no evidence in the proceeding below supporting the assertion that the class as a whole was subject to uniform treatment. As such, Plaintiffs failed to carry their burden as to the specific elements of Rule 52.08 and the certification order constitutes an abuse of discretion.

A. There is no evidence in the record to support the required showing that there are questions of law or fact common to the class, because the undisputed evidence adduced demonstrated that there was never any uniform practice applicable to the class.

1. Plaintiffs offered no competent evidence to support their required showing under Rule 52.08(a)(1) that there are questions common to the class, and the trial court's certification order is therefore unsupported in the record.

In its Order granting certification, the trial court found that the commonality requirement was met by stating simply:

The Court believes plaintiffs have met the commonality requirement. This case involves allegations of the widespread practice of up-charging customers. Issues of unfair practices will be common for the members of the class.

(R. 4 (emphasis added).)

The plain text of the Order, therefore, explicitly finds that the commonality element was met not upon evidence of “the widespread practice of up-charging,” but upon mere allegations of such practice. Such conclusory allegations, however, are not sufficient to sustain Plaintiffs’ burden under Rule 52.08; instead, proof of the elements must be supported by the evidence. Without evidentiary support in the record, the trial court must be found to have abuse its discretion. *Dale*, 204 S.W.3d at 163.

But the only evidence proffered by Plaintiffs here, regarding any alleged “uniform” or “widespread” practice of Allied, consisted of their submission of their exemplar loans – what they contended to be “random sampling” of Allied loan files. This purportedly “random sample,” was comprised of just 29 loan files, hand-selected by Plaintiffs’ counsel from his review of all of Allied’s thousands of customer files. No testimony – expert or otherwise – was offered to explain the significance of those files, or how they might support Plaintiffs’ motion.

Because no testimony was offered to establish the foundation and relevance of the loan documents submitted by Plaintiffs, Plaintiffs’ counsel attempted to testify by means of an affidavit as to those issues. That construction of the evidence submitted by counsel, however, must be disregarded as it is not probative evidence. An attorney cannot serve as both counsel and witness in the same proceeding. Mo. Sup. Ct. R. 4-3.7; *see also Arthur v. Zearley*, 320 Ark. 273, 281 (Ark. 1995) (prohibiting counsel from acting as both advocate and witness on the issue of propriety of a class certification). Furthermore, after Allied made its offer of proof, counsel withdrew his affidavit. That action actually left no evidence in the record to explain the significance of the 29 “exemplar” loan files.

In reality, the only evidence in the record supporting Plaintiffs’ burden under Rule 52.08 is the 29 unsubstantiated loan files. And, the undisputed testimony about those exemplar files, is: (1) that the files do not constitute a representative sampling of Allied’s files; and (2) even if they did, many of those 29 individuals would not qualify for class membership even under Plaintiffs’ class definition. In sum, the trial court abused its

discretion in finding that Plaintiffs met their burden on the commonality requirement because there is no evidence in the record to support it.

2. *The trial court's order certifying the class explicitly and implicitly adopts class counsel's "testimony" regarding the propriety of class treatment.*

Notwithstanding the fact that Plaintiffs withdrew their counsel's contested affidavit (R. 60 at p. 198:14 to 199:3), it apparent from the Order below that the trial court impermissibly relied on the affidavit in reaching its decision. For instance, the trial court noted that the "proposed class consists of approximately 1800 mortgage customers who paid up-charges." (R. 1-2.) The trial court also noted that "[t]his case involves allegations of the widespread practice of up-charging customers." (R. 4.)

But the only mention of the "1800 mortgage customers" in the record occurs when Plaintiff's counsel discussed the findings of his "random sampling" of Defendant's loans:

So basically if you apply the percentages on the random sampling of 49 percent or 50 percent, there should be over 1800 loans in those three years that were upcharged and another like amount for the two years before that.

