

IN THE
SUPREME COURT OF MISSOURI

NO. SC88273

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 REPLY 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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INTRODUCTION

This appeal presents the Court with two questions. First, may a trial court define a class in terms that require proof of the underlying claims simply to determine membership in that class? Second, may a trial court certify a class without any competent evidence establishing that class treatment is appropriate? Allied submits that the answer to both of these questions is no, and nothing in Respondents' Substitute Brief changes that analysis.

Respondents have failed to provide the legal grounds justifying certification of their putative class. If anything, the admissions contained in Respondents' Brief only reinforce the conclusion that the trial court abused its discretion in certifying this class. Respondents concede Allied's principal contention – that an individual cannot be a member of their proposed class unless he or she has a meritorious claim. They also assert that just 40 to 50 percent of all of Allied's customers are class members. Thus, it is undisputed that a determination of whether a particular individual is a class member may only be made following a manual review of more than 5,000 loan files. Nor is it disputed that such a review will require detailed fact-finding and interpretation of loan file documents, which undoubtedly vary from loan to loan. Respondents concede that this analysis is essential before a court may determine whether an individual paid more for certain loan-related services than it cost Allied to obtain those services.

Thus, the only method Respondents propose to identify class membership is to conduct a hearing on the merits of each potential member's claim. Either Allied's due process rights are violated by adjudicating the merits of each claim long before trial, or

the need for 5,000 mini-trials will eviscerate any benefits of class treatment. Regardless, the trial court never addressed this fundamental flaw in the proposed class definition, which must be resolved as a threshold to class certification. The trial court's failure to address this issue constitutes an abuse of discretion.

To cure their definition's flaws, Respondents offer to strike a portion of the definition certified below. Respondents should not be permitted to change their position at this stage of the proceedings. The parties have conducted discovery and presented evidence on the original definition that Respondents proposed and the trial court certified. Allowing Respondents the opportunity to change their position for the first time at the Supreme Court would be fundamentally unfair to Allied and effectively nullify almost five years of litigation.

Nevertheless, even assuming that Respondents' proposed amendment of their class definition would be permitted, it does not alter the reality of the class definition: Under either proposed definition, it is impossible to reach the threshold determination of class identity without an examination of every charge in every one of Allied's loan files. Quite simply, the allegations in this case cannot be managed by class action rules.

Even if this threshold definitional issue were properly addressed, the trial court abused its discretion by certifying the class in the absence of competent evidence supporting the required elements of Rule 52.08. If admissible evidence existed to support the trial court's ruling, Respondents surely would have cited it in their Substitute Brief. Rather than undertake this basic exercise, however, Respondents have chosen to confuse the issues – and the record – on appeal, by focusing their argument on irrelevant,

inadmissible, or withdrawn evidence. Indeed, Respondents' entire brief is based on the premise that, because the Department of Housing and Urban Development ("HUD") once alleged that Allied engaged in unspecified conduct that may have been contrary to federal law, they should be permitted to proceed with a class action against Allied. This argument is supported neither by the facts in the record, nor the law.¹

Despite the fact that Respondents bear the burden of proving the elements of class certification, they have made no showing of any common or uniform class-wide treatment among potential class members. Instead, Respondents rely on generalized statements of common issues, asserting, for example, that whether Allied has violated Missouri's Merchandising Practices Act is an issue that is common to the class, which warrants class treatment of this action. In its Order, the trial court followed Respondents' erroneous treatment of the class rules, finding that commonality, predominance, and typicality were met not by the evidence in the record, but by the broadest characterizations of the Respondents' allegations in their Petition.

Respondents make sweeping allegations that Allied's alleged overcharges constituted a "widespread" or "uniform" practice, but the only evidence actually cited by Respondents demonstrates that the alleged conduct was anything but uniform. Instead, that evidence suggested that every loan brokered by Allied involved a separate and

¹ Because Respondents' improper reliance on the HUD evidence is the subject of a separate Motion to Strike, filed by Appellant on August 7, 2007, this argument is not repeated here.

distinct negotiation, with separate representations, diffused among fifty or more branch offices. Although some evidence of overcharging might be gleaned from a detailed analysis of a particular loan file, when provided the opportunity to review each of the 5,000 loans at issue, Respondents themselves were only able to identify 29 files that they contend might fit the definition of their proposed class. And, as the evidence below demonstrated, only a handful of those 29 files could properly be considered class members.

