IN THE
SUPREME COURT OF MISSOURI

NO. SC 97175

STATE EX REL. GENERAL CREDIT ACCEPTANCE COMPANY, LLC,

Relator,

v.

THE HONORABLE DAVID L. VINCENT III,
JUDGE OF THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI,

Respondent.

PROCEEDING IN PROHIBITION FROM THE CIRCUIT COURT
OF ST. LOUIS COUNTY, MISSOURI, CAUSE NO. 14SL-CC01561

BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this writ proceeding pursuant to Mo. Const. art. V, § 4.1, which vests this Court with general superintending control over all courts and tribunals, including the authority to issue and determine original remedial writs, *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856 (Mo. banc 2001); and pursuant to Mo. Rev. Stat. § 530.010, *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. banc 1986). Pursuant to this authority, on August 21, 2018, this Court issued a preliminary writ of prohibition directing Respondent Honorable David L. Vincent III, Circuit Judge of St. Louis County, Missouri, in the action captioned *Weatherspoon v. General Credit Acceptance Company*, No. 14-SL-CC01561 ("*Weatherspoon*"), to show cause why a writ should not issue prohibiting him from doing anything other than vacating his order of March 12, 2018, granting class certification (A1-10), and directing Respondent to deny said motion. (A70-98). Relator General Credit Acceptance Company ("Relator" or "GCAC") now requests this Court to make permanent the preliminary writ of prohibition.[1]

[1] The materials identified herein as "A___" are compiled in the accompanying Appendix.

STATEMENT OF FACTS

This is a duplicative class action, substantively identical to a class-action amended complaint filed several years ago by plaintiff Helena Weatherspoon ("Weatherspoon"), represented by the same counsel, in another case in the Circuit Court of St. Louis County, *GCAC v. Deaver*, Case No. 11SL-AC28887-02 ("*Deaver*") (A1023-42). Like this case, *Deaver* was a putative consumer class action against GCAC, brought on behalf of a class of debtors in default on their consumer auto loans, whose vehicles were repossessed or surrendered, alleging technical consumer law violations by GCAC regarding the collection, enforcement, repossession and disposition of collateral, and the collection of alleged deficiencies. *Deaver* concerned the same debts, defaults, repossessions, collateral sales, deficiencies and compliance with consumer lender requirements as are involved here. Every member of Weatherspoon's class here was a member of the putative class in *Deaver*. (A1023-42).

The Prior, *Deaver* Case. *Deave*r was filed in early 2012 by debtor David Deaver on behalf of a putative class of car buyers who had defaulted on their loans and had had their vehicles repossessed. Weatherspoon was allowed to intervene as an individual claimant in that case (joining her claim with Deaver's counterclaim), and certain minor amendments were permitted (A1020-22). But then those amendments, as well as a new amendment substantively identical to the complaint in this case, were stricken by the Court in *Deaver*, for Deaver's and Weatherspoon's failure to obey a court order (A1050). Weatherspoon remained a party in the *Deaver* action until the day the case ended, when Deaver voluntarily dismissed his own remaining claims after failing to have a class action certified.

After five years of litigation in *Deaver*, class certification was denied by the Circuit Court there, interlocutory appeal of that denial was rejected by the Missouri Appellate Court and then by this Court, and thereafter Deaver voluntarily dismissed his own claim – but not the action – on September 29, 2016.

Further facts relating to the effect of the *Deaver* case are stated in the argument at Point VII.

This Case. Plaintiff Helena Weatherspoon ("Weatherspoon") is a debtor who defaulted on the payments she owed Car Credit Acceptance Company, a separate entity not a party to this law suit, pursuant to a consumer installment loan for the purchase of a car (A1019). After her default Car Credit Acceptance Company sent Weatherspoon a Right to Cure Notice (A1017), and she voluntarily surrendered her car (A393, A399, A436). GCAC received the Weatherspoon security interest by assignment from Car Credit Acceptance Company three weeks after the Right to Cure Notice was sent to her (A106). Weatherspoon's repossessed vehicle was sold after she failed to respond to GCAC's Pre-Sale Notice (A1018). As her Post-Sale Notice indicates, she owes a deficiency to GCAC for the balance remaining after disposition of the collateral. (A389) GCAC has no judgment against Weatherspoon, unlike most of the class members.

Weatherspoon prayed, *inter alia*, for the following relief for her putative class members against GCAC: "actual damages not less than the minimum damages provided by § 400.9-625(c)(2); … damages equal to the amount of any judgment wrongfully obtained by GCAC; … statutory damages of $500 for each defective post-sale notice mailed; … prejudgment and post-judgment interest; … attorney's fees; …a preliminary and permanent

injunction enjoining GCAC from engaging in the practices alleged, including without limitation, enjoining GCAC from collecting deficiency judgments, time price differential, delinquency and collection charges; …a mandatory injunction compelling GCAC to return any money collected for deficiency judgments, time price differential, delinquency and collection charges …; a declaration that the right to cure, presale, and post-sale notices mailed by GCAC to Plaintiff and the Missouri C classes fail to comport with the statutory requirements. (A67-68)

On September 29, 2017, Weatherspoon filed a motion for class certification (A70-98)., and a motion asking that class certification be decided without any evidence being heard at a hearing (A1086-88). GCAC opposed the second motion, and asked for an evidentiary hearing (A1089-92). On October 12, the trial court denied Weatherspoon's motion to decide class certification on the briefs and set an evidentiary hearing class certification for December 7, 2017 (A1093).

The specific claims which were the subject of the motion to certify a class are: a claim for UCC statutory damages under §9-625 alleging that GCAC's Pre-Sale Notices and Post-Sale Notices did not comply with the content requirements of §§9-610 to 9-614 and §9-616; a claim alleging GCAC charged interest after default and before judgment, in supposed violation of §408.553; and a claim for actual damages alleging Right to Cure Notices sent to the class failed to comply with sections §408.554 and §408.555. (A83-85)

On November 29, 2017 GCAC filed its Memorandum in Opposition to Class Certification (A200-263). On December 5, 2017 Weatherspoon filed her Reply to Support Class Certification (A458-506).

On December 7, 2017 the parties appeared before the trial court for the evidentiary hearing (A14-50). The trial court expressed its view off the record that it would prefer to receive written submissions, rather than hear oral testimony. After a truncated oral argument by the parties, the Court entered an Order directing GCAC to file a Sur-Reply brief and the evidence it had intended to present at the hearing by January 7, 2018, and Weatherspoon to do the same by February 7, 2018 (A1171). The parties did so. (A649-675; A726-745)

On February 14, 2018 a status hearing was held at which the trial court took the motion for class certification under advisement and directed the parties within 20 days to present to the trial court proposed orders on the motion (A1140), which the parties did (A1141-50; 1151-70).

On March 12, 2017, the trial court entered a ten-page Order granting class certification (A1-10). The Order, erroneously denominated "Order and Judgment" (erroneous because class certification orders are interlocutory orders, and are not judgments, *Elsea v. U.S. Engineering Co*., 463 S.W.3d 409, 413 (Mo. App. W.D. 2015)), was written by Weatherspoon's counsel and signed by the trial court without changes being made, except that that the trial court added a sentence at the end of the order providing for a stay while GCAC filed a Petition for Permission to Appeal.

Two classes were certified in the Order:

Class 1: All persons

a. who are named as borrowers or buyers with a Missouri address on a loan or financing agreement with GCAC, assigned to GCAC or owned by GCAC;

b. whose loan or financing agreement was secured by collateral; and

c. who had the possession of their collateral taken by GCAC, voluntarily or involuntarily, from May 12, 2008 to the present.

Class 2: All persons within Class 1 who had the possession of their collateral taken by GCAC involuntarily.

(A10, decretal ¶ 6)

GCAC timely filed a petition for permission to appeal the class certification pursuant to Rule 84.035 in the Missouri Court of Appeals, Eastern District (case No. ED 106503). (A1094-1138) On March 28, 2018 the Missouri Court of Appeals denied the petition. (A1139).

On May 10, 2018, the trial court entered an Order clarifying that in its Class Certification Order it had not intended to make any ruling concerning GCAC's defenses, including set off, and striking any portions of the Class Certification Order appearing to do so. (A11-13).

On May 18, 2018, Relator GCAC filed its Petition for Writ of Prohibition in this Court. On May 22, 2018, Weatherspoon filed Suggestions in Opposition to the Issuance of a Writ. On August 21, 2018, this Court issued its Preliminary Writ of Prohibition directing the Respondent to show cause why a writ should not issue prohibiting him from doing anything other than vacating his order certifying the class and directing Respondent to deny the motion for class certification on or before September 20, 2018.

On September 19, 2018, Weatherspoon filed her Answer to Relator's Petition for Writ of Prohibition ("Answer").

POINTS RELIED ON

1. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Respondent Trial Court Abused its Discretion in Certifying Classes that are Grossly Overbroad, in that They Contain a Very Large Percentage of Persons With No Injuries or Claims, Because These were Resolved Against Them or Extinguished in Prior Litigation, and the Court Failed to Consider That Litigation, as Required by Rule 52.08(b)(3).

State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855 (Mo. banc 2008).

King Gen'l Contr., Inc. v. Reorg. Church of Latter Day Saints, 821 S.W.2d 495 (Mo. banc 1991).

Xiaoyan Gu v. Da Hua Hu, 447 S.W.3d 680 (Mo. App. E.D. 2014).

Strable v. Union Pacific R. Co., 396 S.W.3d 417 (Mo. App. E.D. 2013).

Rule 52.08(b)(3).

R.S. Mo. §408.556.1.

Rule 74.05. and Rule 74.06.

11 U.S.C. § 521.

2. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Respondent Trial Court Abused its Discretion in Certifying Claims Without Established or Legitimate Basis -- that Section 408.553 Creates a *Per Se* Ban on the Accrual of Any Contract Interest on a Balance Owing

by a Debtor After Default and Before Judgment – in that the Trial Court was Required on Class Certification to Determine the "Applicable Substantive Law" in Order to Assess Whether the Claims Met the Requirements of Rule 52.08.

Green v. Fred Weber, Inc., 254 S.W.3d 874 (Mo. banc 2008).

State ex rel. McKeage v. Cordonnier, 357 S.W.3d 597 (Mo. banc 2012).

Hope v. Nissan North America, Inc., 353 S.W.3d 68 (Mo. App. W.D. 2011).

R.S. Mo. § 408.553.

R.S. Mo. § 365.100.

R.S. Mo. § 408.020.

3. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Respondent Trial Court Abused its Discretion in Certifying Right to Cure Notice Claims Against GCAC, in That Weatherspoon's Pleading and Evidence Established that GCAC as an Assignee is a Stranger to the Notices, that no Basis for Assignee Liability was Asserted or is Available Under Missouri law, and that Therefore Weatherspoon Failed to meet the Threshold Requirement of Asserting an Injury Traceable to GCAC, Without which there is Simply Nothing to Certify.

Mitchell v. Residential Funding Corp., 334 S.W.3d 477 (Mo. App. W.D. 2010).

Michael D. v. GMAC Mortg., LLC, 763 F. Supp.2d 1091 (W.D. Mo. 2011).

Gerke v. Kansas City, 493 S.W.3d 433, 439 (Mo. App. W.D. 2016).

Corozzo v. Wal-Mart Stores, Inc., 531 S.W.3d 566 (Mo. App. W.D. 2017).

UCC §400.9-404.

4. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Respondent Trial Court Abused its Discretion in Certifying Any Claims Against GCAC, in that Weatherspoon Failed to Establish that Common Issues Substantially Predominate over Individual Issues, and GCAC Showed that Individual Issues Swamp any Common Issues.

Hope v. Nissan North America, Inc., 353 S.W.3d 68 (Mo. App. W.D. 2011).

Smith v. Missouri H'ways & Transp. Com'n, 372 S.W.3d 90 (Mo. App. S.D. 2012).

Ogg v. Mediacom, LLC, 382 S.W.3d 108 (Mo. App. W.D. 2012).

Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc., 339 F.3d 1001 (8th Cir. 2003).

Rule 52.08(b)(3)

UCC §§9-610 to 9-614

UCC §9-616.

UCC §9-625.

R.S. Mo. § 408.553

R.S. Mo. §§ 408.554 and 408.555.