(R. 14 at p. 17:19-23.) No evidence in the record below actually supports this statement.⁸ Nor did Plaintiffs submit any other evidence that might suggest Allied's alleged conduct was "widespread" or uniform across the class.

In relying on evidence that was offered and then withdrawn, the trial court clearly abused its discretion. In fact, by cavalierly basing its certification opinion on Plaintiffs'

⁸ Plaintiffs did not offer any testimony – expert or otherwise – at the class hearing.

selection of 29 loan files combined with the inadmissible testimony of counsel, the trial court has effectively permitted Plaintiffs to insulate their “proof” from even a basic inquiry into foundation, adequacy, or relevance. Thus, the trial court’s order has the perverse effect of elevating the “testimony” of class counsel – who has demonstrated no qualifications to analyze the mortgage documents or to perform statistical sampling – above even the testimony of experts qualified in the field, as such expert testimony would have, at the very least, been subject to cross-examination. The trial court’s evidentiary error, therefore, offends basic notions of fair play and substantial justice, and constitutes an abuse of discretion.

B. There is no evidence in the record to support the required showing that the class is so numerous that joinder is impractical.

The *Dale* court recognized that the numerosity prerequisite cannot be satisfied by mere speculation and conclusory allegations as to the size of the class. *Dale*, 204 S.W.3d at 167. In precisely that sort of conclusory form, the trial court below found that “joinder of the hundreds of mortgage customers would be impracticable” and, therefore, “the numerosity requirement is satisfied.” (R. 3.)

But the reality is that there is no evidence in the record that “hundreds of mortgage customers” could properly be class members. In fact, Plaintiff’s counsel, after full access to thousands of Missouri loans brokered by Allied, was only able to hand-select 29 loans that he contended constituted an “overcharge.” And, as discussed more fully in Section II, many of these 29 “exemplars” could not even qualify for class membership under Plaintiffs’ definition; indeed, many fail to show evidence of even any overcharge.

Further, of the ones that do show a “prima facie” overcharge, other considerations prevent these customers from participating in the class as defined. These considerations include: (1) a lack of evidence showing that the customer received any representation from Allied (or, to the contrary, documentation evidencing that the customer received a representation from Allied that the fees charged would include Allied’s compensation); (2) evidence that the borrower agreed to arbitrate any disputes with Allied; and (3) a lack of evidence showing that the loan ever closed. In the end, it is readily apparent that there is no evidence in the record that might support Plaintiffs’ required showing under Rule 52.08(a)(1) that “the class is so numerous that joinder of all members is impracticable.”

It is crucial to note, as indicated in Allied’s offer of proof, that counsel specifically selected the 29 “overcharges” after examining all of Allied’s loan files, and that there is no evidence to show that counsel is qualified to perform a statistical sample. Presumably, counsel selected those few loans he felt best supported his contentions. As set forth *infra*, however, the trial court ignored these facts, and adopted counsel’s unsupported number of 1,800 persons for the size of the class. (R. 1-2.) As there is absolutely no support in the record for this number or, for that matter, any alternative number regarding the size of the proposed class, Plaintiffs have failed to meet their burden under Rule 52.08(a)(1). Accordingly, the trial court abused its discretion in certifying the class.

C. The undisputed evidence shows that Plaintiffs’ claims are not typical of the class because Plaintiffs are subject to unique defenses that are not available to all members of the class.

Rule 52.08(a)(3) establishes that a class action may be maintained only if “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Thus, a “class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. Ct. App. 2000). In contrast, a class representative who cannot assert injury on the same basis as the proposed class he or she seeks to represent cannot meet the requirement of Rule 52.08(a)(3), and certification in such a circumstance constitutes an abuse of discretion. *Id.*

The test for typicality is this: If trying a representative’s claims would not necessarily prove each of the proposed class member’s claims, the representative’s claims are not typical. *Fleck v. Cablevision VII, Inc.*, 763 F. Supp. 622, 625 (D. D.C. 1991). A claim is not typical, and certification not appropriate, where the class representative is subject to unique defenses that are likely to become a focus of the litigation. *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006); *see also Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 342 (4th Cir. 1998) (“[W]hen the defendant’s affirmative defenses . . . may depend on facts peculiar to each plaintiff’s case, class certification is erroneous.”). In such instance, the danger exists that the named plaintiff will be distracted by the presence of a unique defense applicable only to him or her – thereby ignoring the obligation to represent the interests of the absent class members. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508-09 (9th Cir. 1992).