The trial court's order is not based, as Respondents suggest, on evidence supporting their contention that Allied engaged in a widespread practice of overcharging. Instead, it is based on allegations and conjecture, premised on the fundamental allegation that Allied may ultimately be liable to the class. The trial court's certification of a class that requires more than 5,000 mini-trials to assess the merits of each potential class member's claim before he or she may be considered a class member, combined with its failure to require Respondents to meet their burden of proof, constitutes an abuse of discretion.

ARGUMENT

I. Respondents may not change their position on appeal by unilateral amendment of the class definition; Allied must be afforded a hearing in the trial court before the class definition is modified.

The class certified is fatally indefinite because it requires a subjective, merits-based inquiry into each potential class member's claim just to identify class membership. In response, and in an apparent attempt to preserve their favorable ruling below,

Respondents now concede that their class definition is infirm. In other words, Respondents admit that the very definition about which they have litigated for nearly five full years is flawed.

Respondents contend, however, that the flaw may be cured with a single, simple edit. In doing so, Respondents seek to alter the nature of this litigation by offering to unilaterally excise language from their flawed definition, effectively conceding that the very class definition they proposed to the trial court—which it accepted verbatim—is flawed because it requires a merits-based inquiry to determine class membership. Following a hearing below on certification, and an appeal to the Eastern District, Respondents now contend that the portion of the definition requiring a finding that a customer’s overcharge resulted from Allied’s “nondisclosures and false, unfair, deceptive or misleading disclosures” should be removed. If that were the case, Respondents maintain, all of the definitional defects would disappear. Respondents actually assert that, with this simple change, there is sufficient objective criteria in their new class definition to determine the class and there would be no merits-based inquiry necessary.

As detailed below, that substantive assertion is without merit. Nevertheless, as a procedural matter, Respondents’ attempt to unilaterally alter the nature of this litigation on transfer should not be countenanced by this Court. Missouri courts have long recognized the principle that a party may not change its position on appeal from that which it took in the trial court. *See Ruckels v. Pryor*, 174 S.W.2d 185, 185 (Mo. 1943); *Kranz v. Centropolis Crusher, Inc.*, 630 S.W.2d 140, 145 (Mo. Ct. App. 1982). Rather,

the case on appeal must be determined within the issues developed by the pleadings and the evidence introduced below. *Ruckels*, 174 S.W.2d at 185.

This principle applies here, and Respondents' eleventh hour concession that their class definition is flawed violates this well-established principle of appellate litigation. Respondents are bound by the positions they took in the trial court and the class definition they proposed below. Those positions resulted from months of discovery and motion practice. The definition proposed (and certified) was the subject of extensive briefing and two days of testimony and evidence; in fact, it has formed the foundation of this case for some five years. Nevertheless, Respondents now want to cast those proceedings aside as if they never took place by re-defining the class without formal motion or permitting Allied the opportunity to respond in an evidentiary hearing.

Nor should Respondents' proposed change be considered unimportant. Indeed, contrary to Respondents' implied argument that their new proposed class definition is not out of the ordinary, the new definition proposed for the first time in this Court fundamentally alters this litigation. Respondents concede by their litigation strategy that their proposed class definition – that has been at the heart of this litigation – was flawed from the beginning. But if Respondents were permitted to change their class definition at this late date, Allied's ability to defend this case would be severely prejudiced.

For five years, Allied has litigated this claim – argued its position, fashioned its discovery, briefed the certification issues, and presented evidence to trial court – based on a definition that was proposed in Respondents' original Petition. How can Allied be expected to defend against an order that certifies one class, when Respondents are

allowed to change unilaterally the definition of that class on appeal by simply deleting a significant provision, thereby changing all of their subsequent arguments? Allowing Respondents to change that definition before this Court would render five years of litigation, two days of evidence, and an appeal effectively moot.

As Respondents acknowledge, any amendment of the class definition at this late hour should be achieved through a motion and hearing before the trial court. Thus, before the class definition may be modified by the trial court, Allied (at the very least) is entitled to an evidentiary hearing to present its arguments and evidence concerning this new proposed class definition.

II. Neither the class definition certified by the trial court nor Respondents' eleventh hour "re-draft" satisfies the requirement that a sufficiently definite class must exist because both require the resolution of a paramount liability question.

As detailed in Allied's initial brief, a fundamental prerequisite to class action litigation is the requirement that a sufficiently definite class exists. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 177 (Mo. Ct. App. W.D. 2006), *transfer denied*, No. SC88007 (Mo. Nov. 21, 2006). A definite class forms the basis for the trial court's review of the elements of Rule 52.08. It also identifies those individuals who will be bound by the judgment if Plaintiffs lose, and ensures that only those actually harmed by defendant's conduct receive relief if they win. *See Dale*, 204 S.W.3d at 178.