R.S. Mo. § 408.562.

5. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Respondent Trial Court Abused its

Discretion in Certifying Right to Cure Notice Claims Against GCAC in that Weatherspoon, the Sole Class Representative, Admits She Does Not Possess Such Claims and Therefore is not a Member of the Classes She Seeks to Represent.

Harris v. Union Elec. Co., 766 S.W.2d 80 (Mo. banc 1989).

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

Koehr v. Emmons, 55 S.W.3d 859 (Mo. App. E.D. 2001).

Burrill v. First Nat. Bank of Shawnee Mission, N.A., 668 S.W.2d 116 (Mo. App. W.D. 1984).

Rule 52.08(a).

R.S. Mo. §§ 408.554 and 408.555.

6. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Respondent Trial Court Abused its Discretion in Certifying Any Claims Against GCAC in that Weatherspoon, the Sole Class Representative, Can Neither Win nor Lose a Dollar, is Moot, and so Has No Stake or Interest in the Outcome of the Litigation.

D.A.N. Joint Venture, III v. Clark, 218 S.W.3d 455 (Mo. App. W.D. 2006).

Boone Nat. S&L Ass'n, v. Crouch, 47 S.W.3d 371 (Mo. banc 2001).

Chemical Sales Co. v. Diamond Chem. Co., 766 F.2d 364 (8th Cir. 1985).

Victory Hills Ltd. P'ship v. NationsBank, 28 S.W.3d 322 (Mo. App. W.D. 2000).

UCC § 400.9-625.

7. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, because the Respondent Trial Court Abused its Discretion in Certifying Claims Against GCAC in that Weatherspoon, the Sole Class Representative, is Barred from Proceeding Here on All Claims Except the Right to Cure Notice Claim by the Preclusive Effect of the Unappealed Involuntary Dismissal of Her Claims During her Participation as a Named Party in the Prior, *Deaver*, Class Action Against GCAC.

Stewart v. Liberty Mut. Fire Ins. Co., 349 S.W.3d 381 (Mo. App. W.D. 2011).

Williams v. Southern Union Co., 364 S.W.3d 228 (Mo. App. W.D. 2011).

Magee v. Blue Ridge Prof'l Bldg. Co., Inc., 821 S.W.2d 839 (Mo. banc 1991).

Kesterson v. State Farm Fire & Cas. Co., 242 S.W.3d 712, 716 (Mo. banc 2008).

8. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Class Certification Based on Erroneous Rulings and Dubious Legal Theories for an Overbroad Class Involves multiple Abuses of Discretion that Will Unfairly Pressure Relator to Settle Without Regard to the Merits of the Case.

State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855 (Mo. banc 2008).

State ex rel. McKeage v. Cordonnier, 357 S.W.3d 597 (Mo. banc 2012).

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

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

SUMMARY OF ARGUMENT

This Court has issued a Preliminary Writ of Prohibition. Making the preliminary writ permanent is warranted because class certification was based on a series of clearly erroneous rulings in which the trial court abused its discretion:

1. The class certification here seeks in effect to overturn final judgments rendered by circuit courts throughout Missouri in the last 10 years, as well as to flout the effect of adjudications in federal bankruptcy court. Almost 60% of the members of the two certified classes have had their claims against GCAC already decided against them by the entry of final judgments in other courts throughout the state, in deficiency actions GCAC brought against these individuals concerning the very purchases, loans, debts, defaults, repossessions, notices, dispositions of collateral, compliance with consumer laws, and deficiencies Weatherspoon seeks to relitigate here. Weatherspoon's class action prayers for relief openly seek, among other things: "damages equal to the amount of any judgment wrongfully obtained by GCAC," and an injunction "enjoining GCAC from collecting deficiency judgments" and "compelling GCAC to return any money collected for deficiency judgments." An additional 27% of the members of the classes have had their claims extinguished in bankruptcy.

The trial court was required to take this prior litigation into account on class certification by the plain terms of Rule 52.08(b)(3)(B), but failed to do so. As a result, the classes are grossly overbroad, and should not have been certified because they contain a large majority of persons with no injuries and no claims. *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008) (class could not be certified where 80% of the

putative class had no claim for injuries). Thus, the trial court abused its discretion by certifying claims where a large percentage of the members have no injuries or claims and by effectively allowing the class to seek to overturn thousands of judgments rendered in courts across Missouri.

2. Instead of determining the applicable substantive law, the trial court granted class certification on a legal theory without established or legitimate basis: that Section 408.553 creates a *per se* ban on the accrual of any contract interest on a balance owing by a debtor after default and before judgment. Under this theory of Weatherspoon's, which the trial court erroneously believed it was prohibited from assessing, all of GCAC's Pre-Sale and Post-Sale notices become misleading or incorrect – and GCAC becomes subject to annihilating statutory damages multiplied five thousand-fold – if the notices contain any mention of interest, even if the notices contain the exact content required by the UCC, and even if they follow the suggested format of the sample Notice forms promulgated by GCAC's statutory regulator, the Missouri Division of Finance.

Weatherspoon's "interest" theory is contradicted by the "applicable substantive law," including by the plain words of §408.553 itself; by the Motor Vehicle Time Sales Act, which provides for the accrual of interest at the contract rate on the unpaid balance of the loan; by the prejudgment interest statute, which provides the same; and by the Missouri regulator's sample notice form, which expressly includes post-default interest (A331).

Nonetheless, the trial court erroneously accepted Weatherspoon's "interest" theory without question, under the apparent belief that to examine it would be to venture into the merits (A3), and also that whether the theory was applicable law was itself the common

issue. (A5). This was an abuse of discretion, as Missouri law requires the trial court on class certification to assess whether a claim meets the requirements for certification by determining the elements of that claim with reference to established law, *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 881 (Mo. banc 2008) and not to accept unquestioningly the theories put forward by the plaintiff, or to certify on the grounds that the inquiry into applicable law was itself the common issue. Had the trial court examined the actual elements of a claim for the overcharge of interest, as it was required to do, it would have been forced to conclude that the class claims devolve into thousands of individual accounting actions, resolvable by varying individual evidence only, and that no common issues predominate.

3. Weatherspoon's well-pleaded Petition (including the Right to Cure Notice attached as an exhibit), as well the evidence she submitted on the motion shows that Car Credit Acceptance Company, a separate entity and non-party to this law suit, sent the Right to Cure Notices, and that GCAC did not receive an assignment of Weatherspoon's contract until weeks later. Under Missouri common law, the UCC and section 408, GCAC as an assignee cannot be held derivatively liable to pay affirmative damages for the acts of the assignor. Weatherspoon's allegations and evidence fail to assert a traceable injury to GCAC with respect to the Right to Cure Notices. In a class action, some link to the defendant is a "threshold requirement," without which there is simply nothing to certify. *Gerke v. Kansas City*, 493 S.W.3d 433, 439 (Mo. App. W.D. 2016). By certifying Weatherspoon's Right to Cure claims against GCAC, the incorrect party, the trial court abused its discretion.

4. In addition, interlocutory appeal is warranted because, as detailed below, the trial court's certification decision was clearly erroneous for these additional reasons: a proper assessment of the elements of the certified claims shows that individual issues, and the need for numerous mini-trials and individual inquiries, swamp and predominate over the common issues; Weatherspoon is barred from proceeding here by the preclusive effect of the unappealed dismissal of her pleading when she was a named party in the prior *Deaver* class action; and the trial court certified claims which Weatherspoon's own pleadings show that Weatherspoon, the sole named counterclaimant, does not possess, and for which Weatherspoon therefore cannot act as class representative.

These multiple abuses of discretion in the trial court's rulings impose a "mirror-image of the death knell" situation: "grant of class status would put substantial pressure on the defendant to settle without regard to the merits of the case." The trial court below has approved a form of Class Notice, and the class action will proceed, with thousands of putative class members being made parties upon notice and a failure to opt out, unless the Preliminary Writ of Prohibition issued by this Court is made permanent. No legal relief is available. Under this Court's precedents and the facts here, the issuance of a permanent writ of prohibition is warranted.

ARGUMENT

I. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, because the Court Abused its Discretion in Certifying Classes that are Grossly Overbroad, in that they contain a Very Large Percentage of Persons With No Injuries or Claims, because these were Resolved against them or extinguished in prior litigation, and the Court failed to consider that litigation, as Required by Rule 52.08.

A. Standard of Review.

The following standard of review governs each of the points in this Brief. This Court reviews a trial court's order certifying a class under an abuse of discretion standard. *Vandyne v. Allied Mortgage Capital Corp.*, 242 S.W.3d 695, 697 (Mo. banc 2008). "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 601 (Mo. banc 2012); *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008). Legal errors that appear in the trial court's class certification ruling are reviewed by this Court *de novo*. *E.g., Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 131 (Mo. App. W.D. 2017).

A trial court's certification must be supported by the record. *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d 151, 163 (Mo. App. 2006); *Beatty v. Metro St. Louis Sewer District*, 914 S.W.2d 791, 795 (Mo. banc 1995). If the record does not demonstrate that the

requisites for class certification have been met, the trial court has abused its discretion. *Dale*, 204 S.W.3d at 163-64. A trial court must understand the applicable substantive law underlying plaintiffs' claims to make a reasoned and meaningful determination of the certification issues. *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 880 (Mo. banc 2008). An abuse of discretion in certifying a class occurs when a trial court bases its decision on an erroneous conclusion of law, does not consider the law underlying plaintiffs' claims, or where there is no rational basis in the evidence for the ruling. *Dale*, 204 S.W.3d at 164; *Green*, 254 S.W.3d at 880.

Preservation of Points for Review. Every argument made in Points I through VII here was made in opposition to class certification below. Almost all of the arguments were rejected without being addressed or mentioned by the Order (A1-10) drafted by Weatherspoon's counsel and signed by the trial court.

B. The Certified Classes Are Grossly Overbroad and Contain a Large Majority – Thousands of Persons – Who Have no Injury or Claims, as these Were Resolved or Extinguished in Prior litigation Which the Trial Court Erroneously Ignored, Contrary to Rule 52.08.

A proper class definition underlies each of the requirements of Rule 52.08, and is an essential prerequisite for class certification. "A class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. 2008) (class could not be certified where 80% of the putative class had no claim for injuries); *Dale v. DaimlerChrysler Corp*, 204 S.W.3d 151, 178 (Mo. App. W.D. 2006) (an overly broad class definition "undermines judicial economy and efficiency, thereby interfering with one of the

primary purposes of class action suits."); *cf. Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 882 n.9 (Mo. banc 2008) (reversing class certification where "[t]he trial court plainly lacked an evidentiary basis on which to set the class boundary.").

As was proven below by expert analysis and unrebutted testimony by GCAC's forensic accountant, (1) more than 60% of the members of the putative classes have had their claims already decided against them by the entry of final judgments in other courts throughout the state, in deficiency actions GCAC brought against these individuals concerning the very debts, defaults, repossessions, notices, dispositions of collateral, compliance with consumer laws, and deficiencies Weatherspoon seeks to relitigate here (A693-64, 701-02); and (2) an additional 27% of the members of the putative classes have had their claims extinguished in bankruptcy. (A692, 694, 701-02) Additional claimants are time-barred.

Missouri Supreme Court Rule 52.08 explicitly directs that on class certification the court must consider *"the extent and nature of any litigation concerning the controversy already commenced by or against members of the class"* in determining whether to certify a class. 52.08(b)(3)(B) (emphasis added). The trial court was required to take the prior litigation and judgments into account on class certification, but declined to do so. (A7, A8-9) Weatherspoon argued below, and the trial court apparently accepted, that to take notice of this prior litigation would be to "decide the merits" of affirmative defenses. (A3) However, it is not deciding the merits to recognize that, in prior litigation, the merits for particular plaintiffs have already been decided by another state or federal court in Missouri. The briefing revealed no case holding that consideration of prior litigation, as Rule

52.08(b)(3)(B) commands, becomes prohibited if the prior litigation has resulted in a final judgment, or is a bankruptcy filing.

Weatherspoon argued, and the trial court apparently accepted, that the court was required to look only at Weatherspoon's allegations, and could not consider arguments regarding what she characterized as "affirmative defenses." Rigid acceptance of this limitation would gut Rule 52.08. "The extent and nature of any litigation concerning the controversy already commenced by or against" putative class members is not going to readily be discernible from the class plaintiff's allegations, but it must be considered nonetheless, if Rule 52.08 is to be obeyed.

