**IN THE SUPREME COURT OF MISSOURI**

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APPEAL NO. SC88273

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**BRENNAN AND KIMBERLY VANDYNE,**
**INDIVIDUALLY AND AS CLASS REPRESENTATIVES,**
***Plaintiffs/Respondents,***
**v.**
**ALLIED MORTGAGE CAPITAL CORPORATION,**
***Defendant/Appellant***

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APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
HONORABLE JOHN J. RILEY
CIRCUIT COURT JUDGE
CAUSE NOS. 022-00786 & 022-00786A

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# SUBSTITUTE RESPONDENT'S BRIEF

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## Summary of the Argument

Plaintiffs refinanced their mortgage with defendant Allied Mortgage Capital Corporation ("Allied" or "defendant"), and in so doing, plaintiffs were charged by defendant $50 for a credit report that only cost Allied $3.95, and $90 for a flood certification letter that only cost Allied $28.00.

This practice is called "up charging," whereby a mortgage loan borrower is charged more for settlement services provided by third parties than is charged by the third party for those services. Defendant admits that the practice of up charging is against company policy, industry practice, was the basis of an audit by the U.S. Department of Housing Urban Development ("HUD"), and a settlement with HUD whereby defendant promised not to up charge. Notably, in 2002, HUD audited defendant Allied for up charging, which included the state of Missouri, and in their investigation, HUD uncovered that Allied branch offices up-charged 60 percent of the loans audited, including 60 percent of the sampled files from Missouri. Defendant entered into a settlement with HUD where it refunded overcharges for part of the year 2002. Defendant did not issue refunds for up charges in 1997, 1998, 1999, 2000, and 2001, and partially for 2002.

Plaintiffs filed a class action that defendant's practice of up-charging third party fees associated with the financing of mortgage loans violated Missouri's Merchandising Practices Act, Mo. Rev. Stat. Section 407.010, et seq. ("MPA"). Plaintiffs subsequently

moved to certify a class of individuals from Missouri, who, from March 18, 1997 through December 31, 2002, based on nondisclosures, paid charges for credit reports and/or other loan related services for mortgage loans that exceeded defendant Allied Mortgage Capital Corporation's actual cost for those services.

The trial court (Hon. John J. Riley, Circuit Judge) below held a two-day evidentiary hearing on June 15 and 16, 2005 regarding plaintiffs' motion for class certification. After determining that the prerequisites of class certification were met, notably that the common question of whether defendant's practice of up charging violated the Merchandising Practices Act predominated over individual issues, the trial court certified the class action pursuant to Rule 52.08(b)(3).

The standard of review for an order certifying a class action is abuse of discretion. Critically, because class certification is subject to later modification and even decertification, a court should err in favor of, and not against, allowing maintenance of the class action. *Dale v. DaimlerChrysler Corp.*, 2006 Mo. App. LEXIS 1012 at *17 (Mo. App. 2006). Many of the issues that defendant raises on appeal are intended for the discretion of the trial court and at any time could be brought in a motion for decertification. For this reason alone, the trial court certification order should be affirmed and the case remanded to state court.

In Points I-III, defendant claims that the certified class is not readily ascertainable and requires a merit based inquiry.

The 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). The Court as well noted that an order certifying a class action may be altered or amended pursuant to Rule 52.08(d) and the Court can always decertify the class in whole or in part as to particular claims. (R-8).

Plaintiff states that the following bold, underlined language should be excised from the class definition:

> 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) (emphasis added).

If the this language is removed, there would be an objective criteria to determine the class and there would be no merits based inquiry. Furthermore, as indicated by the Honorable Judge John Riley's order, the parties can modify the class definition by motion and hearing before the trial court pursuant to Rule 52.08(d). Plaintiff has used an objective criteria to define the class in a definite period of time and this class definition

does not include an analysis of the merits of the case. Plaintiffs can go through file by file and determine which of Allied's customers were upcharged for third party services in the processing of their mortgages (how were class actions done prior to computers?). In *Dale*, 204 S.W.3d at 180-181, the Court of Appeals held that the class definition was appropriate for certification even though the objective criteria had to be applied to owners of a certain type of car to delineate the members of the defined class.

In points IV and V, Defendant chiefly contends that the trial court abused its discretion in certifying this class action because common questions do not predominate because it contends there must be individualized inquiry of whether a class member was overcharged and/or whether Allied has a defense for that class member. In *Craft v. Philip Morris Cos.*, the court held that predominance of the common issues is not defeated simply because individual questions may remain after the common issues are resolved, such as questions of damages or individual defenses. 2005 Mo. App. LEXIS 1213, 30-31 (Mo. App. 2005). Indeed, in this case, the common question of whether defendant's practice of upcharging violated the Merchandising Practices Act predominates over individual issues, such as that of damages (a mechanical task) and certain defenses that defendant might have. Since defendant's practice and policy **is not to upcharge**, no class member could have consented to an upcharge; therefore, this alleged individualized issues is a red hearing. For the foregoing reasons, the trial court did not abuse its discretion in finding that plaintiffs met the prerequisites for class certification; therefore, this Court should affirm the trial court's order.

For the foregoing reasons, the trial court did not abuse its discretion in finding that plaintiffs met the prerequisites for class certification; therefore, this court should affirm the trial court's order.

## Table of Authorities

*Beck v. City of Rapid City*, 2002 SD 104, 650 N.W.2d 520 (S.D. 2002) . . . . . 25

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*Kruegar v. New York Telephone Company & Nynex*, 163 F.R.D. 433 (S.D. N.Y. 1995) 33

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*Mehl v. Canadian Pac. Ry.*, Ltd., 227 F.R.D. 505 (D. N.D. 2005) . . . . . 47

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*State v. Kansas City Firefighters Local #42*, 672 S.W.2d 99 (Mo. App. 1984) . . . . . 43

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## JURISDICTIONAL STATEMENT

This is a proceeding for the issuance of a petition for a writ of mandamus (or, in the alternative, a writ of prohibition). The Court has jurisdiction to decide this case pursuant to Article V, Section 4.1 of the Missouri Constitution, which provides in pertinent part: "The supreme court shall have general superintending control over all courts and tribunals. . . . The supreme court . . . may issue and determine original remedial writs."

## STATEMENT OF FACTS

### A. The parties.

The named plaintiffs, Brennan and Kimberly Vandyne, are individuals residing in St. Charles County, State of Missouri and were customers of defendant Allied Mortgage Capital Corporation. (A47[1] Class Action Petition at ¶18).

Defendant Allied Mortgage Capital Corporation ("Allied" or "defendant") originates, funds, and/or brokers thousands of mortgage loan transactions in Missouri and the United States each year. (A44, Class Action Petition ¶2). Defendant requires these borrowers or prospective borrowers to pay the "cost" of certain loan-related services provided by third parties. *Id.* Those services include but are not limited to the obtaining of credit reports, flood letters and document delivery (courier services), appraisal fees, inspection, employment verification, and surveys. (A65, Deposition of Michelle Taylor, Corporate Representative of Allied Mortgage at 20; A44, Class Action Petition ¶2).

### B. Plaintiffs were assessed 'up charges' for third party fees for processing their refinanced mortgage, which forms the basis of their class-action complaint.

Plaintiffs allege that on the 3rd day of November, 2001, they refinanced their mortgage by closing on a mortgage loan, and that Allied was plaintiffs' mortgage broker.

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[1] "A" refers to Volume I-II of exhibits plaintiff used for their Respondent brief in the Court of Appeals.

(A50, Class Action Petition ¶29). Plaintiffs further allege that in connection with the transaction of the mortgage loan, defendant charged plaintiff Fifty Dollars ($50.00) for a credit report, Ninety Dollars ($90.00) for an flood certification letter, and Sixty-Five Dollars ($65.00) for document courier service. (A50-51 at ¶¶30-32).