Thus, Respondents carry the burden to show that their class is defined in objective terms, by which membership may be presently ascertained. *Id.*; *see also 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.”). In other words, where the definition requires an analysis of subjective criteria or a merits-based analysis of the substantive elements of the case, the definition is fatally flawed.

Here, neither the trial court’s definition nor Respondents’ proposed “new” definition meets this requirement of Rule 52.08.

A. As even Respondents concede, the definition certified by the trial court is infirm in that it requires subjective, merits-based determinations to identify class membership.

The mere fact that Respondents have attempted to excise a portion of the definition originally proposed, which they vigorously defended before, and was adopted verbatim by, the trial court, speaks volumes about the infirmities of the definition itself. Indeed, Respondents’ failed efforts to clarify their circular definition serve only to highlight its fatal flaws, and demonstrate why the trial court abused its discretion in certifying the class it did.

Respondents propose to remove the definitional language mandating that a class member be charged an amount greater than Allied’s cost “based on [Allied’s] nondisclosures and false, unfair, deceptive or misleading disclosures.” Their recognition that this portion of the definition cannot stand is not surprising – it is this language that, under the Western Appellate District’s holding in *Dale*, forms the basis of one of the required subjective and merits-based inquiries that renders the definition fatally flawed. The language Respondents propose to remove precisely mirrors the language of the

Merchandising Practices Act, Mo. Rev. Stat. § 407.020(1) (the “MPA”). Thus, as Respondents apparently recognize, 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.

By requiring that this tentative finding be made at the outset of the lawsuit, however, the trial court has placed an unfair burden on Allied. Such finding would certainly not be “accompanied by the traditional rules and procedures applicable to civil trials.” Instead, those determinations at the class definition stage would necessarily (and unfairly) “color the subsequent proceedings” against Allied, and effectively resolve at the outset fact questions that are more appropriately reserved for trial. *Dale*, 204 S.W.3d at 178 (citing *Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 377 (Mo. Ct. App. E.D. 2005)). The trial court has no authority to conduct an essentially binding preliminary inquiry into the merits of a lawsuit when it is making the threshold determination of class membership. *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). The trial court’s certification of a class that requires just that sort of inquiry, therefore, constitutes an abuse of discretion.

Like Allied, Respondents compare the definition certified here to that in *Dale*. But, in doing so, Respondents contend that, like the class definition approved by the *Dale* court, the definition at issue uses objective criteria and does not mandate a merits-based determination. (Resp. Br. at 26-27.) Respondents’ reliance on *Dale* is misplaced.

The fundamental difference between the class certified here and that in *Dale* is that this definition, on its face, contains a legal conclusion – a verbatim recitation of the elements of Respondents’ MPA claim – that requires the court to resolve a paramount liability question to identify class membership. By defining class membership in terms of those individuals who have a valid claim, Respondents propose a class that is both circular and irreparably flawed.

In contrast, the *Dale* court held that a class is properly defined only if framed in terms of objective measurement. *See Dale*, 204 S.W.3d at 178 (“A proposed class definition that rests on the paramount liability question cannot be objective . . .”). Thus, the Court of Appeals found that the definitional criteria attacked by appellant – a failed electric window regulator and appellant’s failure to install a particular motor to fix it – were sufficiently objective because they did not require the trial court to make the type of merits-based determinations that the definition requires here.

Under Respondents’ definition, to identify potential class members, the trial court must determine (1) whether an individual was charged for loan services an amount greater than Allied’s costs; and (2) whether that overcharge was assessed based on “nondisclosures” or “false, unfair, deceptive or misleading disclosures” communicated to the customer by Allied. Unlike the definition presented in *Dale*, this inquiry requires the court to adjudicate a question of liability. There simply is no other way to resolve the question of class membership with the class as defined, without adjudicating the question of whether an individual received no disclosures, or false, unfair, deceptive, or misleading disclosures about the fees.

If the case is allowed to proceed under the definition certified – which even Respondents now concede is flawed – any result of this litigation will 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 with a judgment against Allied. On the other hand, if the finding 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 altogether, 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 re-litigate their individual claims.

This result is fundamentally at odds with the principles of judicial economy and fairness that underlie the class action procedure. This Court should not countenance this type of merits-based class definition, 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). Accordingly, the trial court abused its discretion by certifying a class that requires a merits-based inquiry into questions of paramount liability.