And in fact, in *Nixon* this Court looked at evidence and expert testimony in determining whether the class included numerous persons who were uninjured. 249 S.W.3d at 862. The Court did not confine itself to plaintiff's allegations, or shrink from an issue because it might be regarded as part of a merits issue or affirmative defense. *In re Bisphenol-A (BPA) Polycarbonate Plastic Prod. Liab. Litig.*, 2011 WL 6740338, at *1 and n.3 (W.D. Mo. 2011) (following *Nixon*, and relying on evidence submitted by defendants in concluding that "plaintiffs' proposed class cannot be certified because it includes individuals who have not suffered an injury in fact."); *see, e.g.*, *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (Court properly resolved statute of limitations issue, notwithstanding that it is a merits issue, because it also an issue of class action procedure, as it "would determine the composition of the class and might … determine whether the suit could be maintained as a class action at all."); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 361 (4th Cir. 2014) ("Prior to certifying a class, a district court must definitively

determine that the requirements of Rule 23 have been satisfied, even if that determination requires the court to resolve an important merits issue.").

Weatherspoon also argued, and the trial court apparently accepted, that persons whose claims had been resolved or extinguished were not "uninjured" within the meaning of *Nixon*. "If GCAC prevails on an affirmative defense against class members, it means although the class members were injured, they are unable to recover." (A8).

This is incorrect, as a matter of both logic and law. Persons whose claims have been resolved against them by final judgments in prior litigation are not merely unable to recover; they were determined by the prior adjudication not to have been injured. And this Court in *Nixon* applied "uninjured" in a very broad sense. It relied on *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), which spoke of those not "entitle[d]" to recover "damages," not those without a legal claim. *Nixon* also includes those who have "no grievance." *Nixon*, at 862. And "[a]n 'uninjured person,' especially when the injury is not specific and concrete, may be a person who simply does not feel cheated or injured." *Nixon*, at 861. This is certainly broad enough to apply to those who are not entitled to present any claim, whether that claim was adjudicated against them in prior litigation or was extinguished by prior litigation.

The classes are grossly overbroad, and should not have been certified because they contain a large majority of persons with no injuries and no claims. Thus, the trial court abused its discretion by certifying claims where a large percentage of the members have no injuries or claims and by effectively allowing the class to seek to overturn thousands of final judgments rendered in courts across Missouri.

1. More than Sixty Percent of the Class have had their Claims Resolved Against Them by Final Judgments in Prior Litigation with GCAC.

It was uncontested below that more than 60% of the members of the classes – more than 2,000 people – had final judgments entered against them in prior deficiency litigation with GCAC in Missouri courts in 48 counties across the state (A693-64, 701-02; A328). Persons against whom GCAC obtained deficiency judgments are barred from proceeding as class members here, because compliance with the consumer default, repossession, notice, sale of collateral, and deficiency requirements of the UCC were prerequisites for recovery by GCAC of a properly calculated deficiency judgment after the sale of collateral.

Weatherspoon seeks "actual damages not less than the minimum damages provided by § 400.9-625(c)(2)" – which is the damages provision for violations of the Default Part of the UCC -- as well as "statutory damages of $500 for each defective post-sale notice mailed." She seeks "damages equal to the amount of any judgment wrongfully obtained by GCAC," and an injunction "enjoining GCAC from collecting deficiency judgments, time price differential, delinquency and collection charges," and "compelling GCAC to return any money collected for deficiency judgments, time price differential, delinquency and collection charges." She also seeks "a declaration that the right to cure, presale, and post-sale notices mailed by GCAC to Plaintiff and the Missouri classes fail to comport with the statutory requirements." (Second Amended Class Action Complaint, at 17-18) (A67-8) Plainly, the Weatherspoon class action is nothing but a comprehensive, wholesale attempt to reverse, undo and negate the final judgments obtained by GCAC against more than 60%

of the class plaintiffs. *Res judicata* bars such an action by each plaintiff subject to a prior final judgment.

a. Res judicata applies to "every point and issue" that "could have been brought forward" "by the parties" in the prior litigation.

Missouri applies a broad rule of *res judicata* (claim preclusion) to the prior final judgments. Unlike Collateral estoppel, *res judicata* applies broadly, "not only to points and issues upon which the court was required by pleadings and proof to form an opinion and pronounce judgment, but also to every point properly belonging to the subject matter of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." *King Gen'l Contr., Inc. v. Reorg. Church of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991). *Res judicata* "precludes consideration of issues decided in the prior lawsuit, as well as those issues that the parties could have brought into the case at that time." *Spath v. Norris*, 281 S.W.3d 346, 350 (Mo. App. W.D. 2009).

Consistent with *King*, the broad rule of *res judicata* has been applied to "every point and issue" that "could have been brought forward" "by the parties" in the prior litigation.

> In Missouri, *res judicata* bars *every point and issue* properly belonging to the litigation that the parties *could have*, exercising reasonable diligence, brought forward at the time. We believe that this principle unequivocally applies to a defense that a defendant failed to raise in the prior action for failure to exercise reasonable diligence. To adopt Defendant's interpretation of *res judicata* would defeat the intended purposes of the doctrine—to avoid multiplicity of lawsuits and to promote finality and consistency of judgments.

Xiaoyan Gu v. Da Hua Hu, 447 S.W.3d 680, 687 (Mo. App. E.D. 2014) (emphasis in original) (citation omitted). "The fact that the issues raised were purely defensive as to the

original action and thus apparently outside a compulsory counterclaim rule is irrelevant." § 4414 Claim Preclusion—Defendant Preclusion, 18 Fed. Prac. & Proc. Juris. § 4414 (3d ed.).

In consumer cases, Missouri has followed the "no notice – no deficiency" rule: violation of the consumer statutes by the creditor bars the creditor from collecting a deficiency. *McKesson Corp. v. Colman's Grant Village, Inc.*, 938 S.W.2d 631, 633 (Mo. App. E.D. 1997). Therefore the issues that Weatherspoon seeks to raise – GCAC's compliance with consumer statutes -- could have been raised as defenses in each of the deficiency actions.

In addition, these issues were actually elements of GCAC's deficiency actions. Missouri law, R.S. Mo. § 408.556.1 provides:

> In any action brought by a lender against a borrower arising from default, the petition shall allege the facts of the borrower's default, facts sufficient to show compliance with the provisions of sections 400.9-601 to 400.9-629, which provisions are hereby deemed applicable to all credit transactions….

Sections 400.9-601 to 400.9-629 constitute the Default Part of the UCC, governing every step of consumer transactions, from default through notice, repossession, acceleration, sale, and the calculation of a correct deficiency (or surplus). *States Res. Corp. v. Gregory*, 339 S.W.3d 591, 596 (Mo. App. S.D. 2011) ("The right to a deficiency judgment accrues only when there is strict compliance with statutory requirements.").

Both by statute and by court decision, then, compliance with the consumer notice requirements were elements of the claim for a deficiency judgment, and must necessarily have been pleaded and proven by GCAC in order to have obtained such judgments. *Textron Financial Corp. v. Trailiner Corp.*, 965 S.W.2d 426, 429 (Mo. App. S.D. 1998). They were

not simply "points and issues" "properly belonging to the subject matter of the litigation," or that "could have been raised" by the deficiency defendants as a defense or counterclaim – although this is enough -- they were elements of GCAC's deficiency claims, which were necessarily decided in GCAC's favor in each case when judgment was granted and an amount certain of debt owing was awarded. Therefore they were "points and issues upon which the court was required by pleadings and proof to form an opinion and pronounce judgment," and are within the core area of *res judicata*. *King*, 821 S.W.2d at 501 at.

In any event, they are also clearly within the broader ban of *res judicata,* even if they had not been litigated, because "*res judicata* applies not only to the specific issues ruled upon by the court and used to form the court's judgment, but also to issues that the parties could have brought in the previous litigation." *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324, 329 (Mo. App. E.D. 2014). And the repeated reference to "issues that *the parties* could have brought forward" means what it says: it applies to plaintiffs and defendants. *E.g., State ex rel. Barnett v. Mullen*, 125 S.W.3d 896, 898-99 (Mo. App. E.D. 2004) (judgment entered against defendant by default barred him from filing a new action as plaintiff seeking to relitigate).

Boggiano is instructive. There lawyers "sued for the reasonable value of their services as attorneys for defendant." After the entry of a final judgment for the lawyers, the defendant client sought to bring a counterclaim.

> The defendant's counterclaim sought recovery of damages for an alleged wilful breach by plaintiffs of their duties as counsel for defendant. The acts alleged as the basis of the counterclaim could have been set up as a complete defense to plaintiffs' cause of action. An attorney who acts in bad faith and seeks to secure his personal advantage to the prejudice of his client may properly be denied any compensation

> for his services. . . . Since such defense was available, the judgment for plaintiffs on their cause of action must be considered as an adjudication that plaintiffs were not guilty of a breach of their duty as attorneys for the defendant.

Boggiano v. Thielecke, 326 S.W.2d 386, 391-92 (Mo. App. 1959).

> Where the subject matter of a counterclaim is involved in the determination of the issue in a plaintiff's cause of action in such manner that the judgment in plaintiff's cause of action necessarily negatives the facts on which defendant relies to establish his demand, the judgment in plaintiff's case will be *res judicata*….

Boggiano, 326 S.W.2d at 392; *Mendota Ins. Co. v. Hurst*, 965 F. Supp. 1290, 1294 (W.D. Mo. 1997) (same).

b. The "four identities" are met here.

The case law often speaks of the requirement that for *res judicata* to apply, four identities are looked for: "1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made." *King,* 821 S.W.2d at 501 (Mo. banc 1991). They are all present here.

As Missouri courts have repeatedly noted, elements one and two are closely related:

> The dispute in this case centers on whether the first two identities were met, the "thing sued for" and the "cause of action." In *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002) , the Supreme Court defined these identities as "the 'facts' that form or could form the basis of the previous adjudication." The facts that form the basis of the previous adjudication are the same and, therefore, **the identities of the thing sued for and the cause of action are the same, if "the claim arises out of the same 'act, contract or transaction' " as the previous adjudication.** *Id*. at 318–19 (citation omitted).

Kesler v. Curators of the Univ. of Missouri, 516 S.W.3d 884, 890–91 (Mo. App. W.D. 2017) (emphasis added); *Winter v. Northcutt*, 879 S.W.2d 701, 708 (Mo. App. S.D. 1994) (the "identity of the thing sued for" is "the subject matter of the suit.").

> Transaction is very broadly construed.
>
> The test is not whether a new legal theory is asserted in the subsequent action, but rather, whether the subsequent action arises out of the same transaction or occurrence as the prior suit. Transaction has been broadly defined. It is the aggregate of the circumstances constituting the foundation for the claim, and it includes all of the facts and circumstances which resulted in the injury.

Philips, 430 S.W.3d at 329 (citations omitted).

> "[T]hat a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief."

Commonwealth Land Title Ins. Co. v. Miceli, 480 S.W.3d 354, 364 (Mo. App. E.D. 2015).

> Our Supreme Court defines "cause of action" as a "group of operative facts giving rise to one or more bases for suing." Id. This definition "centers on 'facts' that form or could form the basis of the previous adjudication.". . . [T]the term "transaction" has a broad meaning, . . . includes . . . all or any part of the transaction, or series of connected transactions, out of which the action arose."

Becker v. St. Charles Boat & Motor Inc., 131 S.W.3d 868, 870–71 (Mo. App. E.D. 2004).

It is not necessary that the causes of action be identical, but the claims must have arisen out of the "'same act, contract, or transaction.'" *Chesterfield Village*, Inc. v. City of Chesterfield, 64 S.W.3d 315, 318–19 (Mo. banc 2002) (citation omitted);

Under these tests, however formulated, it is apparent that all the claims brought in this case arise out of the same "aggregate of all the circumstances," the same facts, the same "act, contract or transaction," and the same "series of connected transactions" as the prior deficiency actions brought by GCAC against those same claimants. In each case they arise out the same vehicle purchase, consumer installment contract, loan, default, consumer notices, repossession, acceleration, sale of collateral, and calculation of deficiency. There is

a complete congruence and identity between the "subject matter" of the prior deficiency actions and this suit.