In conclusory fashion, the court below found that Plaintiffs met the typicality element of Rule 52.08(a)(3), because their claims are the “same kinds of claims the other

proposed class members would have.” (R. 5.) But that conclusion, devoid of any factual analysis, wholly ignores the evidence actually adduced, and the undisputed fact that Plaintiffs’ claims are subject to at least two unique defenses – either of which makes their claims atypical of those held by the proposed class.

At the conclusion of the underlying transaction, Plaintiffs – apparently dissatisfied with the fees assessed – complained to Allied and negotiated a credit of \$650.00 in fees charged at closing. Because the total fees charged were \$655.00, in effect, Plaintiffs received a credit for all of the third-party fees at issue. Therefore, as a matter of law it cannot be said that Plaintiffs sustained any ascertainable loss, a required element of their private cause of action under the MPA. *See* Mo. Rev. Stat. § 407.025(1) . In the end, Plaintiffs do not even meet the definition of their own class – which includes only individuals who were “overcharged” for third-party fees.

Moreover, while acknowledging that he executed the loan documents fully aware of the charges he was being assessed, Plaintiff Brennan VanDyne testified that the charge for his credit report had no bearing on his decision to use Allied’s services at the time of the loan transaction. (R. 286 at p. 77:3-20; R. 259 at p. 79:25-80:5; R. 322 at pp. 127:3-4, 127:11-12.) Thus, Plaintiffs’ individual claim also cannot, as a matter of law, meet the required materiality element of the MPA, in that any alleged failure to disclose Allied’s profits was not material to them.

Plaintiffs adduced no evidence that any alleged misrepresentation was of a fact “material” to them; nor did they dispute that they suffered no “ascertainable loss” because the third-party fees assessed against them were fully refunded. Accordingly,

Plaintiffs' claims are clearly subject to valid defenses that would preclude their recovery under the MPA, making their claims atypical from those of the class they purport to represent. Mo. Rev. Stat. § 407.020.

In short, not only is it apparent that Plaintiffs may not be members of their own class, but the unique circumstances surrounding Plaintiffs' transaction readily demonstrate that their claims do not "have the same essential characteristics as the claims of the class at large," defeating typicality. *Blaz v. Galen Hosp. Ill., Inc.*, 168 F.R.D. 621, 626 (N.D. Ill. 1996).

Nonetheless, in finding that the typicality requirement was met, the trial court effectively ignored the distinct nature of Plaintiffs' claim, choosing instead to enter a sweeping finding that Plaintiffs' claims were typical because they are the "same kind of" claims other class members might have. A declaration that Plaintiffs' claims are typical of the class without evidentiary support does not make it so. Proof of typicality "requires more than general conclusory allegations." *Belles v. Schweiker*, 720 F.2d 509, 515 (8th Cir. 1983). Because Plaintiffs have failed to meet their required burden under Rule 52.08(a)(3), the trial court abused its discretion in finding that the typicality element was met.

V. The Trial Court Erred In Certifying The Class Because The Record Does Not Demonstrate That The Elements Of Rule 52.08(b) Have Been Met, In That There Is Nothing In The Record To Support The Court’s Findings Regarding Predominance and Superiority.