B. Respondents “new” proposed definition is also infirm because it includes individuals in the class who have no standing to bring suit in their own right.

Even if the language highlighted by Respondents could be excised from the class definition, the resulting “new” definition is still infirm. Respondents’ new proposed class definition is:

All persons in Missouri who, since March 18, 1997 through December 31, 2002, paid charges for credit reports and/or other loan related services for mortgage loans that exceeded Defendant’s actual cost for those services.

(Resp. Br. at 29.)

But Respondents’ new definition does not cure one of the fundamental problems posed by their original: the undisputed evidence demonstrates that, without a detailed analysis of the facts of each customer’s loan transaction, the definition will include as members hundreds (or thousands) of individuals who are not actually class members. It is well-recognized that a “class must be sufficiently identifiable without being overly broad.” *Dale*, 204 S.W.3d at 178. On its face, this “new” definition is overinclusive and, therefore, fatally flawed.

Under this “new” definition, for example, a customer who signed documents acknowledging that his or her total fees would include Allied’s compensation, as well as customers who did not find any upcharge to be material to their loan transaction, would be included in the class. In both instances, uninjured individuals who have no standing to sue would be included within the class. This type of definition is impermissibly

overbroad. *See Duffin v. Exelon Corp.*, 2007 U.S. Dist. LEXIS 19683, 10-11 (D. Ill. 2007) (“Overbroad class descriptions violate the definiteness requirement because they include individuals who are without standing to maintain the action on their own behalf.”).

Courts routinely refuse to certify classes that are so broad as to include members who are not entitled to relief. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (noting argument that “exposure-only” class members lack an injury-in-fact and acknowledging need for Article III standing); *Id.* at 884 (Breyer, J., dissenting) (referring to the “standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact”); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (concluding that “no class may be certified that contains members lacking Article III standing,” and “[t]herefore, the class must be defined in such a way that anyone within it would satisfy standing.”); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 334 (S.D.N.Y. 2003) (noting that “each member of the class must have standing with respect to injuries suffered as a result of defendants’ actions”); 7AA Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1785.1 (3d ed. 2005) (“[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention.”). This Court should not adopt Respondents’ “new” definition because it is no less infirm than the definition originally certified by the trial court.

III. The trial court’s certification of a class defined in terms of a merits-based inquiry also violates due process in that it renders notice virtually impossible, because the trial court cannot identify class members with any precision before a full hearing on the merits of each claim.

The fundamental flaws attached to either of Respondents’ proposed classes – the one certified below, or the new one proposed before this Court – are apparent when considering the practical realities of this case. Following certification, the next step in the litigation process is to provide notice to those individuals who fall within the class as defined. But it is impossible to identify who is a class member.

As detailed in Allied’s Substitute Brief, the class definition certified below is fatally flawed for at least two reasons. First, it includes those customers who paid for credit reports and any “other loan related services.” Although an individual may incur charges for numerous “loan related services,” the only evidence in the record relates to a single type of charge, namely credit reports. Neither Respondents nor the court offer any mechanism by which these unspecified “other” services may be identified.

The second flaw is that the definition itself requires the resolution of the underlying merits of each class member before membership may be determined. Respondents candidly acknowledge that an individual cannot be a member of their class, unless he or she has a meritorious claim. A member of the class, therefore, must demonstrate that he or she paid more for particular services than Allied incurred in costs for such services. This determination of class membership, however, may only be made through a manual review and analysis of each of Allied’s 5,000 customer files.

By requiring that Respondents make this factual showing (and, in turn, requiring Allied to defend against such allegations) with regard to each potential class member, the trial court has essentially put “the cart before the horse.” Respondents contend that only one out of every two potential class members is a member of the class. But, the class definition requires Allied to assert and prevail on all its defenses to each individual claim before it can be determined who is a member of the class. This inquiry, in turn, requires an ultimate determination on the merits of each potential class member’s claim – whether he or she paid more than Allied’s cost for a particular service; whether he or she received no disclosures, or false, unfair, deceptive, or misleading disclosures about the fees – before Allied has the opportunity to respond to such substantive claims or assert any available defenses. 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. And it is precisely these issues of proof that demonstrate that the definition certified violates Allied’s due process rights.

A precise class definition is necessary to “identif[y] the plaintiffs who will be bound by the judgment if they lose, and insure[] that those actually harmed by the defendant’s wrongful conduct will receive the relief ultimately awarded.” *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 400 (Tex. 2000). Ultimately, the finder of fact may agree or disagree with Allied’s defenses concerning a particular class member. Allied, however, is entitled under principles of due process to assert its defenses before a factfinder, with the usual evidentiary rules and procedural protections that are absent during the threshold determination of class membership. But, as phrased, the class

definition forecloses this inquiry, and presumes liability at the threshold determination of class membership.