Plaintiffs were assessed 'up charges' for third party fees for processing their refinanced mortgage. Brennan and Kimberley Vandyne paid $50 for a credit report. (A105, HUD settlement statement; A108). Allied Mortgage admits that the Vandyne's credit report only cost $3.95. (A76, Deposition of Jeanne Lee Stell, at 65 ln 16-19). Furthermore, Brennan and Kimberley Vandyne paid $90 for a flood certification letter. (A105 HUD settlement statement; A109). Allied received $90 flood certification fee from the plaintiffs. Id. (A77, Deposition of Jeanne Lee Stell, at 68 ln 14-18). Nation's Title, however, the company that issued the flood certification letter, only charged Allied a fee of $28 for the flood certification letter. (A77, Deposition of Jeanne Lee Stell, at 68 ln 2-8; A111).

Plaintiffs filed a class action that defendant's practice of up-charging third party fees associated with the financing of mortgage loans violated Missouri's Merchandising Practices Act, Mo. Rev. Stat. Section 407.010, et seq. ("MPA")[2]

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[2] This court dismissed plaintiffs' legal restitution and unjust enrichment and implied duty of good faith and fair dealing claims.

**C. Allied Mortgage admits that its corporate policy as well as the industry practice is not to up-charge its customers third party fees in the transaction of obtaining a mortgage.**

Jeane Lee Stell, the corporate representative for Allied Mortgage is the individual in charge of compliance for state and federal regulations. (A61, Deposition of Jeane Lee Stell at 3 and 8). Ms. Stell stated that it was the position of Allied Mortgage not to upcharge or make a profit on third party fees for processing a mortgage.

Q. And what about when you began working for Allied in operations? You said the first year you were setting up branch offices making sure that they were compliant. What were the branch offices told about third party fees?

A. [Ms. Stell ] **That you couldn't charge third party fees was our policy.**

**Q. And how long has that been the policy of Allied?**

**A. Ever since I have been with Allied.**

**Q. Why can't you up-charge third party fees?**

**A. Basically a lot of the different states don't allow it. HUD specifically has certain regulations for credit reports, and it is just the industry standard.**

Q. Did Allied have any written policies that were given to branches about up-charging on third party fees?

A. As far as I know, yes. I would say in our manual I believe there is a policy in there. Are you saying when I first started or today?

Q. When you first started.

A. As far as I am aware, yes. As long as I can remember, we had a policy and it was in our manual.

(A63 at 11) (emphasis added).

In addition, Allied's written policy is also unambiguously set forth in defendant Allied's operation manual. Allied Mortgage's branch operation's manual provides in pertinent part:

> It is the common practice to collect the credit report and appraisal fees in advance and to make those a standard fee. **There is nothing wrong with that, however, you may only charge the borrower the actual amount of the services rendered.** If you have collected more than the actual cost of the services, you must refund the difference to the borrower. Of course, the simplest way to do this is at the time of the closing in the form of a documented credit. Documented means that it shows up as a credit on the HUD 1. If you do not do this, you will have to refund the difference to the borrower via refund **and maintain adequate documentation in the permanent loan file.**

(A232 Chapter 7 at 27; A74, Deposition of Stell at 58 ln 18 - 59 ln 15) (emphasis added).[3]

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[3] Ms. Stell also testified that prior to June 2001 in one form or another this language has been in defendant Allied Mortgage's operations manual. (A75, Deposition

If there has been an overcharge for these third party fees in processing an Allied mortgage customers loan, Allied claims it is their position to refund the overcharge. (A68, A78, A80, Deposition of Jeane Lee Stell at 32, 73 and 81). Defendant Allied acknowledged that the HUD audit found 60 percent of the files reviewed contained upcharges. (A68, A74, Deposition of Jeanne Lee Stell at 32, 56 ln 1-16). Allied was able to obtain the amount of the overcharged by looking at the loan files and the audits that they had done. (Id. at 32). Furthermore, as part of their quality control, Allied claims that it audits branches on a monthly basis to determine whether they are upcharging for credit reports, appraisals, and courier fees. (Id. at 25).

**D. HUD's investigation, Allied's own investigation, and the subsequent settlement with HUD regarding Allied's practice of upcharging on credit reports.**

The U.S. Department of Housing and Urban Development investigated Allied's closing practices and found that significant number of customers of Allied were assessed up charges on third party fees. According to the HUD audit sent by Ivy Jackson, director of Interstate Land Sales and RESPA division to Mr. Jim Hodge of Allied, provided:

> The Secretary of Housing and Urban Development is responsible for the enforcement of the Real Estate Settlement Procedures Act RESPA 12 U.S.C. 2601. HUD's regional office in Denver has recently reviewed a

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of Stell at 59 ln 10-15).

> number of loan files from Allied Mortgage Capital Corporation. That review indicates that there are overcharges for credit reports in about 60 percent of the files and the overcharges seem to be as much as 117 and average about 38 dollars. These charges appear to violate Section 8 of RESPA and HUD's FHA rules.

(A149, letter of the HUD investigation of Allied's overcharge practices).

In another letter, HUD made a finding that Allied was up charging credit reports and provided Allied with the documentation of that fact. (A156-60, HUD's letter to Allied, with documentation of up charges for credit report).

After receiving this notification letter from HUD, Allied's own investigation found that Allied branch offices were overcharging third party fees to their customers in the processing of mortgages. (A74, Deposition of Jeanne Lee Stell, at 57). Allied Mortgage has not indicated the extent that Allied Mortgage was overcharging, but its investigation found there was up charges for third party fees. (Id. At 56 ln 17- 57 ln8). This is of course against Allied's stated policy of no up charges for third party fees. (Id).

Allied entered into a settlement agreement with HUD over its practice of up charging credit reports. (A116-A120, Settlement Agreement). The settlement agreement provides that: "based on an initial survey and review of Allied loan closing documents for the period of January 2000 through May 2002. HUD has determined that Allied charged certain borrowers more for credit reports than Allied had been charged by the provider of those credit reports." (A177).

As part of  Allied Mortgage's settlement agreement with HUD, Allied had to promised to:

*  *  *

> 3.  Allied represents and warrants that, prior to the date of this Agreement, it has instituted, and that it will maintain in effect, systems designed to prevent upcharging of third party services.
>
> 4.  Allied agrees that it will reinforce the segments of its quality control program dealing with charges and fees that may not be collected from a mortgagor specific services including coverage of the laws and regulations regarding upcharging, and will continue, or, an annual basis, to conduct training for all of its loan origination employees on the requirements of RESPA and other applicable laws.
>
> 5.  Allied agrees that it will continue, on an annual basis, to audit the closing practices of its branch offices. Where upcharging of third party services is found, Allied will take appropriate action to eliminate that upcharging, and will take appropriate action against responsible Allied employees.

(A117, Settlement Agreement).

**E.  Allied does not discloses its practice of up charging.**

Allied admits that since January 1, 1997 to the present that it did not communicate or make disclosures to its customers that Allied charges its customers for third party loan-related services such as credit reports which are more than the amount that defendant pays to those third parties for the credit reports.  (A80, Deposition of Jeanne Lee Stell, at 82).

Here, on plaintiffs' settlement closing statement, there is no indication that Allied earns a profit for the credit report, flood letter, and courier services. (A105, HUD settlement closing statement). In the uniform forms used for the closing of the mortgage, called HUD 1 settlement statement, it is listed: Credit Report Fee - the credit report agency: $50.00; flood certification - $90.00. (Id.) Allied does not disclose that it is 'up charging' for their third party fees.

**F. The class action certification hearing and the trial court order certifying the class.**

The trial court (Hon. John J. Riley, Circuit Judge) below held a two-day evidentiary hearing on June 15 and 16, 2005 regarding plaintiffs' motion for class certification based on plaintiffs' claim that defendant's practice of up-charging third party fees associated with the finance of mortgage loans violated Missouri's Merchandising Practices Act, Mo. Rev. Stat. Section 407.010, et seq. ("MPA"). (R10-R87). The court heard evidence relating to Allied's business practices and the more than 5,000 loans the company brokered in more than 50 offices throughout the State of Missouri over course of five years. (*Id.*) The very arguments presented herein were litigated at the two-day hearing. (See e.g. R 22, lns 7-25).