Even assuming the four prerequisites of Rule 52.08(a) are met, a class action may not be maintained unless Plaintiffs also carry their burden, and the trial court finds, that “[1] the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Mo. Sup. Ct. R. 52.08(b)(3). The importance of the “predominance” element required by Rule 52.08(b)(3) cannot be overstated; indeed, it is considered to be a “far more demanding” requirement than the “commonality” requirement of Rule 52.08(a)(2). *Dale*, 204 S.W.3d at 175 (citing *Craft*, 190 S.W.3d at 381); *Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.*, 213 F.R.D. 537, 547 (W.D. Mo. 2002); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997).

A. Common issues do not predominate because questions of law and fact that must be resolved on an individual basis overwhelm any common issues.

1. Because there is no evidence of uniform conduct or uniform treatment of the class, Plaintiffs have not met their burden under Rule 52.08(b).

“The determination of whether a question is a common or an individual question, for purposes of satisfying the common-question-predominance requirement, is based on the nature of the evidence that will suffice to resolve the question.” *Dale*, 204 S.W.3d at 175 (citing *Craft*, 190 S.W.3d at 382 and *Mehl v. Canadian Pac. Ry., Ltd.*, 227 F.R.D. 505, 520 (D. N.D. 2005)). The key to that evidentiary inquiry, however, is uniformity among the membership of the proposed class: If, to make a prima facie showing on a given question, the individual members of a proposed class will need to present individualized evidence that varies from member to member, then it cannot be said that the question is “common” to the class overall, but an individual question that must be made on an individualized basis. *Id.* Thus, in order to meet the predominance element of Rule 52.08(b), the transactions at issue must involve uniform conduct, or uniform treatment, of the class as a whole. Only then will the class be “sufficiently cohesive to warrant adjudication by representation.” *Craft*, 190 S.W.3d at 382.

In this case, the entirety of the trial court’s analysis regarding predominance is found on page 7 of the Order Certifying the Class:

The Court finds that common questions do predominate over individual issues. The common issues involve whether Defendant violated the Merchandising Practices Act, Breach of the Covenant of Good Faith and Fair Dealing, and whether class members are entitled to Restitution or a Declaratory Judgment.

(R. 7.)

As a preliminary matter, the only claim remaining in the case at the time of the Order was a single claim for the violation of the Merchandising Practices Act. (R. 12 at p. 9:3-5.) The remaining claims referenced by the court – Breach of the Covenant of Good Faith and Fair Dealing, and Restitution – were dismissed by the court on Allied’s motion. In short, such purported “common questions” are no longer at issue in this case.

Furthermore, and as detailed in Section I, the very fact that the certified class is defined in terms of a violation of the MPA constitutes an abuse of discretion, and, by itself, demonstrates that “common issues” cannot predominate over individualized inquiries in this case. In fact, the paucity of the analysis by the trial court on this issue readily demonstrates that the record is entirely devoid of any evidence regarding uniform conduct or uniform treatment of the class. To the contrary, and as set forth in Sections I and II, the undisputed evidence establishes that every one of the 5,000 transactions at issue will involve unique issues of proof and contested issues of fact.

For example, it must be determined whether a customer was charged “loan-related service” fees, a term that is defined neither in the class definition nor in any of the pleadings; whether the amount of fees each individual paid Allied for those services

exceeded Allied's costs; whether the resulting alleged "overcharge" was based on Allied's "nondisclosures and false, unfair, deceptive or misleading disclosures;" whether the customer has acknowledged that his or her charges include Allied's compensation; and whether the customer has agreed to arbitrate any disputes resulting from the transaction. Any one of these inquiries, standing alone, would exclude a particular customer from membership in the class.

2. *Because the class definition places Allied's representations at issue, individual issues will predominate over common questions..*

Cases that involve inquiry into the nature of representations made to many different persons are by their very nature, unsuitable for class treatment. *Van West v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 451 (D. R.I. 2001). This is especially true when the defendant's alleged conduct – like Allied's here – consists of a series of discrete acts that vary in nature and are committed over a protracted period of time. *Id.* Thus, Missouri courts hold that, in cases involving representations, individual issues such as the substance and materiality of the representations will typically predominate over common issues. *See Grosser v. Kandel-Iken Builders, Inc.*, 647 S.W.2d 911, 917 (Mo. Ct. App. 1983) (holding that a "diversified" promise consisting of different representations made to people over a long period of time, "by its very nature is unsuitable as a class action").