By reaching the liability issue during class identification, without a full trial on the merits, the trial court violates Allied's due process rights. Absent class members likewise will be deprived of their rights to a full trial, if their claims are denied at the class identification stage. In sum, without any objective basis for determining the identity of the class – that is not inextricably tied to the merits of each individual claim – the Court's denial of class certification is the only appropriate remedy. *Dale*, 204 S.W.3d at 179-80. The Order below, therefore, constitutes an abuse of discretion.

IV. The trial court abused its discretion in certifying a class that, by Respondents' admission, requires numerous individual fact inquiries and more than 5,000 mini-trials to determine class membership.

A. Both Respondents' proposed "new" definition and the definition certified by the trial court are infirm because they both require numerous mini-trials to determine class membership.

Both the definition certified below and Respondents' "new" definition are flawed because they impermissibly require that a factfinder ask, as a threshold question, whether each potential class member "paid charges for credit reports and/or other loan related services for mortgage loans that exceeded Defendant's actual cost for those services." As illustrated below, both inquiries require the trial court to make extensive individualized, factual determinations before identifying class members.

As the Western Appellate Court recognized in *Dale*, “[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.” *Dale*, 204 S.W.3d at 178 (citing *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63 (D. Nev. 1985)). It simply is not administratively feasible to identify class membership by using the definition certified below.

Under Respondents’ definition, the trial court must undertake a detailed, two-part analysis of more than 5,000 individual transactions, merely to identify class members. The trial court must first determine whether an individual paid charges for credit reports and/or other “loan related services,” a term that has never been defined. Nor does it bear any relation to the evidence adduced below. Rather, the only evidence presented by Respondents below related to a single charge – credit reporting services – for which they contend Allied’s charges exceeded its costs. What “loan related services”, then, are covered by the class definition? Arguably, any service provided by Allied (acting as a broker in a loan transaction) is a “loan related service.” How, then, should the court identify potential class members? As framed, the inclusion of this ambiguous term in the definition would require the court to examine every charge in each of Allied’s loans and do so without any guidance from Respondents.

Second, the trial court must also determine whether an individual’s charges “exceeded defendant’s actual cost for those services.” Neither Respondents nor the trial court has proposed any administratively feasible methodology for resolving this inquiry. Respondents proposed the following procedure for ascertaining the class:

We believe that by looking at the individual loan files and I have, you know, the 29 that I have looked at, you can see from the actual file by looking at two documents, the HUD-1 Settlement Statement line 803 and 804 and then looking into the – actually, the credit report is looking at line 803. And then looking into the file for the credit report.

(R. 16-17 at p. 25:19 to 26:1.). This statement by counsel is the only method “proffered” by Respondents to establish the identity of the class.²

As is clear from the two-day evidentiary hearing below, the task of determining which individuals, if any, were “overcharged” – using the identical process proposed by Respondents – is a more complicated process than Respondents suggest. It requires a manual review of every loan file, as well as the participation of individuals in Appellant’s headquarters in Houston, Texas, employees of the branch that originated the loan and, in many instances, obtaining further documentation from third parties, much of which could only be obtained by subpoena. (*See* R. 31 at p. 82:19 to 83:10 and 84:3-11; R. 54 at p. 177:1 to R. 55 at p. 178:9.)

² In their Substitute Brief, Respondents point to the HUD investigation and suggest that the same methodology may be used to ascertain class members in the present action. (Resp. Br. at 29.) Respondents, however, never explain what methodology was employed by HUD to determine persons who were allegedly overcharged and no such evidence was submitted below.

Thus, the undisputed evidence establishes that resolving the “overcharge” inquiry merely to reach the threshold decision regarding class membership would necessitate more than 5,000 separate proceedings. As the *Dale* court recognized, where identification of potential class members requires numerous “mini-hearings,” class treatment is inappropriate because it would undermine judicial economy and efficiency, among the primary purposes and advantages of class action suits.

Here, the trial court’s abuse of discretion flows directly from the fact that neither Respondents nor the trial court have ever identified any mechanism to determine which customers are members of the class – other than holding 5,000 hearings on the issue of “overcharges.” This exercise is anything but administratively feasible, and the present class as defined therefore violates the definiteness requirement.

B. No competent evidence in the record supports the required showing that individual issues will predominate over class issues.