The third and four identities – (3) the identity of the persons and parties to the action; and (4) the identity of the quality of the person for or against whom the claim is made -- are readily met here, as the parties, GCAC on one side and every class plaintiff GCAC sued for a final judgment on the other, are the same and acting in the same legal capacity. The parties need not be aligned in the same way as before; *res judicata* applies where the defendant in the first action is now the plaintiff in the second. *E.g., Missouri Real Estate & Ins. Agency, Inc. v. St. Louis Cty.*, 959 S.W.2d 847, 851 (Mo. App. E.D. 1997) (identities found where sides reversed -- plaintiff property owner in second action for inverse condemnation against county was defendant in first action where county brought condemnation action against owner).

At the hearing on class certification, counsel for Weatherspoon suggested that the final judgments GCAC obtained were somehow not worthy to receive *res judicata* effect, because some were defaults, or had been entered by associate circuit judges. (A22-23) (Class Certification Hearing Tr. 9:14-10:9). This is a contention wholly without legal support or merit. *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324, 329 (Mo. App. E.D. 2014) (giving *res judicata* effect to prior decision by associate circuit judge); *Spino v. Bhakta*, 174 S.W.3d 702, 707 (Mo. App. W.D. 2005) (giving *res judicata* effect to default judgment); *State ex rel. Family Support Div. v. Stovall–Reid*, 163 S.W.3d 519, 521–22 (Mo. App. E.D. 2005) (same holding); *Barnett*, 125 S.W.3d at 898-99 (same); *Drainage Dist. No. 1 Reformed, of Stoddard Cty. v. Matthews*, 234 S.W.2d 567, 572–73 (Mo. banc 1950) (same);

Clark v. Kinsey, 405 S.W.3d 551, 553 (Mo. App. E.D. 2013) ("Small claims court judgments have *res judicata* effect.").[2]

c. Res Judicata always acts to bar a subsequent suit seeking to negate or undo the prior judgment or rights established by that judgment.

The effect of the class certification is to have the trial court act as a roving Court of Appeals, in effect undoing final judgments entered in other courts across Missouri. (A390) But *res judicata* always applies to bar an action, such as this, where:

> its successful prosecution in a subsequent action would nullify the judgment, for example, by allowing the defendant to enjoin enforcement of the judgment, or to recover on a restitution theory the amount paid pursuant to the judgment, or by depriving the plaintiff in the first action of property rights vested in him under the first judgment.

Restatement of Judgments (Second) Section 22(2)(b) and comment f. *See, e.g.*, *Hawkins v. Citicorp Credit Services, Inc.*, 665 F. Supp.2d 518 (D. Md. 2009) (final judgment in favor of creditor for a deficiency barred subsequent suit by class action plaintiff under consumer debt statutes because that class action would impair the prior judgment).[3]

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[2] Weatherspoon relies in her Answer on Restatement (Second) of Judgments § 27 (1982) ("Issue Preclusion—General Rule"), and *Hayes v. United Fire & Cas. Co*., 3 S.W.3d 853, 856 (Mo. App. 1999). They are wholly inapposite, as they concern only collateral estoppel (issue preclusion). *Res judicata* (or claim preclusion) is applicable here. "The critical distinction between collateral estoppel and *res judicata* is that the former operates only as to issues previously litigated but not as to matters not litigated in the prior action though such might properly have been determined." *King*, 821 S.W.2d at 500.

[3] "We find the Restatement to be persuasive authority with respect to the preclusion doctrines, given the Missouri Supreme Court's repeated reliance on the Restatement (Second) of Judgments in its decisions." *Xiaoyan Gu v. Da Hua Hu*, 447 S.W.3d 680, 687 (Mo. App. E.D. 2014) (citing cases).

In her Answer to the Preliminary Writ, Weatherspoon denies that she seeks to overturn the prior final judgments obtained by GCAC: "class members are not seeking to overturn final judgments." (Answer at 2) But the class action is entirely premised on claims that GCAC's consumer notices are defective, and that GCAC's repossessions, accelerations of debt, sales of the collateral and calculations of deficiencies are wrongful. (A51, 60, 62-67) It seeks to relitigate here the very debts, defaults, repossessions, notices, dispositions of collateral, compliance with consumer laws, and deficiencies that were the subject matter of the prior deficiency actions and final judgments.

Weatherspoon's own prayer for relief refutes her denial in detail. In it, Weatherspoon seeks "actual damages not less than the minimum damages provided by § 400.9-625(c)(2)" – which is the damages provision for violations of the Default Part of the UCC -- as well as "statutory damages of $500 for each defective post-sale notice mailed." She seeks "damages equal to the amount of any judgment wrongfully obtained by GCAC," and an injunction "enjoining GCAC from collecting deficiency judgments, time price differential, delinquency and collection charges," and "compelling GCAC to return any money collected for deficiency judgments, time price differential, delinquency and collection charges." She also seeks "a declaration that the right to cure, presale, and post-sale notices mailed by GCAC to Plaintiff and the Missouri classes fail to comport with the statutory requirements." (A67-68) Plainly, the Weatherspoon class action is nothing but a comprehensive, wholesale attempt to reverse, undo and negate the final judgments obtained by GCAC against more than 60% of the class plaintiffs. *Res judicata* bars such an action by each plaintiff subject to a prior final judgment.

d. Weatherspoon's action is an impermissible collateral attack on the final judgments.

If plaintiffs had reason to challenge or reopen those final judgments, Missouri law provides clear procedures for doing so, in the original judgment court, within set time frames, or upon a proper individual showing of intrinsic fraud – of which there is not a hint alleged to exist. Mo. Sup. Ct. R. 74.05 and 74.06. They cannot sidestep that law with the class claims here.

Even assuming, arguendo, that 408.556 was not fully complied with in obtaining a particular judgment, that would be irrelevant to the finality of that judgment, as the Missouri Court of Appeals recently held in *Hollins v. Capital Sols. Investments I, Inc.*, 477 S.W.3d 19 (Mo. App. E.D. 2015). One cannot resist the application of *res judicata* by rearguing the merits of the prior adjudication. That is the whole point of a final judgment.

> Section 408.556 specifically instructs a lender what it must plead in an action brought against a borrower arising from default. Hollins further argues that CSI did not properly plead its action against Hollins because it did not state in its petition how the amount owed to the lender was calculated. CSI disputes that its pleading was deficient. We need not evaluate the sufficiency of CSI's petition because even assuming, arguendo, that it failed to meet the requirements of Section 408.556 and thus failed to state a cause of action, such failure does not deprive the trial court of subject matter jurisdiction…. [E]ven if Hollins had a meritorious defense to CSI's claim at the time judgment was entered, an irregular or erroneous judgment is not subject to a subsequent collateral attack.

Hollins v. Capital Sols. Investments I, Inc., 477 S.W.3d 19, 25-6 (Mo. App. E.D. 2015).

This too is a long-standing rule:

> If the Bank's petition in that case contained untrue allegations of fact, that time and case (No. 14740) presented the appointed time, case and forum in which to deny and contest those alleged facts. Having failed to there do so the opportunity is no longer available. There must be a sometime end to litigation.

Drainage Dist. No. 1 Reformed, of Stoddard Cty. v. Matthews, 234 S.W.2d 567, 572–73 (Mo. banc 1950) (default judgment precludes defendant from bringing new suit raising matters which could have been raised in defense of the prior suit).

Class action is a procedural device, and does not permit class plaintiffs to do what they could not do as individuals, because Rule 52.08 cannot "abridge, enlarge or modify the substantive rights of any litigant." Mo. Ann. Stat. § 506.030. Yet, if this class action is allowed to proceed as framed, thousands of final judgments going back to May of 2008 entered by circuit courts throughout Missouri will be subject to collateral attack. No final judgment rendered by a Missouri court will be safe from being attacked years later by a class action that ignores finality of judgments and runs roughshod over the clear procedures for challenging or reopening a judgment, in the original judgment court, within set time frames, or upon a proper individual showing of intrinsic fraud – of which there is not a hint alleged to exist here. Mo. Sup. Ct. R. 74.05 and 74.06; *Hollins*, 477 S.W.3d at 25-6.

Those with prior final judgments against them should have been excluded from any class. "[I]t is the plaintiff who has the burden of submitting a proper class definition or amendment." *Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 76 (Mo. W.D. App. 2011). As Weatherspoon and her counsel have resisted this modification for years in litigation against GCAC, GCAC asks that this Court order the Respondent trial court to deny class certification, in preference to modifying the class. "We decline to exercise our discretion to modify the class definition… [where] plaintiffs have been on notice of the potential [problem] presented by their proposed definition for more than a year, [but] …have insisted on offering the same class definition." *In re LIBOR-Based Fin. Instruments*

Antitrust Litig., 299 F. Supp. 3d 430, 546–47 (S.D.N.Y. 2018) (denying class certification); *Victorino v. FCA US LLC*, 326 F.R.D. 282, 302 (S.D. Cal. 2018) (denying class certification, rather than modifying the proposed class definition, where plaintiffs had adhered to the definition throughout the briefing and there were other problems with class certification).

2. More than a Quarter of the Class have had their Claims Extinguished in Prior Bankruptcy Litigation.

GCAC proved below that more than 27% of the members of the putative classes – well more than 1,100 people – went through bankruptcy at some time following the repossession of their vehicle. (A692, 694, 701-02). Based on an individual examination of 114 bankruptcy court files, (obtained by a painstaking search of a sample of 416 of the potential class then numbering 4570, but now larger), none of these bankrupts disclosed their claims against GCAC in their schedule of assets. (A692, 694, 701-02) (A374-75) (Hearing tr. 156:15 – 158:5). They are therefore barred from asserting those UCC claims here, under well-settled principles of the judicial estoppel effect of bankruptcy:

> [T]he Bankruptcy Code imposes a statutory duty upon a debtor, 'an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.' All lawsuits and even potential claims must be disclosed, whether "contingent, dependent or conditional." Federal courts do not think this duty trivial: '…the importance of this disclosure duty cannot be overemphasized.'

Strable v. Union Pacific R. Co., 396 S.W.3d 417, 422-23, 426 (Mo. App. E.D. 2013) (plaintiff judicially estopped from asserting claim where he "obtained a complete discharge from all debts, without ever disclosing his … lawsuit asset to the bankruptcy court or his creditors") (citations omitted); *Jim Meagher Chevrolet, Inc. v. GM*, 1994 WL 902494, *1 (E.D. Mo. 1994) (same).

Courts have repeatedly refused to certify a class when a large percentage of the class consists of persons whose claims were or might have been extinguished in a prior bankruptcy proceeding. The grounds for denial are two-fold: (1) that the class is overbroad, and (2) that the court "would have to make individualized inquiries at trial into the specific details of each putative class members' bankruptcy proceedings" and that "this was enough to establish that common issues did not predominate over individual issues." *E.g., Mayo v. USB Real Estate Sec. Inc.*, 2012 WL 4361571, *5 (W.D. Mo. 2012) (class certification is "foreclosed" where a large percentage of the putative class "may be judicially estopped or otherwise precluded from bringing the claim unless it was listed in the mandatory bankruptcy filings"); *Watkins v. Consumer Adjust. Co.*, 2014 WL 3361771, *1-2 (E.D. Mo. 2014) (dismissing class action based on estoppel in bankruptcy); *Gawry v. Countrywide Home Loans, Inc.*, 640 F. Supp.2d 942, 955-56 (N.D. Ohio 2009) (denying class certification of consumer fraud claims involving uniform credit documents, as common issues did not predominate over individual issues where "specific details of the bankruptcy proceedings for each putative class member" would have to be examined in order to determine if each claim had been extinguished in bankruptcy).