After the two-day hearing in June and the submission of detailed briefs with exhibits by both parties, the trial court held that plaintiffs met the four prerequisites of Rule 52.08(a) (numerosity, commonality, typicality, and adequacy of representation) and the requirements of Rule 52.08(b)(3) in that common questions do predominate over

individual issues; namely, whether defendants' practice of upcharging violated the Merchandising Practices Act. (R-7).

Finding the prerequisites of class certification were met, the 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).

The court further appointed the named plaintiffs as class representatives for the above-named class. (Id.) Finally, the Court noted that an order certifying a class action may be altered or amended pursuant to Rule 52.08(d) and the Court can always decertify the class in whole or in part as to particular claims. (R-8).

Defendant filed a petition for leave to appeal the order granting class certification, and the Court of Appeals granted this petition. At the oral argument, attorney for plaintiffs Jeff Lowe agreed that the following bold, underlined language should be excised from the class definition:

> All persons in Missouri who, since March 18, 1997 through December 31, 2002, **<u>based on nondisclosures and false, unfair, deceptive or misleading disclosures of Defendant Allied Mortgage Capital Corporation</u>** 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) (emphasis added).

If the this language was removed, Mr. Lowe argued, there would be an objective criteria to determine the class and there would no merits based inquiry. He further argued that the parties could so modify the class definition by motion and hearing before the trial court pursuant to Rule 52.08(d). In a per curiam order, dated December 5, 2006, the Court of Appeals affirmed the trial court's order certifying the class.

## POINTS RELIED ON

**I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS MET THE PREREQUISITES FOR CLASS CERTIFICATION IN THAT PLAINTIFF SATISFIED THE REQUIREMENTS UNDER RULE 52.08(a) FOR NUMEROSITY, COMMONALITY, TYPICALITY AND ADEQUACY AND THE REQUIREMENTS UNDER RULE 52.08(B)(3) IN THAT THE COMMON QUESTION OF WHETHER DEFENDANT'S PRACTICE OF UP CHARGING VIOLATED THE MERCHANDISING PRACTICES ACT PREDOMINATED OVER INDIVIDUAL ISSUES.**

*Craft v. Philip Morris Cos.*, 2005 Mo. App. LEXIS 1213 (Mo. App. 2005)

*Dale v. DaimlerChrysler Corp.*, 2006 Mo.App. LEXIS 1012 at *17 (Mo.App. 2006)

*Doyle v. Fluor Corp.*, 2006 Mo. App. LEXIS 949 (Mo. App. 2006)

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS BECAUSE THE CLASS DEFINITION PROVIDES FOR AN OBJECTIVE ASCERTAINMENT, AND THAT THE DEFINITION DOES NOT REQUIRES A MERITS-BASED INQUIRY TO DETERMINE CLASS MEMBERSHIP.**

*Craft v. Philip Morris Cos.*, 2005 Mo. App. LEXIS 1213 (Mo. App. 2005)

*Dale v. DaimlerChrysler Corp.*, 2006 Mo. App. LEXIS 1012 at *17 (Mo. App. 2006)

*Doyle v. Fluor Corp.*, 2006 Mo. App. LEXIS 949 (Mo. App. 2006)

## ARGUMENT

## I. THE TRIAL COURT DID NOT ERR IN CERTIFYING THE CLASS BECAUSE THE CLASS DEFINITION PROVIDES FOR AN OBJECTIVE ASCERTAINMENT, AND THAT THE DEFINITION DOES NOT REQUIRES A MERITS-BASED INQUIRY TO DETERMINE CLASS MEMBERSHIP.[4]

### A. Standard of review for class certification rulings.

Class certification determinations under Rule 52.08 lie within the sound discretion of the trial court. *Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004); *State ex rel. American Family Ins. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003). This Court reviews an order granting or denying class action certification solely for abuse of discretion. *Craft v. Philip Morris Cos.*, 2005 Mo. App. LEXIS 1213 at *10 (Mo. App. 2005) (citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. App. 2000).

An abuse of discretion, in certifying a class, "occurs when a court bases its decision **on an erroneous conclusion of law or where there is no rational basis in [the] evidence for the ruling.**" *Dale v. DaimlerChrysler Corp.*, 2006 Mo. App. LEXIS 1012 at *17 (citing *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, No. 102, 128, 2006 WL 1073067 at *2 (Okla. Apr. 25, 2006)) (emphasis added).

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[4] This is responsive to Defendant's Points I-III.

Inasmuch as Rule 52.08(c)(1) provides for de-certification of a class "before [a] decision on the merits," a court will err on the side of upholding certification in cases where it is a close question. *Dale v. DaimlerChrysler Corp.*, 2006 Mo. App. LEXIS 1012 at *17 (citing *Beck v. City of Rapid City*, 2002 SD 104, 650 N.W.2d 520, 525 (S.D. 2002) (since decertification is always possible, the court should give the benefit of the doubt to approving the class). Likewise, "[b]ecause class certification is subject to later modification, a court should err in favor of, and not against, allowing maintenance of the class action." *Dale*, 2006 Mo. App. LEXIS 1012 at *17 (citing *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602 (D. Colo. 1990))

**B. The relevant law.**

"The primary concern underlying the requirement of a class capable of definition is that the proposed class not be amorphous, vague, or indeterminate." *Craft v. Philip Morris Cos.*, 2005 Mo. App. LEXIS 1213 at *44-45 (internal citations omitted). A class is sufficiently definite if it is "administratively feasible to determine whether a given individual is a member of the class." *Id.* However, the class "need not be so ascertainable from the definition that every potential member can be identified at the commencement of the action." *Id.*

A sufficiently definite class exists to justify class certification, "if its members can be ascertained by reference to objective criteria." *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 178 (Mo. Ct. App. 2006) (citing *Craft*, 190 S.W.3d at 387-88). "This means

that the class should not be defined by criteria that are subjective or that require an analysis of the merits of the case." *Id.* (internal citations omitted).

In *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d at 160-161, the trial court certified a class action with the following class definition: (1) all individuals who purchased a new Dodge Durango in the State of Missouri; (2) within the four years prior to the filing of the complaint on 10-10-00; (3) who have returned to an authorized DaimlerChrysler dealer for service to failed electric window regulators; (4) who have not received Bosch motor window regulators; (5) who still own their Dodge Durango. The defendant claimed that the class definitions in question was infirm (and therefore a fatal and impermissible class definition) in that they require the trial court, in determining class membership thereunder, to conduct individualized fact-finding or separate mini-hearings to determine if a Durango purchaser has experienced a "failed electric window regulator" or, if so, whether it was repaired with the installation of a Bosch motor power window regulator. *Dale*, 204 S.W.3d at 180-181.

To this argument, the Court of Appeals held:

> The appellant [...] in claiming as it does in this subpoint, suggests [...] that any individualized fact-finding necessary to determine class membership renders the particular class definition in question infirm. We find no support in the cases cited by the appellant for that proposition: Sanneman, 191 F.R.D. at 445, and Vietnam Veterans Against the War v. Benecke, 63 F.R.D. 675 (W.D. Mo. 1974). Rather, in Sanneman, the court decried the individual fact-finding that would have to be

> conducted with respect to the subjective criteria of the definition in question, 191 F.R.D. at 445-47, as was the case in Vietnam Veterans, 63 F.R.D. at 681. **There is nothing in the language of either case that leads us to believe that any and all individualized fact-finding necessary in determining class membership universally renders a class definition infirm. In fact, as the respondent points out, in American Family, the Missouri Supreme Court was faced with essentially the same argument as is raised here and affirmed the trial court's class action certification. 106 S.W.3d at 489.**
>
> Here, we find nothing subjective about the two criteria of the class definitions attacked by the appellant: failed electric window regulators and the failure of the appellant to install a Bosch motor to fix it. **They are straightforward and necessary in delineating the members of the defined classes**.

*Dale*, 204 S.W.3d at 180-181 (emphasis added). As a result, the court held that the class definition was appropriate for certification. *Dale*, 204 S.W.3d at 180-181.