Thus, because the class is defined in terms of "disclosures," further inquiries must be made on an individualized basis regarding the nature of those disclosures. As the class is presently defined, each member must demonstrate that he or she received a "false, unfair, deceptive or misleading disclosure," or received no disclosure at all. In turn, each

of these inquiries will require a factfinder to make numerous factual inquiries into the disclosures made by Allied, received by the customer, and the state of mind of each individual. For instance, if an individual did receive a representation, the factfinder must ask: Did that representation state that the fees charged would include Allied's compensation? Was the representation misleading? Was it unfair? Was it deceptive? Was it false? Not only do such determinations obviously require merit-based findings, that should be reserved for trial before a factfinder, as discussed above in Section I, but the multiplicity of possible answers to these questions highlights the individualized nature of this inquiry.

3. *Proof of “ascertainable loss,” a required element of the sole claim remaining in the litigation, cannot be addressed on a class-wide basis, so common questions do not predominate and Plaintiffs have not met their burden under Rule 52.08(b).*

An essential element of Plaintiffs' claim under the MPA is to prove that each class member suffered an “ascertainable loss,” in other words, whether the customer paid more for certain “loan related services” than it cost Allied to provide those same services. Although it may be true that a class can be certified where only the amount of damages differs from person to person, there are different concerns in cases such as this, where the fact of damages must be determined on an individual basis. Indeed, where proof of the fact of damage “requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues.” *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 213 F.R.D. 537, 547 (W.D. Mo. 2002). Thus,

“[c]ourts are not bound to certify a class if the determination of whether class members suffered actual damage requires presentment of individualized proof.” *Id.*

This principle is further recognized in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 188 (3d Cir. 2001), where the court held that:

class treatment of damages issues, however, presumes the ability to prove the fact of damage without becoming enmeshed in individual questions of actual damage. Where proof of fact of damage requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues, thereby rendering class certification problematic.

Id. (ellipses and citations to District Court opinion omitted).

In the present case, the only evidence in the record establishes that the essential determination of the fact of damages – whether an individual paid more than costs – will be highly individualized and subject to issues of proof unique to each of the 5,000 transactions during the relevant period. As the evidence shows, to determine whether an individual class member was overcharged for the third-party fees would require at least a two-part inquiry: First, the trial court will have to review the particular loan file to determine what third-party services (if any) were provided to the customer. That process may require a subpoena to third parties to obtain relevant records not contained in the loan files. (R. 54 at p. 177:1 to R. 55 at p. 178:22; R. 30 at p. 8:22 to R. 31 at p. 84:11.) Second, a separate inquiry would also be necessary to determine Allied’s costs for providing the third-party services for that particular loan. That inquiry, again, would

likely entail a subpoena to third parties to provide invoice information. (R. 54 at p. 177:1 to R. 55 at p. 178:22; R. 30 at p. 8:22 to R. 31 at p. 84:11.)

In short, just the need to establish the fact of damages (an essential element of Plaintiffs' sole remaining claim), simply to determine whether an individual is – or is not – a class member will require an evidentiary mini-trial on each and every one of over 5,000 potential class members' transactions. That evidence is undisputed. Under the predominance requirement of Rule 52.08, this alone establishes that class treatment is inappropriate – and makes it clear that individualized issues concerning the fact of damages will necessarily overwhelm any issues that might be considered to be common to the class overall. *See Owner-Operator*, 213 F.R.D. at 547 (holding certification improper where the determination of the fact of damages “would necessarily entitle the Defendants to present individualized proof of offsets, advances and maintenance expenses charged to the owner operators' accounts to determine whether any escrow funds remained to which the owner-operator may be entitled.”).