Missouri cases appear to apply a categorical rule regarding extinguishment in bankruptcy. *Strable*, 396 S.W.3d at 422-23, 426. But if the application of judicial estoppel turns on the assessment of individual facts, such as intent – see *Loth v. Union Pacific R. Co.*, 354 S.W.3d 635 (Mo. App. E.D. 2011) – potentially necessitating more than 1,100 mini-trials, class certification would then be impermissible for the whole class. *Mayo*, at *id.*; *Gawry*, at *id*. Either way, the issue depends on the resolution of individual facts for

many hundreds, and it is plain that individual issues simply swamp the common one of a notice form. Where extensive individual factual inquiries are required to determine whether an individual is a member of a class, or can surmount defenses, certification is improper. *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 116-17 (Mo. App. W.D. 2012) (lack of predominance where court would have to review many documents to resolve class member claims); *Little*, 306 S.W.3d at 581 (Mo. App. E.D. 2010) (if evidence on a question varies from class member to class member no predominance).

3. The Class Period Includes Many Persons Whose Claims are Time-Barred.

An additional significant portion of the certified class – more than 10% – are time barred. In *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012), the Eighth Circuit addressed which Missouri statute of limitations provision applies to an action for damages under 9-625 of the UCC. Three possibilities were presented in argument by the parties. The Missouri statute of limitations for civil actions includes two provisions governing actions to enforce statutory liabilities:

> [1] a civil action "upon a liability created by a statute other than a penalty or forfeiture" must be commenced within five years, R. S. Mo. § 516.120(2); and
>
> [2] a civil action "upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state," must be commenced within three years, R. S. Mo. § 516.130(2).

In addition to these two "civil action" provisions, the Penal Law contains a "long-standing but rarely applied statute [which] provides a six-year limitations period for some actions to recover penalties or forfeitures from 'moneyed corporations'":

> [3] "None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

R. S. Mo. § 516.420.

The *Rashaw* Court held that the Supreme Court of Missouri "would hold that § 516.420 [six years] is limited to penal statutes and does not apply to civil actions to recover penalties and forfeitures governed by § 516.130(2) [three years]." The *Rashaw* Court stated the reasons for its conclusion. First, it cited a series of earlier Missouri Supreme Court cases expressly holding that the Penal Law, of which § 516.420 [six years] was then a part, is inapplicable to a "civil action": "'The sections quoted from the criminal law, and providing for limitations for the bringing of actions for penalties and forfeitures . . . do not apply.'" 685 F.3d at 742-43. In addition, the *Rashaw* Court could find no indication that § 516.420 [six years] was intended to apply beyond the reach of the penal law to govern civil actions such as this UCC case – a conclusion buttressed by the section's plain terms, which state when it, rather than several other enumerated provisions of the Penal law, would apply ("None of the provisions of sections 516.380 to 516.420 shall apply…."). The three-year and five-year limitations provisions for "civil actions" the Court found applicable are not within the quoted sections that the six-year provision supplants.

See Huffman v. Credit Union of Texas, 758 F.3d 963, 966 (8th Cir. 2014) (holding that the six-year statute of limitations in § 520.420 does not apply to civil actions under the Mo. UCC); *Wong v. Bann-Cor Mortg*., 918 F. Supp.2d 941, 947 (W.D. Mo. 2013) (*Rahsaw* is "the most thorough interpretation of the relevant Missouri statutes of limitation and the best guidance available on this [limitations] issue.").

Weatherspoon cited *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168, 178 (Mo. App. 2006). But *Schwartz* did not address the limitations period for a claim under the UCC; it applied the little-used provision in the penal law statute of limitations to a claim under the Missouri Second Mortgage Loan Act (MSMLA). And the reasoning of *Schwartz*, -- that a claim for statutory damages is a "claim for penalty or forfeiture against a moneyed corporation [which] carries a six-year limitations period," *id*. -- has implicitly been called into doubt by this Court's subsequent decision in *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 265-66 (Mo. banc 2013). There, the Court held that TCPA statutory damages of $500 per offense, awarded without regard to actual damage, did not constitute a penalty: "TCPA statutory damages of $500 per occurrence are not damages in the nature of fines or penalties."

Following class certification, the Missouri Court of Appeals decided *Baker v. Century Fin. Grp., Inc.*, 554 S.W.3d 426, 435-39 (Mo. App. W.D. 2018), *transfer denied* (July 3, 2018), *transfer denied* (Sept. 25, 2018). In *Baker* the court addressed the statute of limitations under the Missouri Second Mortgage Loan Act. In holding that the six-year limitation period from the penal law applies, the *Baker* Court first noted that "*Rashaw* involved claims under the Missouri Uniform Commercial Code and the Missouri

Merchandizing Practices Act; it did not involve any claims under the MSMLA." *Id*. at 436. However, the *Baker* court went on to directly state "we disagree with the Eighth Circuit," and to provide an analysis adhering to *Schwartz* and rejecting that provided by *Rashaw*. *Id*. at 439.

Notwithstanding the *Baker* decision, this Court should give consideration to the well-reasoned opinions of *Rashaw* and its progeny, and find that the six-year class is overbroad.

4. A Class Action Containing Numerous Judgment Debtors and Other Persons with No Claims is Hardly "Superior."

Under 52.08(b)(3) Weatherspoon also had to establish that a class action is the "superior" method to adjudicate the claims and defenses Weatherspoon seeks to put at issue here. Rule 52.08(b)(3)(B) explicitly directs the extent and nature of any litigation concerning the controversy already commenced by or against members of the class" must also be considered in determining whether a class action is "superior."

As GCAC argued in opposing class certification (A249-50), class action treatment is far from "superior" here, for the simple reason that, because of the prior litigation, most – more than 87% – of the members of the proposed classes have no viable or live claims against GCAC; most of them have unsatisfied judgments that GCAC could levy against them. Including these people in a class, in their thousands, and giving them class notices, etc., when they have no claims, would be to mislead these people in ways far more serious than anything GCAC might have done by any technical error in a consumer notice.

Most – 93% -- of the remaining fraction with possible claims owe more to GCAC than they can recover. (A695) Virtually all of the members of the two classes have no ability

to obtain net damages against GCAC if they win (as we assume here), but are exposed to the risk, amounting to a high likelihood, of personal liability to GCAC if they lose. If the section 408 and UCC claims lack legal merit, as GCAC believes they do, then all that will be left standing – against class members haled into the trial Court by Class Notice and the failure to opt out – will be GCAC's unsatisfied judgments and claims for the debt owing by the class members. This would be a high price to pay for being effectively made into defendants by mere Notice and failure to opt out, in a certified class that was grossly overbroad because of the trial court's failure to obey the command of Rule 52.08(b)(3)(B), and take into account the prior litigation.

II. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Circuit Court Abused its Discretion in Certifying Claims Without Established or Legitimate Basis -- that Section 408.553 Creates a *Per Se* Ban on the Accrual of Any Contract Interest on a Balance Owing by a Debtor After Default and Before Judgment – in that the Court Was Required on Class Certification to Determine the "Applicable Substantive Law" in Order to Assess Whether the Claims Met the Requirements of Rule 52.08.

A. Standard of Review.

As more fully stated in the Standard of Review to Point I, which is incorporated herein, a class certification order is reviewed under an abuse of discretion standard. *Vandyne*, 242 S.W.3d at 697. "A court abuses its discretion if the class certification is based

on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *McKeage*, 357 S.W.3d at 601. Legal errors are reviewed by this Court *de novo*. *Lucas*, 524 S.W.3d at 131.

B. The Trial Court Abused its Discretion in Certifying a Claim Asserting Weatherspoon's Baseless "*Per Se*" Ban on Interest Theory.

Instead of determining the applicable substantive law, the trial court granted class certification on a legal theory without established or legitimate basis: that Section 408.553 creates a *per se* ban on the accrual of any contract interest on a balance owing by a debtor after default and before judgment. Under this theory of Weatherspoon's, which the trial court erroneously believed it was prohibited from assessing, all of GCAC's Pre-Sale and Post-Sale notices become misleading or incorrect – and GCAC becomes subject to annihilating statutory damages multiplied five thousand-fold – if the notices contain any mention of interest, even if the notices contain the exact content required by the UCC, and even if they follow the suggested format of the sample Notice forms promulgated by GCAC's statutory regulator, the Missouri Division of Finance.

As shown below, Weatherspoon's "interest" theory is contradicted by the "applicable substantive law," including by the plain words of §408.553 itself; by the Motor Vehicle Time Sales Act, which provides for the accrual of interest at the contract rate on the unpaid balance of the loan; by the prejudgment interest statute, which provides the same; and by the Missouri regulator's sample notice form, which expressly includes post-default interest (A331). Nonetheless, the trial court erroneously accepted Weatherspoon's "interest" theory

without question, under the apparent belief that to examine it would be to venture into the merits. (A3). In fact, the trial court accepted Weatherspoon's argument that

> The question of law regarding whether GCAC violated § 408.553 by charging interest after default but before a judgment was obtained, is also a common question sufficient to establish commonality.

(Order granting certification) (A5).

This position would give the plaintiff license to obtain class certification of anything, every time, simply by making up any law it wanted and arguing that the court was forbidden to inquire into the merits of the imagined law, and the mere question concerning the validity of the invented theory presented the common issue requiring certification.

This was an abuse of discretion, as Missouri law requires the trial court on class certification to determine the elements of a claim with reference to established law, *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 881 (Mo. banc 2008) (looking on class certification to MAI jury instructions for elements of the "applicable substantive law" of nuisance), and not to accept unquestioningly theories put forward by the plaintiff in order to avoid having to show that the elements of an actual claim can meet the predominance requirement for certification. Only by making a determination of what the applicable law is can a court then conduct its inquiry into whether the issues are common or individual. *EQT Prod. Co. v. Adair*, 764 F.3d 347, 361 (4th Cir. 2014)("The district court abused its discretion by failing to resolve" [a legal issue that would determine whether commonality existed] prior to certification," and in instead ruling that the legal issue itself was a question "subject to a common resolution" that permitted class certification).

Had the trial court examined the actual elements of a claim for the overcharge of interest, as it was required to do, it would have been forced to conclude that the class claims devolve into thousands of individual accounting actions, resolvable by varying individual evidence only, and that no common issues predominate.

1. The Trial Abused Its Discretion in Failing to Determine the Applicable Law on Class Certification, in Order to Assess Whether the Evidence Needed to Resolve the Claims is Common or Individual.

Weatherspoon argued below, and the trial court accepted, that an assessment of the validity of plaintiff's "*per se*" interest theory on class certification would be an impermissible foray into the merits, and that the validity of the theory itself was the common issue justifying class certification. (A478, 486-87; A3, 5) On the contrary, an assessment of the interest "theory" was a necessary part of the class certification decision below, because the trial court was required under Rule 52.08 to determine the actual elements under the law of an overcharge of interest claim in order to assess whether the evidence required to resolve that claim was common or individual. No court on class certification is required to accept what the plaintiff says the legal elements of a claim are. This Court in *Green* did not accept the plaintiff's idea of what the elements of a nuisance claim are for purposes of class certification; it looked to the controlling Missouri case law and the MAI jury instructions for that. *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 881 (Mo. banc 2008). The trial court was required to make an independent determination of the elements of the "applicable substantive law" for each of Weatherspoon's claims, not to automatically accept Weatherspoon's "theories."

> Although the class certification decision is independent of the ultimate merits of the lawsuit, the applicable substantive law is relevant to a meaningful determination of the certification issues. *See Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. banc 2007) ('a court must understand the ... applicable substantive law to make a meaningful determination of the certification issues').

Green, 254 S.W.3d at 880, (analyzing MAI jury instructions to identify the elements of the claims under applicable Missouri law for class certification); *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. banc 2012) (looking to the law regarding contractual choice of law provisions in order to decide whether common or individual issues predominate); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."). If the rule were otherwise, and any theory had to be accepted, then a *per se* theory, sweeping away legal elements and individual issues, could always be asserted by class counsel. In that event, every proposed class would be certified, and the requirements of Rule 52.08 would be meaningless.

Hope v. Nissan North America, Inc., 353 S.W.3d 68, 91-92 (Mo. App. W.D. 2011) is directly on point. There the class plaintiff asserted a theory quite analogous to Weatherspoon's *per se* interest theory: that the purchase of one of defendant's vehicles, *ipso facto*, caused an economic loss and was a breach of implied warranty, needing no further factual inquiry. On class certification the Missouri Court of Appeals did not simply accept the plaintiff's theory. It looked in detail to the elements of breach of implied warranty under established Missouri law, rejected plaintiff's *ipso facto* theory as an incorrect statement of the law, and thereby concluded that "the action in reality becomes hundreds

or thousands of individual claims" for breach of warranty, "requiring individual determinations" of the actual elements (actual damage, causation, notification), and that predominance therefore was not established. 353 S.W.3d at 91-92. If Weatherspoon's position were correct, the *Hope* Court would have had to accept the plaintiff's *ipso facto* theory; but the Court did not do so.