For much the same reasons, the trial court also abused its discretion by failing to recognize that individual issues will undoubtedly overwhelm any issues that might be common among class members.

The trial court’s ruling on the “predominance” element should be reversed for at least two reasons: First, membership in the class is dependent upon each customer’s state of mind as to the materiality of the fees at issue (not to mention the requirement that Respondents now seek to disavow – that payment of certain charges must be based on nondisclosures or misrepresentations); and, second, as described above, the court must engage in numerous mini-trials to determine which individuals may be entitled to relief.

For example, the trial court must determine (i) whether a customer was charged “loan-related service” fees; (ii) whether the amount of fees each individual paid Allied for those services exceeded Allied’s costs; (iii) whether the resulting alleged “overcharge” was based on Allied’s “nondisclosures and false, unfair, deceptive or misleading disclosures;” (iv) whether the customer has acknowledged that his or her charges include Allied’s compensation; and (v) whether the customer has agreed to arbitrate any disputes resulting from the transaction. Standing alone, any one of these inquiries would exclude a particular customer from membership in the class. But the combined force of all of the individualized inquiries necessary to respond to the questions set forth above highlights the trial court’s abuse of discretion in finding that the predominance element was satisfied. And nothing in Respondents’ Substitute Brief changes that evidentiary fact.

The predominance question is a much more stringent test than the commonality element of Rule 52.08. Indeed, to determine whether a question is sufficiently common to meet the predominance element of Rule 52.08(b)(3), a court must look beyond the Petition and “examine the nature of the evidence that will suffice to resolve the question” of liability. *Green v. Fred Weber, Inc.*, No. ED89176, 2007 Mo. App. LEXIS 1040, at *3 (Mo. Ct. App. E.D. July 17, 2007) (quoting *Craft*, 190 S.W.3d at 382). In short, the predominance element actually requires an analysis of the underlying issues that must be proven in order for the class to prevail at trial.

Then, the court must determine whether those issues are “common” to the class as a whole, or whether there are “individualized” issues that must be evaluated for each

putative class member on a case-by-case, class member-by-class member basis. *Craft*, 190 S.W.3d at 382. “If, in order to make a prima facie showing on a question, the members of a proposed class will need to present evidence varying among members, that question is individual.” *Id.* Only where the same evidence is sufficient for each proposed class member’s prima facie showing will that question be considered sufficiently “common” for class treatment. *Id.*; *see also Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482, at *7 (W.D. Mo. Sept. 7, 2005) (holding that in making the predominance determination, the court should conduct “a preliminary inquiry into the facts and determine[] whether, if the plaintiff’s general allegations are true, common evidence could suffice to make out a prima facie case for the class”).

Neither the trial court below nor Respondents in their Substitute Brief undertook this required analysis. Nor could they ever do so: There was no competent evidence in the record to support their burden.

This fact is borne out by Respondents’ arguments that seem to confuse the “predominance” requirement with the “commonality” inquiry. Instead of, for example, offering evidentiary support for the exacting standard of the predominance element, Respondents “simply state [that] whether Missouri class members were subject to an upcharge for third party services in processing a mortgage is the common issue,” as if their contention that the fact that they have asserted this claim meets the test for predominance. (Resp. Br. at 38.) Elsewhere, Respondents argue that the “common legal

grievance” is whether such an overcharge would “violate the Missouri Deceptive Trade Practices Act [sic].” (Resp. Br. at 48.)

In effect, Respondents argue that whether payment of an alleged or potential overcharge violates the MPA is the single common question that predominates over any other in their proposed class action. Respondents’ flawed argument is that because each potential class member has a potential claim against Allied, they have met their burden of proof on the predominance element of Rule 52.08. The contention is without merit.

Whether an individual paid an overcharge is one issue that will need to be resolved for every class member. This element of each class member’s claim, which requires an individualized, fact-based inquiry, does not somehow render it a “common” issue for the class as a whole so that the “proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Dale*, 204 S.W.3d at 175 (citing *Craft*, 190 S.W.3d at 382). In other words, the adjudication of whether the representative plaintiffs (the VanDynes) were overcharged will not resolve the same issue for all other class members.

This is because the only methodology for determining whether an individual was overcharged requires a manual review of more than 5,000 Missouri loan files, along with the participation of Allied’s employees in both its headquarters in Houston, Texas and the branch office that originated the loan and, more often than not, procuring further documentation from third parties, including by subpoena. (*See* R. 31 at p. 82:19 to 83:10 and 84:3-11; R. 54 at p. 177:1 to R. 55 at p. 178:9.)