This inquiry, along with the inquiries identified above, will certainly be the predominate issues at trial. Indeed, these inquiries will need to be resolved for each potential class member and will dominate proceedings even long before this case reaches trial.

In sum, each of the central questions in this case is an highly individualized, rather than a common, question. The undisputed evidence presented at the class certification hearing shows that each loan transaction is different – each individual received different services, different charges, different representations (if any). It, therefore, cannot be said

that there is any uniformity across the class. Because there is nothing in the record that supports the trial court's findings that common questions predominate over individual questions, certification of this class was an abuse of discretion. *Dale*, 204 S.W.3d at 175-76.

B. The record does not support the court's finding that class treatment is a superior method of adjudication.

In addition to proving the existence of a predominance of common issues, Rule 52.08(b)(3) requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule provides four, non-exhaustive factors that the Court may consider in making its "superiority" determination, including a consideration for the "difficulties likely to be encountered in the management of a class action." Mo. Sup. Ct. Rule 52.08(b)(3)(D). One of these criteria – the problem of "manageability" – encompasses the entire range of problems that might make class treatment inappropriate. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974).

The superiority element requires the trial court to balance, in terms of fairness and efficiency, the merits of a class action in resolving the controversy against those of "alternative available methods" of adjudication. *Dale*, 204 S.W.3d at 181 (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996)). "If individual issues predominate, then class certification is usually not a superior method for resolving the controversy, since management of such issues by a court will not be efficient." *Clark v. Experian Info., Inc.*, 233 F.R.D. 508, 511 (N.D. Ill. 2005) (citation omitted).

Combined with the significant presence of individual issues that predominate over common facts, the manageability and fairness issues raised by Plaintiffs' proposed class (and the methodology proposed to identify membership in their class) demonstrate that class treatment is not the superior method of resolving this case. Manageability of this case as a class action is made more difficult – if not impossible – by the multiplicity of individual issues that must be resolved in connection with Plaintiffs' various claims.

Moreover, it is evident that Allied would likely have a unique defense available against Plaintiffs' claims, as well as each putative class member's claims. For instance, depending on the facts surrounding each transaction and the representations made to each customer or the emphasis he or she placed on the fees, a particular individual may or may not be included in the proposed class definition. Without question, Defendants are entitled to assert those defenses and seek a determination of those issues on an individual basis. To hold otherwise would impose an unfair burden on Defendants. *See, e.g., Clark*, 233 F.R.D. at 512 (“The defendants also have the right to assert affirmative defenses and these affirmative defenses will require a person-by-person evaluation of conduct to determine whether an individual potential class member’s action precludes individual recovery.”). Such individualized determinations will necessarily overwhelm any issues that may be common to the class as a whole. The predominance element of Rule 52.08(b) cannot be met, rendering class treatment inappropriate.

VI. The Trial Court Erred In Certifying The Class Because The Required Element Of Adequacy Of Class Counsel Cannot Be Met In That Class Counsel Has A Direct, Familial Relationship With The Named Plaintiffs And, Thus, Has A Financial Interest In The Outcome Of The Case That Is Antagonistic To Absent Class Members.

A. The Adequacy Element of Rule 52.08

Before certifying a class, the court must also find that both the class representatives and class counsel “will fairly and adequately protect the interests of the class.” Mo. Sup. Ct. R. 52.08(a)(4). Because absent class members are bound by the outcome of the named plaintiffs’ case, the importance of the adequacy inquiry cannot be overstated. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735-36 (Mo. banc 2004); *Dale*, 204 S.W.3d at 44 (citing *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977)). Adequacy of representation is not presumed in the absence of specific proof to the contrary; rather, the burden of proof is on the plaintiff. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2002).