2. Weatherspoon's *Per Se* Ban on Interest Theory is Without Basis in Law

Section 408.553 on its face provides no support for the theory that the appearance of an entry on a notice for interest violates 408.553. That section states:

> Upon default the lender shall be entitled to recover no more than **the amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment** together with interest thereafter at the simple interest equivalent of the rate provided in the contract.

R.S. Mo. § 408.553 (emphasis added).

By its plain terms, this provision does not suspend the accrual of contract interest after default. It limits the creditor's recovery to what it would receive if the debt had been paid off on the date of final judgment. The "amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment" would include (1) all the missed payments of interest and principal, with interest thereon at the contract rate to the date of judgment, together with (2) the remaining payments (of principal only) which absent default would not be yet due on the judgment date, but which are required to be paid early in order to prepay on that date. The section plainly does not provide that the debtor in default is rewarded by being relieved of the obligation to pay interest on past due amounts – a rule which would turn commercial practice upside down, reward and

encourage defaults (through which a debtor by its breach could unilaterally convert an interest-bearing loan into an interest-free loan), while punishing creditors and non-defaulting debtors who must make up in higher rates for the defaulter's windfall.

What section 408.553 does do is to forbid a creditor from accelerating on default the entire remaining amount owed on the contract – the principal *and the future interest* over the projected, but now truncated, duration of the loan – and then charging additional interest prior to judgment *on that amount*. In other words, a creditor may accelerate the entire principal, and charge interest on the contract payments that are in arrears at the time of judgment, but cannot also accelerate the entire finance charge that would have been paid on the loan over its normal life and charge interest on that.

Other Missouri law governing specifically what consumer lenders may charge on delinquent loan balances conclusively refutes the "per se" interest ban theory. Section 365.100 of the Motor Vehicle Time Sales Act ("MVTSA"), ("[I]nterest on delinquent payments"), expressly authorizes what it was claimed § 408.553 forbids: "if the contract so provides, the holder thereof may charge, finance, and collect: … (2) Interest on each delinquent payment at a rate which shall not exceed the highest lawful contract rate." GCAC's contract with Weatherspoon (A1019-1020) provides for the accrual of interest at the contract rate on the unpaid balance of the loan, as authorized by the MVTSA.

And other Missouri law also expressly provides for the accrual of interest after default, contrary to Weatherspoon's "theory." Section 408.020 ("When no rate of interest is agreed upon, nine percent allowed as legal interest"), states:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made.

The "interest" theory was implicitly rejected recently by the Missouri Appellate Court in *LVNV Funding, LLC v. Mavaega*, 527 S.W.3d 128, 140 (Mo. App. W.D. 2017), where it was held that under Missouri law a creditor "was entitled to continue assessing interest at the contract rate on [the debtor's] account" after default – a holding that would not have been possible if section 408.553 barred the charging of contract interest after default.

Finally, the statutory regulator of consumer lenders, the Missouri Division of Finance, agrees that interest can legally be charged after default and before judgment. The sample Post-Sale Notice, which it recommends that consumer lenders use, expressly provides that interest on the outstanding balance in default will continue to accrue before judgment:

> If the sale resulted in a deficiency balance interest will continue to accrue on that balance at the rate of $_____ per day until the loan is paid in full.

(A305) If the "per se" theory about §408.553 were correct, then the Missouri Division of Finance recommends that lenders violate Missouri law.

In response to all this, Weatherspoon put forward to the trial court only *dicta* from a concurrence in *Hollins v. Capital Sols. Investments I, Inc.*, 477 S.W.3d 19 (Mo. App. E.D. 2015), addressing as an aside a hypothetical argument about an unsecured payday loan for less than $500 with annual interest at 199%. As shown above, that interpretation in

concurring *dicta* is misplaced. In fact, notwithstanding *Hollins*, the identical 408.553 interest claim has been presented by Weatherspoon's counsel and rejected as a matter of law by Missouri trial courts (at least) five times in the last two years. *See Ally Financial, Inc. v. Van-Alst*, No.16CW-CV00314 (Circuit Court of Callaway County, July 17, 2017); *Ally Financial, Inc. v. Keyser*, No.16CA-CV00449-01 (Circuit Court of Cass County, July 3, 2017); *Ally Financial, Inc. v. Benitez*, No.1616-CV06878 (Circuit Court of Jackson County, at Independence, April 21, 2017); *1st Mid-America Credit Union v. Pollard*, No. 15CN-CV00141 (Circuit Court of Cole County, September 2, 2016); *Ally Financial, Inc. v. Buffington*, No. 16CM-AC00628 (Circuit Court of Camden County, September 15, 2017). (A1003-1016). (None of these decisions was appealed by class counsel, making this an issue that will very likely evade appeal if not addressed here).

The trial court had an obligation under Rule 52.08 to make an independent assessment of the law governing the putative class claims. The trial court should have examined the elements of an established, recognized legal claim, not an imaginary one. *Green*, 254 S.W.3d at 880, (analyzing MAI jury instructions to identify the elements of the claims under applicable Missouri law for class certification). By not doing so, the trial court abused its discretion.

3. In the Absence of the *Per Se* Ban on Interest Theory, the Interest Claims Devolve into Thousands of Individual Accounting Actions that Cannot be Certified.

In the absence of Weatherspoon's "interest is illegal *per se*" theory, claims for the alleged overcharge of interest – which Weatherspoon never bothered actually to plead or otherwise put forward -- would of necessity devolve into thousands of individual accounting

actions. *Hope*, 353 S.W.3d at 91-2. Each of these would necessarily include a determination of the interest terms, principal amount and date of the individual's consumer installment contract, the individual's account records, including specific payment dates and amounts, returned checks, the date of judgment, if any, etc., and a computation based on this individual evidence. This means that a court would have to go through the account aging records and more for each of thousands of plaintiff in order to resolve this issue, to which class certification will have added no advantages of common evidence. And because, as Weatherspoon's UCC claims depend on the supposed misstatement of the amount owing, due to the alleged improper accrual of interest (A74, 76, 85), all these claims would also involve individual inquiries, not resolvable at a stroke. The trail court should have properly assessed this claim and denied certification of it. *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 116-17 (Mo. App. W.D. 2012) (lack of predominance where court would have to review many documents to resolve class member claims); *Little*, 306 S.W.3d at 581 (Mo. App. E.D. 2010) (if evidence on a question varies from class member to class member no predominance).

III. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, because the Court Abused its Discretion in Certifying Right to Cure Notice Claims Against GCAC, in that Weatherspoon's pleading and evidence established that GCAC as an assignee is a stranger to the notices, that no basis for assignee liability was asserted or is available under Missouri law, and that therefore Weatherspoon

failed to meet the threshold requirement of asserting an injury traceable to the defendant, without which there is simply nothing to certify.

A. Standard of Review.

As more fully stated in the Standard of Review to Point I, which is incorporated herein, a class certification order is reviewed under an abuse of discretion standard. *Vandyne*, 242 S.W.3d at 697. "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *McKeage*, 357 S.W.3d at 601. Legal errors are reviewed by this Court *de novo*. *Lucas*, 524 S.W.3d at 131.

B. Weatherspoon's Well-Pleaded Complaint and Her own Evidence Established that GCAC Sent no Right to Cure Notices, but Became an Assignee After the Notices Were Sent by a Non-Party to this Suit.

The court below certified two classes (A10); Class 2 is also known as the "Right to Cure" Class. (A58-59, 79) In this claim, it is alleged that the language in the Right to Cure Notices Weatherspoon received (she received three for her multiple defaults) do not precisely track *verbatim* the language in section 408.554. (A1017) (Exhibit A to the Amended Petition) (A104-05, 120) (Exhibits 3 and 8 to the Motion).

Weatherspoon's own allegations and evidence on class certification established that GCAC did not send any Right to Cure Notices to Weatherspoon, or to anyone else in the class. The trial court certified a claim directed against the wrong person.

Weatherspoon's Right to Cure Notice (A1017), which she attaches to her Petition, shows on its face that Car Credit Acceptance Company, a separate entity and non-party to this law suit, sent the Notice – as Weatherspoon has known for years, and through four

iterations of her pleading. Two additional Right to Cure Notices sent to Weatherspoon for a prior default, which she attached to her Motion to Certify, also showed that they are not from GCAC, but are also from non-party Car Credit Acceptance Company. (A104-05, 120). This was corroborated by the assignment of Weatherspoon's paper from Car Credit Acceptance Company to GCAC, which assignment took place on May 18, 2012 – three weeks after the Right to Cure Notice was sent on April 27, 2012. (A106). GCAC was not the secured party at the time the alleged Right to Cure notice violations occurred, but became the assignee of this person after the fact. The other Right to Cure Notices in the record before the trial court on class certification are the same. (A125-28).

Weatherspoon's Right to Cure Notice from Car Credit Acceptance Company (A1017), as an exhibit to Weatherspoon's Amended Petition (A51), is incorporated into the allegations of her pleading. Rule 55.12 ("An exhibit to a pleading is a part thereof for all purposes."); *Suburban Business Products, Inc. v. T.E. Schmitt Co.*, 796 S.W.2d 77, 78-79 (Mo. App. E.D. 1990) (finding that no claim had been asserted against one defendant when the contract attached as an exhibit to the petition showed defendant was not a party liable for the transaction); *Brewer v. Cosgrove*, 498 S.W.3d 837, 843 (Mo. App. E.D. 2016) (considering contract attached as exhibit to petition, and finding petition sufficient where the contract did not "contradict" the other allegations in the petition). Citing *Elsea v. U.S. Engineering Co.*, 463 S.W.3d 409, 413 (Mo. App. W.D. 2015), Weatherspoon argued below (A478), that the trial court must accept such allegations as true on class certification.

In his deposition, GCAC's Controller, Joseph Burris, explained what is apparent from the Notices themselves: they were all sent by Car Credit Acceptance Company, which

was the secured creditor at the time of default. Burris further testified that GCAC received by assignment for value the security interest at issue *after* the Right to Cure Notice (also referred to as a Notice of Default, or NOD) was sent to the debtor by Car Credit Acceptance Company. Weatherspoon's counsel questioned him specifically about Weatherspoon's Right to Cure Notice (A120, 1017) (referred to as Dep. Ex. 3; also Ex. 8 to the Motion), as well as standard procedures applicable to any class member:

Q. Do you know if this document that we're looking at right now, which is Exhibit 3, Page 1, was ever revised to include the language as I read it?
A. I don't know.
Q. Okay. Did GCAC send out an NOD-1 and an NOD-2 to every consumer before it would repossess a car that was in default?
A. No.
Q. No? When would it not send out either NOD-1 or NOD-2 before it repossessed the car, assuming it wasn't voluntarily turned in?
A. GCAC didn't send this notice.
Q. Who sent this notice?
A. The form says Car Credit Acceptance Company.
Q. Okay. So at the time that this notice of default is sent out, is the paper not yet assigned to GCAC?
A. That's correct.
Q. Okay. Did GCAC send out -- not this notice but did they send out notices of default, NOD-1s, NOD-2s, GCAC, not Car Credit Acceptance Company, but GCAC?
A. That would not have been our standard procedure.
Q. Do you know if they ever did while you were there?
A. Ever is a long time. I have no recollection of that occurring.

(A281) (Dep. tr. 42:12 to 43:16)

Burris' unrebutted testimony is corroborated not only by the Right to Cure Notices themselves, which do not make any mention whatsoever of GCAC, but also by the assignment of Weatherspoon's paper from Car Credit Acceptance Company to GCAC, which assignment took place on May 18, 2012, *weeks after* the Right to Cure Notices were

sent by Car Credit Acceptance Company , one day after the Cure Date stated in the April 27, 2012 "Right to Cure" Notice had elapsed, and the day before GCAC sent the Pre-Sale Notice for Weatherspoon's vehicle. (A106).