It is undisputed that the factfinder will have to undertake this complicated process for each Allied customer in Missouri (for each “loan related service” fee within each loan) merely to determine whether the individual was overcharged. The resolution of this issue alone will entail a detailed factual inquiry into the individual transactions of each potential member. But the inquiry would not end there.

If the factfinder finds evidence of a potential overcharge in a particular transaction, then it then must ask whether the resulting alleged “overcharge” was based on Allied’s “nondisclosures and false, unfair, deceptive or misleading disclosures.” Because the class is defined in terms of “disclosures,” the factfinder must 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 Allied’s employee made a specific representation to a customer, fundamental questions must be asked: 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? The multiplicity of possible answers to these questions highlights the individualized nature of this inquiry.

After performing these inquiries, the factfinder must make at least two other determinations: (i) whether the customer has acknowledged that his or her charges include Allied’s compensation; and (ii) whether the customer has agreed to arbitrate any disputes resulting from the transaction. The undisputed evidence produced below showed that both of these inquiries requires a manual review of each of Allied’s 5,000 Missouri loans.

It cannot be disputed that each of these issues (and others in specific cases) must be determined on an individual basis. Nor can it be disputed that the evidence presented on each question for each individual will vary. As the proceedings below made clear, no two transactions are the same. It simply cannot be said that the same evidence would be sufficient for each proposed class member's prima facie showing.

Nevertheless, the trial court adopted Respondents' simplistic view of predominance, stating that the common issues that predominate over individual issues are "whether [Allied] 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.) Even though the trial court's conclusion is a misstatement of the procedural posture of the case – as Respondents' claims for Breach of the Covenant of Good Faith and Fair Dealing and Restitution were previously dismissed by the trial court – the Order is erroneous. In effect, the court's predominance "analysis" is nothing more than a restatement of ultimate liability in this case. This analysis is insufficient to meet the stringent requirement that common issues predominate over individual issues. "[J]ust because the legal issues or underlying theories of recovery involved may be common to all class members does not mean that the proof required to establish these same issues is sufficiently similar to warrant class certification." *Dumas*, 2005 U.S. Dist. LEXIS 33482, at *9.

As the evidence below established – and as Respondents concede – the analysis that the factfinder must make merely to establish who is and who is not a member of the class involves numerous individualized proceedings. Applying the principle of *Craft* and

Green, the vast majority of the evidence necessary to support each putative class member's claims is individual, not common. By certifying the class in the absence of the required showing under Rule 52.08(b)(3), the trial court abused its discretion and should be reversed.

C. The trial court abused its discretion in certifying the class because it violates the superiority requirement, in that the 5,000 individual proceedings necessary to identify class membership render this action unmanageable as a class action.

The trial court's certification under 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 claims. One of the "pertinent" considerations in this analysis is the difficulties that might be encountered "in the management" of the class action. Rule 52.08(b)(3)(D).

As this Court has noted, the "object of Rule 52.08(b)(3) is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 489 (Mo. banc 2003). Both Respondents and the trial court ignored this guiding principle.

In its Order, the trial court stated in conclusory fashion that class treatment of this case is "superior to other methods of adjudicating claims, including joinder of the claims of multiple mortgage customers, because each case is probably worth under \$100.00 individually." (R. 8.) This "reasoning," however, ignores the undisputed evidence presented.

Respondents argued to the trial court – and continue to argue on appeal – that at least one out of every two Allied customers is not a member of their class; nevertheless, they propose (and Allied agrees) that the only way to identify which customers were overcharged is to undertake a manual review of every file and analyze individually the documentation therein. But even then, the trial court’s task is not complete, because, (as detailed above,) even if a loan file may show a “prima facie” overcharge, numerous other considerations will often prevent these customers from participating in the putative class.

As Respondents acknowledge, then, if this case were to proceed as a class action, they would submit evidence as to potential overcharges at the preliminary class identification stage, and Allied would be entitled to offer its own evidence and cross examination on each of the 5,000 files Respondents propose to include in their class. Undoubtedly, these preliminary proceedings would devolve into 5,000 “mini-trials” necessary to determine class membership. To find otherwise would be tantamount to depriving Allied of a full and fair opportunity to offer the best evidence in its defense – that certain proposed class members were not overcharged for loan services or did not suffer damages.

Thus, class treatment in this case would not accomplish anything. Rather, the numerous mini-trials involved in identifying class members would serve only to overwhelm the Missouri court system and increase the parties’ expenses exponentially.