To determine whether the adequacy element of Rule 52.08 is met, the trial court must consider whether any conflict of interest exists that could adversely affect the interests of the class. *Dale*, 204 S.W.3d at 45. In performing this inquiry, the court not only considers whether there is an actual conflict of interest, but whether there is a likelihood that such a conflict may exist. *Id.* at 45-46 (citing *Susman*, 561 F.2d at 94).

B. Plaintiffs’ counsel has a direct familial relationship with the class representatives; therefore, he has a conflict of interest with the absent class members that renders him unable to fairly and adequately protect the interests of the class.

Plaintiffs’ attorney, John Steward, is related to both Plaintiffs as their brother-in-law – he is married to Plaintiff Kimberly VanDyne’s sister. (R. 324 at p. 16:11-18; R. 24 at pp. 54:22-25, 55:7-16.) That fact is not disputed. Despite numerous opportunities to do so, Plaintiffs have not indicated that Mr. Steward would not share in any fees recovered should Plaintiffs ultimately prevail. Indeed, Mr. Steward continues to appear in this case on Plaintiffs’ behalf.

“[A] majority of courts [] have refused to permit class attorneys, their relatives, or business associates from acting as the class representative.” *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 89 (7th Cir. 1977); *Pattillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980); *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976); *Bogus v. Am. Speech and Hearing Ass’n*, 20 F.R. Serv. 2d 859 (E.D. Pa. 1975); *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974). Thus, it is routinely held that, when a plaintiff is represented by a member of his or her immediate family – or even one of his or her relatives’ close associates – the adequacy element cannot be met and class certification is inappropriate. *Susman*, 561 F.2d at 89.

The justification for this stringent standard is rooted in due process, and the protections afforded potential class members who are not present during the proceedings. In a class action, absent class members will be bound by the court’s judgment; therefore,

the interests of those not present during the litigation are inextricably tied to the interests of the named class representatives and their counsel. Both, in fact, have a fiduciary obligation to the class they seek to represent. In turn, the court must ensure that the proposed class representatives and counsel will fairly and adequately represent the interests of the class – and not take a position that might be antagonistic to the class they seek to represent. Not only must the court monitor counsel’s performance and the decisions made by class representatives, but it must also ensure that no conflict of interest emanates from the relationship of the class representatives and class counsel.

Thus, “[a]n attorney whose fees will depend upon the outcome of the case and who is also a class member or closely related to a class member cannot serve the interests of the class with the same unswerving devotion as an attorney who has no interest other than representing the class members.” *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978). Since possible recovery of the class representative is far exceeded by potential attorneys’ fees, courts fear that a class representative who is closely associated with the class attorney would, for example, allow settlement on terms less favorable to the interests of absent class members. *Susman*, 561 F.2d at 89; *see also Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974); *Graybeal v. Am. Sav. & Loan Ass’n*, 59 F.R.D. 7 (D. Col. 1973) (“The impropriety of such a position is increased where . . . the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole.”). Such concern is particularly warranted in a case such as this where, as the trial court noted, each individual claim “is probably worth under \$100.00 individually.” (R. 8).

Likewise, it is immaterial whether the class representative has taken precautions to ensure that he will not benefit from attorney's fees or act as an attorney in the case. *Susman*, 561 F.2d at 93. Neither plaintiff's motivation in bringing the suit nor the quality of legal representation afforded by counsel are relevant to this inquiry. *Id.* To the contrary, "the factor mandating judicial inquiry is the appearance of impropriety" inherent in plaintiff's representative role versus counsel's desire to maximize recovery of attorney's fees. *Id.* (emphasis added); *see also Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976) (holding that plaintiff's promise not to share in attorney's fees recovered cannot cure inherent conflict presented by a "close personal or professional relationship" between plaintiff and class counsel").