**C. The certified class in this instant action can be ascertained by reference to objective criteria and does not require an analysis of the merits.**

The 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). The Court as well noted that an order certifying a class action may be altered or amended pursuant to Rule 52.08(d) and the Court can always decertify the class in whole or in part as to particular claims. (R-8).

Plaintiff states that the following bold, underlined language should be excised from the class definition:

> All persons in Missouri who, since March 18, 1997 through December 31, 2002, **<u>based on nondisclosures and false, unfair, deceptive or misleading disclosures of Defendant Allied Mortgage Capital Corporation</u>** 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) (emphasis added).

If the this language is removed, there would be an objective criteria to determine the class and there would be no merits based inquiry. Furthermore, as indicated by the Honorable Judge John Riley's order, the parties can modify the class definition by motion and hearing before the trial court pursuant to Rule 52.08(d). Accordingly, the class action definition should read:

> 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.

Plaintiff has used an objective criteria to define the class in a definite period of time, that is were the class members subject to an upcharge by defendant Allied. This class definition is not subjective or does not require an analysis of the merits of the case. Furthermore this class definition does not include an analysis of the merits of the case.

Simply put, plaintiffs can go through file by file and determine which of Allied's customers were upcharged for third party services in the processing of their mortgages. The *Dale* decision indicates that there is nothing impermissible in delineating the class members in this fashion. 204 S.W.3d at 180-181. Class counsel will then send notice to these members of the class.

Indeed, as explained herein, the example of the HUD audit demonstrates that a Missouri class - subject to defendant's practice of up charging - is ascertainable. A random sampling uncovered that 60 percent of Allied's customers were up charged; Allied - working with HUD - had no problem with the feasibility of ascertaining which customers had been up charged. Furthermore, plaintiff produced documents from defendant (bates numbered 303-355) indicating the customers refunded for overcharges in 2002. (A313-A367).

Accordingly, the trial court did not abuse its discretion in finding that the class was ascertainable by the objective criteria that they were Missouri citizens subject to the up charging by defendant in the relevant time period. Additionally, for the reasons stated herein, plaintiff can give adequate notice to class members it has identified from the reviews of defendant's loan files.

## II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS MET THE PREREQUISITES FOR CLASS CERTIFICATION.[5]

### A. Standard of review for class certification rulings.

Class certification determinations under Rule 52.08 lie within the sound discretion of the trial court. *Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004); *State ex rel. American Family Ins. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003). This Court reviews an order granting or denying class action certification solely for abuse of discretion. *Craft v. Philip Morris Cos.*, 2005 Mo. App. LEXIS 1213 at *10 (Mo. App. 2005) (citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. App. 2000); see also (Point I, standard of review).

### B. The trial court did not abuse its discretion in finding that plaintiffs met the prerequisites for class certification.[6]

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[5] This is responsive to Defendant's Points IV-V.

[6] Section 407.025.3 of the MMPA provides, in pertinent part, that "[a]n action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 to the extent such state rule is not inconsistent with the federal rule." Analysis of whether a plaintiff has met their burden for class certification under section 407.025 is essentially identical to the analysis given under Rule 52.08. *Dale*, 2006 Mo. App. LEXIS 1012 at *17.

### 1. Class action requirements.

Certification under the Missouri Rules of Civil Procedure is a two step process. First, a plaintiff has to establish the following prerequisites in Mo.R.Civ.P. 52.08(a)[7]

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous, joinder of all members is impractical,

(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 adequately protect the interest of the class.

Id.

If the four prerequisites of Rule 52.08(a) are satisfied, a class action still cannot be maintained, unless, in addition, the trial court finds that one of the three options of Rule 52.08(b) applies. *Craft*, 190 S.W.3d at 379. The trial court found that certification was appropriate pursuant to Rule 52.08(b)(3).

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Additionally, cases interpreting Rule 23, Rule 52.08, and § 407.025 are essentially interchangeable. *Id.*

[7] §407.025.3.(1)-(4) is the equivalent of Mo.R.Civ.P. 52.08(a).

Rule 52.08(b)(3) provides that an action may be maintained as a class action if Rule 52.08(a) is satisfied, and if, in addition:

(1) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and

(2) that a class action is superior to other methods for a fair and efficient adjudication of the controversy.

Rule 52.08(b)(3)[8]

The plaintiff bears the burden of establishing the existence of the class action pre-requisites under Rule 52.08. In deciding, however, whether a class should be certified, the court is not required nor permitted to inquire into the merits of the case. *Eisen v. Carisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Reinhold v. Fee Trunk Sewer, Inc.*, 664 S.W.2d 599, 602 (Mo. App.), cert. denied, 469 U.S. 832 (1984). Allowing a certification proceeding to "become a mini-trial on the merits is both unauthorized and unwise." *Kruegar v. New York Telephone Company & Nynex*, 163 F.R.D. 433, 438 (S.D. N.Y. 1995). In determining the issues raised in the motion for class certification, the court is required to take as true the substantive allegation of plaintiffs' petition. *In re Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); *McDonnell Douglas Corp. Sec. Litigation*, 98 F.R.D. 613, 614 (E.D. Mo. 1982).

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[8] §407.025.3.(7) is the equivalent of Mo.R.Civ.P. 52.08(b)(3).

### 2. Plaintiff satisfies the requirements under Rule 52.08(a).

In order to proceed as a class action, the plaintiff must first satisfy the following four prerequisites under Rule 52.08(a) -- numerosity, commonality, typicality and adequacy.

#### a. The class is so numerous that joinder of all the members is impracticable.

The numerosity requirement is satisfied when "joinder of all class members is impracticable." Rule 52.08(a)(1). Joinder of all members is "impracticable" for purposes of the rule when it would be inefficient, costly, time-consuming and probably confusing. *Dale v. DaimlerChrysler Corp.*, 2006 Mo. App. LEXIS 1012 at *28 (Mo. Ct. App. 2006). To support a finding of the numerosity prerequisite of Rule 52.08(a)(1), the trial court can accept "common sense assumptions." *Id.* (internal citation omitted). In its discretion, the trial court may resolve the issue based on briefs and affidavits, and other evidence. *Id.*

Although putative class size alone is not necessarily determinative, it is an important consideration in satisfying the numerosity requirement. *Doyle v. Fluor Corp.*, 2006 Mo. App. LEXIS 949 at *16 (Mo. Ct. App. 2006). "Members" may initially include persons who do not have claims or who do not wish to assert claims against the defendants -unless it can be shown that most, if not all of the potential class members have no claims to be asserted by the class representatives. *Id.*

Class certifications have been upheld where the class is composed of 100 or even less. *Dale*, 2006 Mo. App. LEXIS 1012 at *31, *citing with approval* *Cypress v. Newport News Gen. & Nonsectarian Hosp. Asso.*, 375 F.2d 648, 653 (4th Cir. 1967) (18 class members sufficient). See also Doyle, 2006 WL 1735221 at 6 (finding that joinder of over four hundred potential class members was impracticable and the numerosity requirement was satisfied was not deemed to be an abuse of discretion).

Here, the trial court found that "joinder of the hundreds of mortgage customers would be impracticable. Therefore, the numerosity requirement is satisfied." (R-3). Defendant claims that the trial court abused its discretion in certifying the class because there is no support for any number regarding the size of the proposed class and plaintiff has produced no evidence that might suggest Allied's alleged conduct was "widespread" or uniform across the class. (Appellant's brief's 51-52).

For the years 1999-2001, defendant Allied brokered 3,752 loans in Missouri. (App. 145, defendant's answers to plaintiffs' first set of interrogatories, chart attachment, category for Missouri). The class actually goes back to 1997, five years before plaintiffs filed this action on March 18, 2002, so the number of loans in Missouri is larger than the 3,752 acknowledged by Allied. Defendant Allied does not dispute that each of these customers received the same form the HUD 1 settlement statement with third party fees

such as credit reports listed[9] as an amount charged to the customer or listed as paid outside closing.[10]

In 2002 HUD audited defendant Allied for upcharging, which included the state of Missouri, and in their investigation, HUD uncovered that Allied branch offices up-charged 60 percent of the loans audited. (A149, letter of the HUD investigation of Allied's overcharge practices). Defendant Allied acknowledged that the HUD audit found 60 percent of the files reviewed contained upcharges. (A68, A74 Deposition of Jeanne Lee Stell at 32, 46 ln 11-15). In 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. (App. 152-54 at 1-3 comparing those files for Missouri that were checked as 'overcharged').