Thus, the trial court’s determination that class treatment of this case is superior to any other method of adjudication amounts to an abuse of discretion.

V. The record is devoid of competent evidence supporting the trial court’s conclusion that the class is “so numerous that joinder of all members is impracticable.”

The difficulties Respondents face in meeting their burden on predominance, commonality, and superiority, also render it impossible to meet their burden under the numerosity element of Rule 52.08. The only evidence Respondents offered to show numerosity was an affidavit by class counsel regarding his own, biased review of a hand-selected group of Allied’s loan files. (R. 14 at p. 14:23 - 16:19; R. 15 at p. 18:2-5.) That affidavit was withdrawn in the face of Allied’s objection, leaving no evidence in the record to support Respondents’ required showing of numerosity.

Faced with the reality that there is no competent evidence in the record supporting the trial court’s ruling on numerosity, Respondents once again rely on the inadmissible HUD evidence, arguing that “[i]n the sampling of files done by HUD, 15 of the files were from the state of Missouri, and it found up charges in 9 of the files, which as it turns out is 60 percent.” (Resp. Br. at 35-36; *see also* Appellant’s Motion to Strike at 9-11.)

This Court, however, should reject Respondents’ argument because it is raised for the first time on appeal. More importantly, the argument is based on inadmissible hearsay. “An out-of-court statement offered to prove the truth of the matter asserted is the classic definition of hearsay, and the hearsay rule excludes hearsay testimony absent a recognized exception.” *Cruce v. Auto-Owners Mut. Ins. Co.*, 851 S.W.2d 10, 12 (Mo. Ct. App. W.D. 1993). The principal objection to hearsay testimony is the inability of an

opponent-party to cross-examine the person to whom the hearsay statement is attributed. *Id.* (citing *Dryden v. Aitken*, 405 S.W.2d 925, 928 (Mo. 1966)).

Faced with a difficult burden on this element, Respondents ask that this Court rely on “common sense assumptions,” rather than evidence submitted at the hearing below, to establish numerosity. (Resp. Br. at 36). But, “[t]he party seeking class action certification bears the burden of proof,” and Respondents have failed to meet their burden on this element. *Craft*, 190 S.W.3d at 379. This Court should not permit a party to advance “common sense assumptions” to carry their burden and establish the propriety of class treatment. It is axiomatic that “common sense assumptions” are not the same as “substantive evidence” and should be disregarded as a matter of law.

It is not disputed that Allied brokered some 5,000 loans in Missouri during the relevant time period. Although Respondents may speculate about what might be extrapolated from the nine loans they contend were identified by HUD, the fact remains that after unlimited access to Allied’s files, and a trip to Allied’s headquarters to manually review all of Allied’s files, Respondents have failed to show the existence of a class of persons so numerous that they cannot be conveniently joined. Nine individual transactions is not sufficient to meet their burden on numerosity. As there is no evidence in the record supporting numerosity, the trial court abused its discretion in certifying the class.

VI. The trial court abused its discretion in finding that the adequacy requirement was met because class counsel is related to Plaintiffs and has a stake in the outcome of the case.

The fundamental unfairness resulting from the trial court's certification of the class despite the absence of evidence supporting certification is compounded by the close relationship between class counsel and the class representative. The trial court abused its discretion by allowing this class action to proceed because class counsel has a direct familial relationship with the class representatives. This conflict threatens class counsel's ability to represent absent class members fairly and adequately.

Respondents do not disagree with Appellant's assertion that Mr. Steward will likely share in any fees recovered if Plaintiffs prevail in this case. Nor do they suggest that Mr. Steward has already withdrawn or plans to withdraw from his representation of Plaintiffs. Instead, Respondents only cite *Dale* in support of their argument that the close familial relationship between Attorney Steward and Plaintiff Vandyne does not create a conflict of interest affecting the adequacy of representation.

Unlike *Dale*, however, in the present case Respondents do have a "class representative who is a . . . relative of a class attorney." *See Dale*, 204 S.W.3d at 173-74. That fact is not disputed. The trial court, nonetheless, failed to consider the impact of the relationship between Respondents and class counsel on the interests of absent class members.

The trial court's failure to engage in the stringent and continuing inquiry that the law requires on this element, and its finding that the adequacy requirement was met despite the undisputed facts below, constitutes an abuse of discretion.

CONCLUSION

For these reasons, this Court should hold 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: August 20, 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 20st day of August, 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
Francis J. "Casey" Flynn
8235 Forsyth
Suite 1100
St. Louis, Missouri 63105

Attorneys 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 7,688 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.