Weatherspoon's unsupported assertion, in its Motion (A73) that somehow "GCAC mailed Weatherspoon one form right to cure notice" is contrary to the allegations in the Amended Petition and its incorporated exhibits, is contradicted by the undisputed evidence of GCAC's Controller, and flies in the face of the Assignment and the Notice itself. GCAC did not send any Right to Cure Notices to Weatherspoon, or to anyone else.

C. Under Missouri Common Law, the UCC and Section 408, GCAC as an Assignee Cannot be Held Derivatively Liable for the Acts of the Assignor.

Under Missouri law GCAC as an assignee cannot be held derivatively liable for the acts of the assignor, and Weatherspoon made no attempt to assert or allege a basis for assignee liability in her pleading, her Motion, or the briefing on class certification. None is available here. The Missouri UCC's rules regarding successor liability of assignees of security interests make clear that Weatherspoon cannot obtain affirmative recovery from GCAC arising from the Right to Cure Notices that were sent by the assignor before the assignment took place:

> (a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
>
> > (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

> (2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.
>
> **(b) Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.**
>
> (c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.
>
> (d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

400.9-404. Rights acquired by assignee; claims and defenses against assignee (emphasis added).

> The official Comment, which Missouri also enacted, explains (emphasis added):
>
> 3. Limitation on Affirmative Claims. Subsection (b) is new. It limits the claim that the account debtor may assert against an assignee. **Borrowing from Section 3-305(a)(3) and cases construing former Section 9-318, subsection (b) generally does not afford the account debtor the right to an affirmative recovery from an assignee.**[4]

Nor is there any common law of assignee liability in Missouri. *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477 (Mo. App. W.D. 2010) (holding that the UCC does not provide for liability of an assignee for the assignor's wrongdoing, and that Missouri

4"Both state and federal courts have uniformly construed this provision . . . not to create an affirmative right of action by an account debtor against an assignee." *Novartis Animal Health US, Inc. v. Earle Palmer Brown, LLC*, 424 F. Supp. 2d 1358, 1363 (N.D. Ga. 2006) (citing state and federal decisions from multiple jurisdictions).

common law does not alter that). And section 408 also does nothing to change the common law rule of no liability:

> Plaintiffs also claim Assignee Defendants … 'stand in the shoes' of the assignor, Option One, and thus are derivatively liable for its MSMLA [part of Section 408] violations. There is no merit to this argument. Although an assignee is said to 'step into the shoes' of the assignor, this generally means an assignee can acquire no greater right than the assignor held against the obligor. But an assignment of the right to collect a debt does not mean 'that the assignee is subject to all of an obligor's causes of action against the assignor.' Nothing in the MSMLA changed this aspect of the common law.

Michael D. v. GMAC Mortg., LLC, 763 F. Supp.2d 1091, 1109-10 (W.D. Mo. 2011).

In the absence of an imputation from assignor to assignee – which Missouri law does not allow – Weatherspoon's well-pleaded Petition has alleged no "Right to Cure" Notice claims for affirmative relief of any kind traceable to GCAC arising out of the Right to Cure Notices, any more than she has alleged such claims against any other stranger to the Notices.

In argument below, Weatherspoon said (A463) that somehow the Right to Cure Notice claim is not dependent on the Right to Cure Notice. This was contradicted by the operative allegations of the Complaint itself. For example: "GCAC either failed to send Right to Cure Notices or mailed defective Right to Cure Notices to Plaintiff"; "GCAC mailed the same or substantially similar right to cure notice to each Missouri Right to Cure Class member that it mailed to Plaintiff. Each right to cure notice failed to provide the exact language required by § 408.554." (A54-55, 59) (Complaint, ¶¶ 23-28, 59) Of course the Right to Cure Notice claim is wholly dependent on the sending of an allegedly faulty Right to Cure Notice; it arises from that act and does not exist in the absence of that act. (See 400.9-503: "a secured party has on default the right to take possession of the collateral.").

Weatherspoon sought below to apply the prohibitions of section 408.555 to the assignee GCAC, by reason of the (alleged) fact that the assignor, Car Credit Acceptance Company, sent Weatherspoon a purportedly defective Right to Cure Notice. Seeking to make GCAC liable for the alleged statutory violation of the assignor is precisely what assignee liability is. Weatherspoon tried to split hairs by claiming it is somehow not seeking liability from GCAC for the Right to Cure Notice, but Weatherspoon actually seeks to make GCAC liable for the full extent of a(n alleged) Right to Cure Notice claim, notwithstanding that Missouri law governing assignee liability leaves all that liability with the assignor.

D. The Trial Court Abused Its Discretion in Certifying Claims that are Not Traceable to GCAC, the Sole Defendant.

In her pleading and in the motion to certify Weatherspoon sought to represent persons "who had the possession of their collateral taken by GCAC involuntarily," and "who GCAC failed to send a right to cure notice" or "who GCAC mailed a right to cure notice that fails to state" the language from 408.554. (A58-59, 79) This proposed class definition was rendered nonsensical by asserting a claim not traceable to GCAC. Weatherspoon's proposed Right to Cure Class definition consisted of "all persons" who [1] GCAC failed to send a right to cure notice or [2] "who GCAC mailed a right to cure notice that fails to state" the language from § 408.554. But since Weatherspoon's own Complaint and evidence shows GCAC sent no Right to Cure Notices, this definition was absurd. Under it, the class would have been either: [1] All persons in Missouri; or [2] No persons at all.

During the briefing, Weatherspoon receded to a class definition that makes no mention at all of the notices at issue, or indeed of any of the substantive claims. The Right

to Cure Class (now denominated Class 2) consists of persons who, *inter alia*, had their vehicles involuntarily taken (*i.e.*, repossessed) by GCAC, as repossession is a required element of a Right to Cure Notice claim. (§ 408.554.1 and § 408.555.2)

However modified, such a class still is impermissible, because to certify a class of claimants who, by definition, have a grievance against another entity, but none traceable to GCAC, would be to violate this Court's prohibition on classes containing large numbers of people with "no grievance*.*" *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 862 (Mo. 2008). Here the Right to Cure Class *would consist entirely* of such persons.

Weatherspoon's well-pleaded Amended Petition does not allege a Right to Cure Notice claim on her own or the class's behalf that is traceable to GCAC; the evidence presented at the hearing, including Weatherspoon's own evidence, is to the same effect. Because Weatherspoon failed to assert a traceable injury to GCAC with respect to the Right to Cure Notices and section 408, the trial court should have denied certification of those claims. In a class action some link to the defendant is a "threshold requirement," without which there is simply nothing to certify:

> Appellants have not asserted a traceable injury in fact against any specific City. Appellants have not met the threshold requirement of stating a claim to even reach the issue of class certification.

Gerke v. City of Kansas City, 493 S.W.3d 433, 439 (Mo. App. W.D. 2016).

Nor does the fact that this is a class action change that. "That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v.*

Robins, 136 S. Ct. 1540, 1547 (2016) (dismissing class action where class did not assert any injury in fact); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 573–74 (Mo. Ct. App. 2017), *reh'g and/or transfer denied* (Sept. 5, 2017), *transfer denied* (Nov. 21, 2017) (applying Missouri principles of standing and justiciability to follow *Spokeo* and dismiss class action where named plaintiff's allegations revealed it lacked standing to bring the claim). *Cf. Schweich v. Nixon*, 408 S.W.3d 769, 774 n.5 (Mo. banc 2013) ("[S]tanding is a prerequisite to the court's authority to address substantive issues and so must be addressed before all other issues.").

By granting class certification of these claims plainly directed against another entity not even a party to the case, the trial court abused its discretion. "If the complaint is insufficient to justify court action, it is 'fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation' in addition to being 'a waste of judicial resources and taxpayer money.' " *State ex rel. Church & Dwight Co., Inc. v. Collins*, 543 S.W.3d 22, 26 (Mo. banc 2018) (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009)).

IV. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, because the Court Abused its Discretion in Certifying any Claims Against GCAC, in that Weatherspoon failed to establish that common issues substantially predominate over individual issues, and GCAC showed that individual issues swamp any common issues.

A. Standard of Review.

As more fully stated in the Standard of Review to Point I, which is incorporated herein, a class certification order is reviewed under an abuse of discretion standard. *Vandyne*, 242 S.W.3d at 697. "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *McKeage*, 357 S.W.3d at 601. Legal errors are reviewed by this Court *de novo*. *Lucas*, 524 S.W.3d at 131.

B. Common Issues Were Not Shown to Substantially Predominate over Individual Issues.

Weatherspoon presented the following claims for certification: a claim for UCC statutory damages under §9-625 alleging that GCAC's Pre-Sale Notices and Post-Sale Notices did not comply with the content requirements of §§9-610 to 9-614 and §9-616; a claim alleging GCAC charged interest after default and before judgment in alleged violation of §408.553; and a claim alleging GCAC's Right to Cure Notices failed to comply with §§408.554 and 408.555. (A83-85).

Each claim which is sought to be certified must independently meet the statutory requirements. "For 52.08(b)(3) to be satisfied under each cause of action with the putative class definition, common issues must substantially predominate over individual ones as to each cause of action." *Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 81 (Mo. App. W.D. 2011) (for the same class, separately examining each claim, and certifying an MMPA claim, because common evidence could establish liability, while denying certification of claims for breach of express and implied warranty, because these would involve individual

issues of knowledge, reliance, notice and causation, and the individual issues would predominate).

"'Predominance'...requires that common issues *substantially* predominate over individual ones." *Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 381 (Mo. App. E.D. 2005) (emphasis added). To meet her burden Weatherspoon needed to not only identify the issues of law and fact, but also to show, by comparison of the evidence needed to prove the common issues with the evidence needed to prove the individual issues, that the common issues predominate. *Smith v. Missouri H'ways & Transp. Com'n*, 372 S.W.3d 90, 94 (Mo. App. S.D. 2012). "To classify an issue as common or individual, a court looks to the nature of the evidence required to show the allegations of the petition…if the evidence on the question varies from member to member, then it is an individual issue." *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 581 (Mo. App. E.D. 2010).

Weatherspoon failed to meet these requirements, and the trial court's conclusion that they were met was clearly erroneous.

1. Pre-Sale and Post-Sale Notice Claims under the UCC.

Weatherspoon moved to certify claims regarding the Pre-Sale Notices (sent after repossession and before sale), that are governed by Missouri UCC §§ 400.9-610 to 400.9-614, and claims regarding the Post-Sale Notices (sent after sale), that are governed by Missouri UCC §400.9-616. Weatherspoon stated her Pre-sale Notice claims as follows (A72-73):

> The presale notice said the vehicle would be sold at a private sale, was not authenticated, was misleading because GCAC wrongfully accelerated and took possession of the property, and limited redemption payments to cash.

Weatherspoon stated her Post-Sale Notice claims as follows (A83):

> Under § 9-616, a post-sale notice must state the amount of the surplus or deficiency, provide a list of information in a specified order, and state future debits, credits, charges, and other expenses could affect the balance of the surplus or deficiency.

Weatherspoon seeks statutory damages under UCC § 9-625(c) for these violations.

The trial court made erroneous rulings with respect to the interrelated questions of commonality and predominance. The commonality requirement requires "there are questions of law or fact common to the class." The predominance requirement:

> explicitly requires a comparison between common issues and individual issues in order to ascertain whether the common issues predominate, and thus requires the Court to identify the common issues and the individual issues presented by the case. The determination of whether a question is a common or an individual question ... is based on the nature of the evidence that will suffice to resolve the question.

Smith v. Missouri H'ways & Transp. Com'n, 372 S.W.3d 90, 94 (Mo. App. S.D. 2012).

> To classify an issue as common or individual, a court looks to the nature of the evidence required to show the allegations of the petition. If the same evidence on a given question will suffice for each class member, then it is common; if the evidence on the question varies from member to member, then it is an individual issue.

Karen S. Little, LLC. v. Drury Inns, Inc., 306 S.W.3d 577, 581 (Mo. App. E.D. 2010).

> As the United States Supreme Court noted in Wal–Mart Stores, Inc. v. Dukes, —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), what really matters in class certification is not the raising of common questions, but the ability of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Id. at 2551.

Smith, 372 S.W.3d at 94; *Elsea*, 463 S.W.3d at 419.