Furthermore, plaintiff produced documents from defendant (bates numbered 303-355) indicating the customers refunded for overcharges in 2002. (A313-A367). In

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[9] HUD requires that third party fees be listed on the good-faith settlement statement and the HUD 1 settlement statement.

[10] If the customer of Defendant Allied "paid [Allied] outside of closing" POC, this means that they paid the third party fees upfront which were put into a trust account for the customer and recorded on a third party fee register. (Tab 4, Deposition of Michelle Taylor, 44 ln 22- 45 ln 2; 43-45). As will be discussed *infra*, all monies in these accounts not paid to third party vendors by Allied should be returned to Allied customers.

addition, the document bates numbered 2626 appears to be a memo instructing the branch offices how to calculate whether a refund is due. (A367).

Though Allied allegedly disputes the findings of the HUD audit, defendant Allied agreed to resolve the matter with HUD by paying $375,000 dollars to the U.S. Treasury. (A75, Deposition of Jeanne Lee Stell at 60-61 ln 2; A118). HUD suggested that Defendant Allied enter into a settlement in order to avoid "a formal investigation of Allied's credit report charges and other charges [for third party services] nationwide." (A149, letter of the HUD investigation of Allied's overcharge practices) (emphasis added).

The foregoing evidence demonstrates that the class is so numerous that joinder is impracticable. Indeed, the trial court was within its discretion to base its holding on numerosity on this evidence and as well "common sense assumptions" regarding what this HUD sampling and other evidence of overcharging meant for the entire class of the state of Missouri. *Dale*, 2006 Mo. App. LEXIS 1012 at *28.

As a result, the trial court did not abuse its discretion in finding that the numerosity requirement had been that.

**b. There are questions of law and fact common to plaintiffs and members of the class.**

Commonality only requires that "questions of law or fact are common to the class." Mo.R.Civ.P. 52.08(a)(2). This does not mean that all class members must be identically situated. *Renstcher v. Carnahan*, 160 F.R.D. 114, 116 (E.D. Mo. 1995).

Further, factual differences are not fatal to maintenance of the class action if common questions of law or fact exist. There only needs to be a single issue common to all class members; therefore, the requirement is easily met in most cases. *Renstcher*, 160 F.R.D. at 116; *Crain v. Missouri State Employees Retirement System*, 613 S.W.2d 912 (Mo. App. 1981).

Defendant contends that there is nothing in the record to establish Plaintiffs' required showing of commonality, nor is there any evidence of a "widespread practice" regarding overcharges; therefore, plaintiff has not establishing commonality. (Appellant's brief at 51).

In the present case, numerous common questions of law or fact are common to individual members of the class including:

a. Whether defendant failed to inform borrowers or prospective borrowers of the true costs of credit reports and/or other loan-related services;

b. Whether defendant provided misleading and deceptive information about the cost of those services;

c. Whether defendant up-charged its borrowers the third party fees for the processing of mortgages;

d. Whether defendant's conduct as described herein violates Missouri's Merchandising Practices Act, Mo. Rev. Stat. Section 407.010, *et seq*.,;

e. Whether plaintiffs and the Class members are entitled to an injunction prohibiting defendant from imposing the excessive charges;

The trial court found that "[t]he 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).

As the commonality requirement is easily met, plaintiffs simply state whether Missouri class members were subject to an upcharge for third party services in processing a mortgage is the common issue. That it was a widespread practice of defendants has been demonstrated by the HUD audit and refund indicated *supra*. Accordingly, the trial court did not abuse its discretion in finding that the commonality requirement was met.

**c. The claims of plaintiff are typical of the claims of the class.**

The third requirement is established when the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Mo.R.Civ.P. 52.08(a)(3). In order to meet the typicality requirement, a class representative must simply "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. App. 2000). In essence, the named plaintiff and each member of the class need only have an interest in prevailing on similar legal claims, not that all claims be identical. *Phillips v. Hallmark Cards, Inc.*, 722 S.W.2d 86 (Mo. App. 1986). The typicality prerequisite for class certification, pursuant to Federal Rule 23 and Missouri Rule 52.08, is satisfied, even when there is a variance in the underlying facts of the representative's claim and the putative class members' claims, as long as the claim arises from the same event or course

of conduct of the defendant as the class claims, the underlying facts are not markedly different, and the conduct and facts give rise to the same legal or remedial theory. *Dale*, 2006 Mo. App. LEXIS 1012 at 35.

The trial court correctly found that the claims of the class representatives, who were charged $50 for a $3.95 credit report and $90 for a $28 flood certification letter, were typical of the claims of the class, and defendant's arguments that plaintiffs claims were not typical because they were given a "closing credit" of $650 was not persuasive. (R-5).

Defendant claims that the trial court abused its discretion in finding that the typicality requirement was met because plaintiffs have unique defenses applicable to them, not applicable to all putative plaintiffs; notably plaintiffs did not sustain an ascertainable loss because, after complaining about third party fees, they negotiated and received a credit of $650.00 credit for ***all*** third-party fees at issue and that the issue of the amount of the third party fees was not material to plaintiff's transaction with defendant Allied. (Appellant's brief at 54-55).

First, as this Court held in Craft v. Philip Morris Cos., 2005 Mo. App. LEXIS 1213, 30-31 (Mo. Ct. App. 2005) (though in the context of predominance of common issues) class certification should not be denied because individual questions may remain after the common issues are resolved, such as questions of damages or individual defenses.

To the extent that plaintiff or even a class member received a credit, that credit

would not effect the typicality of plaintiff's claims nor take that individual out of the class definition. Defendant Allied admitted that it did not disclose the fact that there was an upcharge (consistent with its policy not to upcharge). Accordingly, any plaintiff and class member that did receive a credit, this credit was not given in consideration for the fact that the customer was upcharged because plaintiff and class member were not aware that third party fees were upcharged, and its Allied's position not to upcharge. As a result, Allied cannot now claim that these credits should be used as an offset for plaintiffs' or class members because the credits were never given by Allied for such a reason.

For example, at one of the proposed closing days, Brennan Vandyne refused to sign the mortgage because he objected to three of defendant Allied's fees: 1) the commitment fee - $250.00; 2) the document preparation fee - $250.00; 3) the courier fee - $250.00. (A278-79; A280, Deposition of Brennan Vandyne at 64 ln 5-6, ln 19-23; 65 ln 2-9; 67 ln 2-11; 73 ln 3-4). He further testified that they did not waive these three fees; instead defendant Allied Mortgage gave him a credit in order to close the loan. (A280 at 71 ln 1-9).

Because Defendant Allied was in essence able to waive those fees so quickly, plaintiff Brennan Vandyne became suspicious regarding Defendant Allied. (A280, Deposition of Brennan Vandyne 77 ln 12 - 20). It was after he closed his loan with Allied that he discovered that third party fees that he thought were hard costs to defendant Allied were in fact not. (A281 at 78 ln 12-21). In particular, in looking at his uniform HUD 1

settlement statement, he believed that the $50 charge for a credit report was a hard costs to defendant Allied mortgage, and it was never disclosed to him that the actual cost was $3.95, and that defendant Allied was making a profit of over $45. (Id. at 76 ln 24- 77 ln 8; 78 ln 12-21).

Furthermore, plaintiffs have demonstrated materiality of defendants' unfair practices. Mo. Rev. Stat. §407.020.1 provides: "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or **the concealment, suppression, or omission of any material fact** in connection with the sale or advertisement of any merchandise in trade..." Id. (emphasis added).