Applying this very standard, numerous state and federal courts – including the Eighth Circuit Court of Appeals – have routinely denied class certification or disqualified counsel who recruit close relatives or business associates to act as class representatives. *See, e.g., Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1155 (8th Cir. 1999); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1375 (11th Cir. 1984); *Pattillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980); *Susman*, 561 F.2d at 89; *Kruger v. European Health Spa, Inc., of Milwaukee, Wis.*, 56 F.R.D. 104, 105-6 (E.D. Wis. 1972); *Shields v. Valley Nat'l Bank of Ariz.*, 56 F.R.D. 448, 450 (D. Ariz. 1971).

While the issue of whether class attorneys or their relatives may act as class representatives is a matter of first impression in this Court, the Western Appellate Court analyzed this issue in *Dale v. DaimlerChrysler Corp.* There, defendant argued that the adequacy prerequisite was not satisfied because a conflict of interest existed with respect

to the named plaintiff, whose wife was employed by one of the three law firms acting as class counsel. 204 S.W.3d at 173. Defendant contended that plaintiff's wife received year-end bonuses, based on the profitability of the firm. Defendant argued that the named plaintiff stood to profit from a greater award of attorneys' fees in the case; therefore, the relationship created an incentive to maximize attorneys' fees, even to the detriment of the class members. *Id.*

Citing the rationale of *Susman*, the *Dale* court recognized that the primary focus of the trial court, with respect to the adequacy prerequisite, must be the interests of the absent parties. *Dale*, 204 S.W.3d at 151. For this reason, the court stated, “[b]asic consideration[s] of fairness require[] that the trial court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives.” *Id.* On the facts presented, however, the *Dale* court declined to adopt a *per se* rule prohibiting relatives or close business associates of class counsel from being class representatives, holding instead that the issue should be addressed on a case-by-case basis, depending on the relationships involved. And, noting that the named plaintiff was not “related to any members of the law firms representing the classes” the *Dale* court found that the class representative was adequate under Rule 52.08. *Id.*

The relationship in this case is much more direct than that presented in *Dale*. Here, Mr. Steward is plaintiff's brother-in-law, raising the spectre of a direct relative of counsel directing the proceedings in this case – and ultimately sharing in the fruits of any favorable resolution. In short, Mr. Steward's continued representation of Plaintiffs creates an appearance of impropriety that, as a matter of law, precludes a finding of

adequacy of representation under Rule 52.08. As courts around the nation have universally held, his relationship with the class representative constitutes an inherent, financially-based conflict of interest that cannot be resolved absent a disqualification of counsel. *Susman*, 561 F.2d at 96; *see also Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1155 (8th Cir. 1999) (“In situations where there is a close familial bond between a class counsel and a class representative. . . there is a clear danger that the representative may have some interests in conflict with the best interests of the class as a whole when making decisions that could have an impact on attorney fees.”).

The trial court’s finding that counsel will fairly and adequately protect the interests of the class in the face of court precedent and undisputed evidence to the contrary constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should rule that the trial court abused its discretion by certifying the class. The trial court's Order of March 23, 2006 certifying the class should be reversed, and the trial court should be directed to enter an order denying Plaintiffs' Motion for Class Certification.

Dated: May 9, 2007

Respectfully submitted,

GREENSFELDER, HEMKER & GALE, P.C.

By

David M. Harris, # 32330
dmh@greensfelder.com
Timothy M. Huskey, # 44129
tmh@greensfelder.com
James J. Zych, # 52061
jz@greensfelder.com
Kirsten M. Ahmad, # 52886
km@greensfelder.com
10 South Broadway, Suite 2000
St. Louis, Missouri 63102
Telephone: (314) 241-9090
Facsimile: (314) 345-5465

*Attorneys for Defendant Allied Mortgage
Capital Corporation*

CERTIFICATION OF SERVICE AND COMPLIANCE
WITH MO. SUP. CT. R. 84.06

The undersigned hereby certifies that on this 9th day of May, 2007, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

JEFFREY LOWE, P.C.
Jeffrey J. Lowe
8235 Forsyth
Suite 1100
St. Louis, Missouri 63105

Attorney for Plaintiffs

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 21,958 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

APPENDIX

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