Materiality cannot be seriously disputed in this case as it is clearly evident that fees or the amount of money made as a profit to the broker is material in a mortgage transaction. Plaintiff Brennan Vandyne already refused to sign defendant Allied's mortgage based on objections over certain fees, and did not sign the mortgage until he was given a credit. This clearly evidence is that the facts regarding the charges on the HUD 1 settlement statement are material to plaintiff and class. Moreover, materiality of an omission is a question for the jury and should not even be considered at the class certification stage.

For the foregoing reasons, the trial court did not abuse its discretion in finding that the typicality requirement was met.

**d. The representative parties would fairly and adequately protect the interests of the class.**

Finally, Rule 52.08(a) requires that"the representative parties fairly and adequately protect the interests of the class." Mo.R.Civ.P. 52.08(a)(4). "The two areas of inquiry with respect to this prerequisite (adequacy of class representation) are: 1) whether the class representatives have common interests with the members of the class, and 2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Ellis v. O'Hara*, 105 F.R.D. 556, 563 (E.D. Mo. 1985). In determining adequacy of representation, courts look to see if a class member is part of the class, possess the same interest and suffered the same injuries as the class members. See *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); see also *Bishop v. Committee on Professional Ethics*, 686 F.2d 1278, 1289 (8th Cir. 1982). The interest of representatives and absent class members must be compatible and not antagonistic. *State v. Kansas City Firefighters Local #42*, 672 S.W.2d 99, 123 (Mo. App. 1984); see also *Sosna v. Iowa*, 419 U.S. 393, 403 (1975).

Defendant contends that because Mr. John S. Steward is the brother-in-law of the named plaintiff, Brennan Vandyne, there exists a conflict with the absent class members, and accordingly, the trial court abused its discretion in finding that the adequacy requirement of Rule 52.08 had been met.

The trial court found that relationship between plaintiffs and Mr. Stewart is not close relationship that will effect the adequacy of Plaintiffs as class representatives

or the adequacy of class counsel. (R. 6-7). It further found that the court believes plaintiffs have demonstrated that they, in conjunction with their attorneys, are capable fairly and adequately representing the interests of upcharged mortgage customers. *Id.*

First, the principal class counsel who have worked on this case are Jeffrey Lowe and Casey Flynn, and they have no family relationship with the named plaintiff.

Furthermore, in *Dale v. DaimlerChrysler Corp.*, regarding whether a relative of an employee/non-lawyer of class counsel could serve as a class representative due to a conflict of interest or a likelihood of such a conflict, the court determined that it was a matter of discretion with the trial court, decided on a case-by-case basis. 2006 Mo. App. LEXIS 1012 at *51. Relying on the Missouri Supreme Court case of *Union Planters Bank*, 142 S.W.3d at 740, the court in *Dale* further noted that "[t]he case-by-case approach is logical inasmuch as the primary concern or focus of the trial court, with respect to the adequacy prerequisite, is not the interests of the class representatives and class counsel, but the interests of the absent parties. *Id.* Indeed, the court reasoned:

> [T]he trial court is required to constantly monitor the case to insure that the interests of the absent parties are being protected. Id. "Basic consideration of fairness require[s] that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation . . . ." Susman, 561 F.2d at 89. Similarly, the trial court is required to review all settlements and compromises of class claims for fairness with respect to absent class members, as well as approving any agreements for the award of

> attorneys' fees to class counsel. Rule 52.08(e); Irvin E. Schermer Trust by Kline v. Sun Equities Corp., 116 F.R.D. 332, 337-38 (D. Minn. 1987); Fischer, 72 F.R.D. 170. Hence, **due to the primary focus being on the interests of the class members and the built-in safeguards for monitoring the class representatives' representation of the absent members, to insure fair and adequate representation, any actual conflict of interest that might arise should be quickly detected and addressed.**

*Dale v. DaimlerChrysler Corp.*, 2006 Mo. App. LEXIS 1012 at *50-51 (emphasis added).

Accordingly, the court held that the trial court did not abused its discretion in determining that the adequacy prerequisite was satisfied. Id. at *51.

Likewise, the trial court in this case can protect the interests of the absent class members by decertifying the class at any time the trial court deems that either class counsel or the named representatives are not adequately representing the class or by not approving a settlement that is unfair to absent class members. As a result, the trial court did not abuse its discretion in finding that the adequacy requirement had been satisfied.

Alternatively, even if the Court believed there was an impermissible conflict of interest between John Steward and the named representative Brennan Vandyne and the absent class members, this should not effect whether class treatment is appropriate as other remedies are available. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 741 (Mo. 2004) (citing 5 Herbert Newberg & Alba Conte, Newberg on Class Actions sec. 15:1 (4th ed. 2002) (internal quotations omitted) (emphasis added) (noting

that substituting class counsel or the named plaintiff should be done rather than denying class status when there are issues of allegedly unethical conduct).

**3. The requirements of Rule 52.08(b)(3) have been established.**

In addition to the four requirements discussed above under Rule 52.08(a), the action must satisfy at least one of the three subparts of Rule 52.08(b) in order to be maintainable as a class action. Here, the action satisfies Rule 52.08(b)(3).

Rule 52.08(b)(3) provides that an action may be maintained as a class action if Rule 52.08(a) is satisfied, and if, in addition:

> (1) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and
>
> (2) that a class action is superior to other methods for a fair and efficient adjudication of the controversy.

Rule 52.08(b)(3)[11]. (numbers added).

Generally, a consumer class action case like this one arises out of the alleged wrongful business practices of the defendant. 7B Charles Wright, et. al. Federal Practice and Procedure § 1782, at 55 (1986). "[T]he question whether defendant engaged in an improper course of conduct typically will be the same for all Class members; as a result, common questions will predominate." Id. at 55-56.

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[11] §407.025.3.(7) is the equivalent of Mo.R.Civ.P. 52.08(b)(3).

As stated by the Missouri Supreme Court in State ex rel. American Family Mutual Insurance Co., 106 S.W.3d at 489: "[t]he 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.'" Id. (citations omitted.) The common-question-predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Craft*, 190 S.W.3d at 382 (citations omitted). To satisfy the common-question-predominance requirement, not every single issue in the case must be common to all class members. *Am. Family Mut. Ins. Co.*, 106 S.W.3d at 488. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Id.* And, the "predominant issue need not be dispositive of the controversy or even be determinative of the liability issues involved." *Id.* (quotation marks and citations omitted). "[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." Carpe v. Aquila, Inc., 224 F.R.D. 454, 458 (W.D. Mo. 2004). 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. *Craft*, 190 S.W.3d at 382; *Mehl v. Canadian Pac. Ry.*, Ltd., 227 F.R.D. 505, 520 (D. N.D. 2005).

In *Craft v. Philip Morris Cos.*, 190 S.W.3d at *30-31, this Court held that "[a]s a general matter, the fact that an affirmative defense may be available against certain

individual class members and affect them differently does not, by itself, show that individual issues predominate. Id. (citing *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 138 (2nd Cir. 2001) and 5 MOORE ET AL., supra, section 23.45[3]). Indeed, this Court in Craft held that the predominance of the common issues is not defeated simply because individual questions may remain after the common issues are resolved, such as questions of damages or individual defenses. *Id.* (citing *State ex rel. American Family Ins. v. Clark*, 106 S.W.3d 483, 488 (Mo. banc 2003).

The trial court correctly determined that the common question of whether defendant's practice of up charging violated the Merchandising Practices Act predominated over individual issues. (R-7).

Here, as set out *supra*, common questions predominate because for each class member the following will have to be demonstrated, does the overcharge violate the Missouri Deceptive Trade Practices Act – this is the common legal grievance. Crucially, there exists substantial evidence that defendant was engaged in the unfair and deceptive practice of upcharging; notably the 2002 HUD investigation that includes Missouri, the settlement with HUD, Allied's own admission that it finds upcharging, and plaintiffs' sampling of Missouri files finding upcharging.

In determining whether class member was upcharged, the following uniform conduct is at issue: (1) a uniform form HUD 1 settlement statement is used, and third party fees are required to be listed on it; (2) Defendant Allied does not disclose its upcharging practice; therefore, there are no issues of differing representations; rather

uniform omissions; (3) its uniform practice that charges on the HUD 1 settlement statement are only supposed to be hard costs to Defendant Allied for obtaining third party services; (4) Allied's own admission that if it finds upcharging, it is against its own policy, against its a settlement decree with HUD, and it is supposed to refund the overcharge.

Defendant raises various canards to demonstrate that individualized issues predominate like (1) the existence of other credits (like in the case of the named plaintiff); (2) various representations to class members; (3) the issue of individual inquiry of whether the class member knew of the up charge, agreed to the upcharge, class member's state of mind, or (4) signing a paper that the class member consented to the up charge, etc..

To all this plaintiffs respond that because defendant Allied claims it **does not upcharge**, a class member could never agree to an up charge, sign a paper to consent to an up charge, or get a credit in consideration for an up charge because Allied states that it does not up charge or profit from third party services in processing a mortgage.

Next, regarding the fact of damage, to the extent that any Allied customer was not subject to the up charge practice, that customer is not included in the court's class definition. As the *Craft* case contemplates, certain class members will turn out not to be damaged or there exists a defense against certain class members; this, however, does not demonstrate that common issues do not predominate. Using the 60 percent of the HUD audit found in a random sampling, there is clearly a group which is more bound together

by a mutual interest in the settlement of common questions, e.g., was the overcharge an unfair practice as Defendant Allied's own manual indicates, than it is divided by the individual member's interests in the matters peculiar to them. *See Elliot v. ITT Corporation*, 150 F.R.D. 569, 577 (N.D. Ill. 1992) (the predominance factor only requires that a court ascertain the existence of a group which is more bound together by a mutual interest in the settlement of common questions than it is divided by the individual members, interests in the matters peculiar to them).

The computation of damages would be a mechanical task based on the simple difference between the price paid by Allied for the third party fees and the price charged. This amount can be calculated by simply reviewing Allied computerized records and/or hard copies of the applicable documents in the loan files to determine the overcharged for credit reports. (A91, Deposition of Michelle Taylor, Corporate Representative of Allied Mortgage at 25 ln 20-26; A105, plaintiffs' HUD 1 settlement statement; A108, income disbursement statement, A109). Defendant Allied admits that the entire accounting records for its customers loans, including the information necessary to determine whether there is an up-charge, is kept on a computerized record known as 'The Plus and Minus.' (A91, Deposition of Michelle Taylor, Corporate Representative of Allied Mortgage 25 ln 20 - p. 26). For example, under the 'Plus and Minus', there is a code (9450) for credit report expenses for each branch, and it shows a payment to the specific vendor and the amount. (A93-A94, Deposition of Michelle Taylor at 34 ln 19 - 35 ln 4). Critically, Defendant Allied's Plus and Minus system can produce a report on third party fees by

loan number. (A101 at 64). In addition, if monies were paid outside of closing (prior to closing), these monies are paid to defendant Allied and kept in a trust account. (A96, Deposition of Michelle Taylor, 45 ln 3- 46 ln 5; 43-45). Defendant Allied keeps track of what happens to these monies by loan number on their general ledger for third party fees, including whether they were collected from the customer or whether they were paid out to third party vendors. (Id.) These results can be shown on Allied's Plus and Minus system. Accordingly, Allied's Plus and Minus system can show the amount of the upcharge for the state of Missouri.

Regarding defendant's contention that certain files might be missing credit reports or that it will be difficult to determine what the credit report costs, Allied should not be allowed to escape class wide liability becaue plaintiff might not be able to prove everyone who was upcharged. In effect, Allied should not be allowed to benefit from its own failure to keep records.

In a case, the trial court did not abuse its discretion in determining that common questions predominate, making class action treatment appropriate.

**b. A class action is superior to other methods.**

Rule 52.08(b)(3) lists the following factors to consider in determining the superiority of a class action to individual lawsuits:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(4) the difficulties likely to be encountered in the management of a class action.

Here, the class action procedure is a superior vehicle for the adjudication. First, joinder or wholesale intervention, the alternatives to class action treatment, would prove wholly unmanageable and result in a great multiplicity of actions, which is one of the major evils Rule 52.08 seeks to prevent. Neither the parties, nor the judicial system, would benefit by numerous, expensive and time-consuming lawsuits. See *Snider v. Upjohn Co.*, 115 F.R.D. 536, 541 (E.D. Pa. 1987). As the court in *Joseph v. General Motors Corporation*, 109 F.R.D. 635, 642 (D. Colo. 1986), explained, relitigating of the same issues and presenting the same evidence in hundreds of actions "would be grossly inefficient and wasteful."

Finally, another factor to consider under Rule 52.08 is the desirability or undesirability of concentrating the litigation of the claim in one forum. Here the advantages of litigating in one forum are obvious. Nothing would be gained, and significant judicial resources would be wasted, by separate litigation in which the identical issues common to each and every Class Member are repeatedly adjudicated. By

certification of this litigation, this Court can adjudicate these identical issues at one time, thereby saving judicial resources and avoiding conflicting results.

The class action vehicle is by far superior to any other procedural vehicle. It allows litigants who otherwise would not have access to the courts to bring their claim for recovery against Allied. The litigation is manageable in terms of notice, damage calculation and damage distribution. Finally, the desirability of concentrating litigation in one forum is obvious. Therefore, this litigation satisfies the requirements of Rule 52.08(b)(3).

The trial court correctly determined that a class action 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 individually. (R-7 - R-8).

Defendants claim that the individual review of the 5000 loan files makes this class-action unmanageable. As explained *supra*, Plaintiffs presented evidence that defendant's computer system can be used to identify class members, who have been damaged by defendant's practice of up charging. Additionally, plaintiffs counsel can go through each file and compare the amount listed on the HUD-1 settlement statement with the actual cost to defendant that is identified in the file or from other records of defendant as argued *supra*. This objective individual review does not make the class action unmanageable.

In *Craft v. Philip Morris Cos.*, 2005 Mo. App. LEXIS 1213, 30-31 (Mo. App. 2005), this Court held that "[f]ailure to certify an action on the sole ground that it would be unmanageable is disfavored by federal courts under Fed. R. Civ. P. 23(b)(3)." *Id.*

citing *Visa*, 280 F.3d at 140; *Klay v. Humana, Inc.*, 382 F.3d 1241, 1272 (11th Cir. 2004). It further held that "[t]he issue of manageability of a proposed class action is always a matter of justifiable and serious concern for the trial court and peculiarly within its discretion.'" *Id.* (internal citations omitted). It noted that this was because the determination is a practical matter dealing with fact issues with which a trial court has greater familiarity and expertise than has an appellate court. *Id.* (internal citations omitted).

With these considerations in mind, the trial court did not abuse its discretion in finding that plaintiffs had demonstrated the superiority of a class action to individual lawsuits.

**C. The trial court and this Court can consider the documents related to the HUD investigation of Allied's practice of upcharging including its subsequent refund to its customers of these upcharges for credit reports in determining whether the trial court abused its discretion in finding that class action treatment was appropriate.**

In considering plaintiffs' motion for class certification, the trial court below and plaintiffs relied on documents related to the U.S. Department of Housing and Urban Development ("HUD")'s investigation of defendant Allied Mortgage Capital Corporation's ("defendant" or "Allied") practice of upcharging third party fees in processing mortgages, namely (1) letter regarding HUD's investigation of Allied's overcharge practices, A149, Exhibit 37 and (2) follow-up letter regarding HUD's

investigation of said practice including summary of individual files showing upcharging for third party services, A150-A166, Exhibit 35. The settlement agreement regarding defendant Allied's practice of upcharging credit reports Exhibit 36 was excluded by the trial court. (A116-A120).

First, defendant Allied is not trying to exclude A149 (Exhibit 37), letter of the HUD investigation of Allied's overcharge practices, finding overcharges for credit reports in about 60 percent of the files. (A149, letter of the HUD investigation of Allied's overcharge practices). This was admitted and relied on by the trial court. (R 18-19; 33 ln 24- 34 ln 4).

Furthermore, when defendant Allied attempted to object to the admission of evidence, A150-A166 – follow-up letter and summary of individual files showing upcharging for third party services, plaintiffs argued that they were not admitting these documents for the truth of the matters asserted, but rather for the action that Allied took based on these documents, notably that Allied did its own investigation of upcharging and entered into a settlement agreement with HUD where they agreed to refund the amounts upcharged for credit reports in processing a mortgage for the year 2002. (R 18 30 ln 16 - 31 ln 11). The trial court admitted it for this course of action that Allied took. (R 18 31 lns 10-11).

These above documents, including the settlement agreement, are relevant to demonstrate a critical issue that Allied has put in controversy; that the upcharging of third party fees for processing a mortgage can be ascertained from the files and records of

Allied and that defendant Allied is capable of refunding the amount upcharged to class members as it did in 2002.

In any case, the trial court is perfectly free to rely on hearsay documents in determining a motion for class certification. As set out more fully *infra*, the case law demonstrates that: (1) the evidentiary rules are not strictly applied and courts can consider evidence that may not be admissible at trial, including hearsay statements and (2) the court need not address the ultimate admissibility of the plaintiffs' proffered exhibits at the class certification stage, but can still consider these exhibits when resolving plaintiffs' motion for class certification.

This is not surprising since a class action motion is a procedural motion, expressly not an inquiry on the merits, and the court is to make this determination of whether it is to be so maintained as soon as practicable. Mo.R.Civ.P. 52.08 (c)(1) ("[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

Finally H.U.D.'s findings of upcharging on the part of defendant Allied fall within a well-recognized exception to the hearsay rule for government reports that make factual findings. See Rule 803(8)(c) of the Federal Rules of Evidence. This exception has been recognized by the Missouri Supreme Court. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 57 (Mo. 1999).

Accordingly, the trial court and this Court can consider the documents related to the HUD investigation of Allied's practice of upcharging including its subsequent

refund to its customers of these upcharges for credit reports in determining whether the trial court abused its discretion in finding that class action treatment was appropriate.

In a motion for class certification hearing, the evidentiary rules are not strictly applied and courts can consider evidence that may not be admissible at trial, including hearsay statements and the court need not address the ultimate admissibility of the plaintiffs' proffered exhibits at the class certification stage.

In Dicker v. Allstate Life Ins. Co., 1990 U.S. Dist. LEXIS 8586, *17-19 (N.D. Ill. 1990), Allstate moved to strike evidence plaintiffs offered in support of their motion for class certification because it lacked foundation or is hearsay. The district court noted that Allstate relied, without supporting authority, upon the dubious proposition that plaintiffs must establish the admissibility of all evidence used to support their motion for class certification.

To this argument, the district court held:

> Plaintiffs' evidence is not being offered at trial. The mandate of Fed.R.Civ.P. 23(c)(1) requires this court to determine whether to certify a class as soon as practicable. Objections to the admissibility of evidence are clearly premature. See Meiresonne, 124 F.R.D. at 622 (attacks on the merits of the plaintiffs' claim are inappropriate at early stage of litigation).

Id.

Likewise, in Rockey v. Courtesy Motors, Inc., 199 F.R.D. 578, 583 (W.D. Mich. 2001) in plaintiffs' motion for class certification, plaintiffs relied on a letter from

defendant's attorney to plaintiffs' counsel, indicating the numbers of putative class members they had been subject to the alleged deceptive practice. The district court agreed that this letter was “obviously hearsay.” Id. Nevertheless, the district court allowed it to be considered noting that courts have held that on a motion for class certification, the evidentiary rules are not strictly applied and courts can consider evidence that may not be admissible at trial. Id. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 2153, 40 L. Ed. 2d 732 (1974) (describing a court's determination of class certification as based on "tentative findings, made in the absence of established safeguards" and describing a class certification procedure as "of necessity . . . not accompanied by the traditional rules and procedures applicable to civil trials"); Paxton v. Union Nat'l Bank, 688 F.2d 552, 562 n.14 (8th Cir. 1982) ("Hearsay testimony may be admitted to demonstrate typicality.") (citing Donaldson v. Pillsbury Co., 554 F.2d 825, 830-31 n.3 (8th Cir. 1977)); Thompson v. Board of Educ. of the Romeo Community. Sch., 71 F.R.D. 398, 401 n.2 (W.D. Mich. 1976) (relying on Eisen and concluding that evidence that may not be admissible at trial could be introduced and considered "on such preliminary matters as class certification," especially where the evidence was not challenged as inaccurate but only as lacking in certain foundational requirements), rev'd on other grounds, 709 F.2d 1200 (6th Cir. 1983); Vinson v. Seven Seventeen HB Phila. Corp No. 2, No. 00-6334, 2001 WL 1774073, at *20 n. 28, 2001 U.S. Dist. LEXIS 25295, at *69 n. 28 (E.D.Pa.2001) ("on a motion for class certification, the evidentiary rules are not strictly applied and courts will consider evidence that may not be admissible at trial")

In fact, courts have held that it need not address the ultimate admissibility of the plaintiffs' proffered exhibits at this stage, but has considered them when necessary for resolution of the Plaintiffs' Motion for Class Certification. Force v. ITT Hartford Life & Annuity Ins. Co. (In re Hartford Sales Practices Litig.), 192 F.R.D. 592, 597 (D. Minn. 1999).

As set out more fully supra, the trial court and this Court can consider the documents related to HUD's investigation of Allied's practice of upcharging including its subsequent refund to its customers of these upcharges for credit reports, even if these documents were deemed hearsay. Furthermore, A149 (Exhibit 37), letter of the HUD investigation of Allied's overcharge practices, finding overcharges for credit reports in about 60 percent of the files was properly admitted and relied on by the trial court. (R 18-19; 33 ln 24- 34 ln 4). Regarding A150-A166 – follow-up letter and summary of individual files showing upcharging for credit reports, this is probative to the fact that upcharging for third party services by Allied can be ascertained from defendant's records and defendant can take action in refunding these overcharges to its customers. This is relevant to plaintiff's showing that the issues in this case predominate over individualized issues. Finally, defendant has taken the position that ascertaining the upcharge for third party services and refunding these upcharges is impossible. The settlement agreement Allied entered into with HUD demonstrates it is possible to refund upcharges as it did for the year 2002 for credit reports.

Under the relaxed rules of evidence for a class certification motion, these documents related to HUD's investigation were properly considered. Regarding the settlement agreement, this Court should be free to consider it in reviewing the trial court's ruling that class-action treatment was appropriate in this case.

**A. The report in its investigation fall within a well-recognized exception to the hearsay rule for government reports that make factual findings.**

The findings of H.U.D. fall within a well-recognized exception to the hearsay rule for government reports that make factual findings. Rule 803(8)(C) excepts from the hearsay rule, in civil cases, the following:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * * factual findings resulting from an investigation made pursuant to authority granted by law.

Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983) (quoting Rule 803(8)(C). The Missouri Supreme Court has relied on this hearsay exception of Rule 803(8)(c) of the Federal Rules of Evidence, in holding that United States government reports, conclusions and all, are routinely admitted for plaintiffs and defendants alike. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 57 (Mo. 1999),

Here, HUD, an agency of the government - acting under federal law, investigated defendant Allied and made factual findings that defendant Allied was upcharging for its

credit reports. As this falls within a hearsay exception, it provides alternative grounds for the trial court to consider it.

## Conclusion

For the foregoing reasons, the trial court did not abuse its discretion in finding that plaintiffs met the prerequisites for class certification; therefore, this court should affirm the trial court's order.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by mail with first class postage fully prepaid, this 29th day of June, 2007, on the following:

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## CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Wordperfect program, the undersigned certifies that the total number of words contained in this brief is 12,958, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Brief of Respondent was scanned for viruses and was found virus-free through the Norton anti-virus program.

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