Weatherspoon put on virtually no evidence. She did not testify, by affidavit or otherwise. She presented no other witnesses. Many of the points necessary to satisfy Rule 52.08 were asserted as bare allegations in the briefing alone, but are contradicted – or refuted

– by Weatherspoon's own well-pleaded complaint, by the Notices themselves and other documents attached to Weatherspoon's Petition or motion briefing.

For example, Weatherspoon failed to allege or prove facts showing that the alleged defects in the Pre-sale Notices sent by GCAC – failure to authenticate, restrictive payment language, misstating the method of disposition of collateral – were the result of any uniform policy or practice. Weatherspoon has had possession of thousands of GCAC Pre-sale Notices for years, yet put no evidence forward to show uniformity with respect to authentication or payment language. The actual Pre-sale Notices in evidence – including Notices put in evidence by plaintiff – are not uniform, but differ from each other in material ways directly related to Weatherspoon's claims. (A707, A708, A709, A710). *See O'Shaughnessy v. Cypress Media, L.L.C.*, 2015 WL 4197789, *6-7 (W.D. Mo. 2015) (denying class certification where there is "different language at different times describing these terms. There are material differences among subscribers that make any determination of liability issues through common evidence impossible.").

With respect to her claim regarding disposition of collateral, Weatherspoon stated only that "Weatherspoon believes, and is discovering" facts that might establish a uniform method of disposition (A493). After more than four years of litigation, this was not enough for certification of this claim to be granted by the trial court. The "trial court's certification must be supported by the record." *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d at 163-64. It was not.

As with the Pre-Sale Notices, no showing was made that the Post-Sale Notices themselves are uniform and that liability can be established without recourse to evidence

from outside the notices that varies from person to person. Weatherspoon's claim that the Notice failed to correctly "state the amount of the surplus or deficiency" is not resolvable by looking at face of the notice, but would entail numerous accounting inquiries particular to each individual plaintiff. *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 116-17 (Mo. App. W.D. 2012) (rejecting plaintiff's argument that resolution of the claims "simply requires interpretation of a handful of standardized forms," "because the court would have to examine various instruments with respect to each individual class member.").

Simply put, Weatherspoon failed to do below what was done in the cases on which she relied: provide evidence of uniformity that would show that class-wide answers were likely, providing justification for class treatment. *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 227 (Mo. App. W.D. 2007) ("Evidence introduced during the class certification hearing showed that store managers were required to reduce payroll, *i.e.*, staffing, by a certain percentage from previous year levels or face discipline" supported certification of claims that "hourly employees were not paid what they should have been paid because of company-wide practices and policies that require or result in systematic understaffing."); *State ex rel. Amer. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 485 (Mo. banc 2003) (certifying a class of Missouri insureds whose vehicle repairs were uniformly determined by a computer program whose "software systematically excludes from estimates certain repairs deemed necessary by industry standards."); *compare Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010) (class certification inappropriate where record did not show that defendant "adopt[ed] a uniform approach with respect to its representation of its interest-crediting policies.").

Contrary to the trial court's ruling, similar questions do not suffice because "dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550-51 (2011) (citations omitted) (emphasis added). Further, these dissimilarities require individualized proof. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005) ("just 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.").

Absent uniformity, the necessity for thousands of mini-trials on individual issues means that individual issues on the UCC claims predominate over any common issues, making certification of these claims improper and in any event unworkable as a matter of trial management. Weatherspoon simply failed to show that common issues predominate. Because class certification will not generate common answers to resolve the UCC claims, certification of these claims should have been denied.

Weatherspoon's reliance on a set of "form notices" alone was not enough when the forms vary from person to person, and the actual claims cannot be resolved by reference to what is in a notice alone, but only by a comparison of what is in the notice with what happened, several thousand different times, out in different places in the real world, over several years. Weatherspoon utterly failed to make a showing of commonality and predominance, as she was required to do, making the trial court's grant of certification clearly erroneous.

2. Right to Cure Notice Claim under Section 408.

Weatherspoon claimed in her motion that GCAC violated §§ 408.554 and 408.555 by failing to send any Right to Cure Notices or by sending deficient notices to the class members. (A72, A73, A74-75, A83, and A85). As shown above, Weatherspoon's well-pleaded Petition and the notices themselves that she put into evidence refute this, in that the Notices were required to be sent and were sent by another entity, not party to this action, and that GCAC was a subsequent assignee who is a stranger to this claim. In addition, this claim fails to meet the requirements of commonality and predominance.

Weatherspoon failed to discuss the elements, but a Right to Cure notice claim has the following elements, each of which requires proof by each individual debtor that varies from class member to class member: (1) the debtor's collateral was not voluntarily surrendered (§ 408.554.1 and § 408.555.2); (2) this was the debtor's first default on the transaction (§ 408.555.3); and (3) the default was only for failure to pay the required payment (§ 408.555.1). In addition, (4) the defect in the notice must cause actual damages (§ 408.562) because (5) it prevented the debtor from curing when the debtor attempted (and presumably had the means) to do so. *Burrill v. First Nat. Bank of Shawnee Mission, N.A.*, 668 S.W.2d 116, 117-18 (Mo. App. W.D. 1984) (plaintiff had no claim under §408.554 for a defect in Right to Cure notice, as it "was not a material error such as to mislead plaintiffs…. Plaintiffs make no attempt to show any prejudice to them (they did not pay off the indebtedness or any part thereof) by any claimed deficiencies in the notice.").

"If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an

individual question." *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 224 (Mo. App. W.D. 2007). The individualized evidence needed to prove each of these elements for each of the thousands of class members is staggering. For each class member, the court would need to examine many documents – transaction histories, payment data, account ledgers, bank records, and correspondence – in order to establish that each of the thousands of class members did not voluntarily surrender, abandon or trade in their collateral, had not previously defaulted on the transaction, defaulted purely for failure to pay and not for failure to maintain insurance or other contractual violations, and suffered actual damages from the allegedly deficient notices. Moreover, numerous depositions, examinations, affidavits, and testimony, would have to be conducted in order to determine if each class member not only intended to cure their default, but actually had the means and ability to do so.

3. Overcharge of Interest Claim.

Weatherspoon's "theory" concerning § 408.553, accepted by the trial court, was that it forbids outright the accrual of any contract interest once a borrower defaults. As shown above, this was an erroneous statement of the law, and hence of the elements and evidence needed to sustain a claim for overcharge of interest.

In the absence of the "interest is illegal *per se*" theory, claims for the alleged overcharge of interest would of necessarily devolve into individual accounting actions, that would include determination of the interest terms, principal amount and date of the individual's consumer installment contract, the individual's account records, including specific payment dates and amounts, returned checks, the date of judgment, if any, and a computation based on this individual evidence.

V. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Court Abused its Discretion in Certifying Right to Cure Notice Claims Against GCAC in that Weatherspoon, the Sole Class Representative, Admits She Does Not Possess Such Claims and Therefore is not a Member of the Classes She Seeks to Represent.

A. Standard of Review.

As more fully stated in the Standard of Review to Point I, which is incorporated herein, a class certification order is reviewed under an abuse of discretion standard. *Vandyne*, 242 S.W.3d at 697. "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *McKeage*, 357 S.W.3d at 601. Legal errors are reviewed by this Court *de novo*. *Lucas*, 524 S.W.3d at 131.

B. Weatherspoon is Not a Member of the Right to Cure Class (Class 2).

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011) (citations omitted).

In deciding whether class certification is warranted, then, this Court is required to determine whether Weatherspoon is in fact a member of the class she seeks to represent.

General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982) ("We have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). The rule in Missouri is the same; Supreme Court Rule 52.08 states (emphasis added):

> (a) Prerequisites to a Class Action. One or more *members of a class may sue* or be sued as representative parties on behalf of all *only if* . . . (3) *the claims* or defenses *of the representative parties are typical* of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

A class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 86, n.10 (Mo. banc 1989). *Gerke*, 493 S.W.3d at 439-400 ("[t]he named plaintiffs must be able to assert an injury in fact in the suit against the [defendant]" and cannot "'piggyback' on the injuries of the class.") (quoting *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 491 (Mo. App. W.D. 2010)). This is a threshold issue. *Koehr v. Emmons*, 55 S.W.3d 859, 864 (Mo. App. E.D. 2001) (class was wrongly certified where sole representative had no live claim).

As shown by the pleadings and evidence submitted on class certification (including Weatherspoon's written answers to requests to admit submitted to a court, her oral representations to a judge in open court, and her sworn deposition testimony in this case), Weatherspoon has not met and cannot meet this threshold requirement. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (affirming the denial of class certification where evidentiary admissions by the class representative established on class certification that her "claim is subject to certain specific factual defenses that undermine typicality.") (repeatedly

cited and followed by this Court for the issue of class overbreadth in *Nixon,* 249 S.W.3d at 861-64).

A plaintiff must assert and establish three elements in order to be entitled to receive a Right to Cure Notice: (1) the collateral was not voluntarily surrendered; (2) there had been no prior default with respect to the same collateral; and (3) the default was "solely by reason of a failure to pay," and not for any other or additional reasons. Weatherspoon fails each of these threshold hurdles for a prima facie case, and so does not even get to the stage of examining her Notice for any alleged technical defects in wording. She was not entitled to any such Notice, and can have no claim. In fact, Weatherspoon isn't even within the definition of the proposed Right to Cure Class (Class 2), which consists of: "All persons within Class 1 who had the possession of their collateral taken by GCAC involuntarily." (A10).

In addition, under Missouri case law, Weatherspoon has no claim under 408.554 and 408.555 because she admits she made no attempt to pay off any part of the amounts due, and had no intention to cure. *Burrill v. First Nat. Bank of Shawnee Mission, N.A.*, 668 S.W.2d 116, 117-18 (Mo. App. W.D. 1984).

1. Weatherspoon was not entitled to a "Right to Cure" Notice and is not within the definition of the Right to Cure Class, because she admits she voluntarily surrendered her car.

Section 408.554 states the notice "may" be sent if the debtor "has not voluntarily surrendered possession of the collateral." And section 408.555.2 provides an express exemption from the notice requirement of section 408.555.1 if the debtor has voluntarily surrendered the car:

> This section does not prohibit a borrower from voluntarily surrendering possession of property which is collateral and the lender from thereafter accelerating maturity of the loan and enforcing the note or loan and his security interest in the property at any time after default.

408.555.2.

Sections 408.554 and 408.555 carefully distinguish repossession from voluntary surrender. These sections, and the entitlement to a right to cure notice, apply only in the case of repossession, and not in the case of voluntary surrender. (This makes perfect sense, since a "right to cure" notice is given to inform the defaulting debtor that it must cure in order to avoid involuntarily losing possession of the vehicle; if the debtor voluntarily surrenders the vehicle, the debtor clearly has elected not to keep possession of the vehicle, and needs no such notice).

Weatherspoon has repeatedly admitted under oath that her vehicle wasn't repossessed, but that she "voluntarily surrendered" it. Weatherspoon isn't even within the definition of the proposed Right to Cure Class, which consists of all persons ". . . who had the possession of their collateral taken by GCAC involuntarily." (A10).

First, in a written response to a Request for Admission that Weatherspoon filed in court in prior litigation with GCAC, Weatherspoon admits that she voluntarily abandoned and surrendered her vehicle, leaving the car with GCAC's service contractor and telling GCAC "they could have it." (A393) (Statement, at page 3, of Helena Weatherspoon, dated October 29, 2012, filed by her in response to Requests to Admit, in *GCAC v. Weatherspoon*, Case No. 12SL-AC24217).

Second, Weatherspoon stated in open court to Judge Sandra Farragut-Hemphill in that same litigation:

> "They did not actually repossess the car from me. I took it and dropped it off at their Firestone place when the motor ran out."

(A399) (Court Hearing Transcript, December 3, 2012, tr. 17:17-19).

Third, Weatherspoon reiterated this admission in her deposition in this case (A436) (Weatherspoon Dep., tr. 130:6-15):

> Q: You voluntarily surrendered your vehicle in May of 2012 at Firestone; is that correct?
> MR. DAESCH: I object to the question. It mischaracterizes her testimony. Calls for a conclusion and she's already asked and answered that question.
> Q: You can answer it.
> MR. DAESCH: If you understand the question.
> Q: I'm sorry?
> A: Yes.

As Weatherspoon voluntarily abandoned or surrendered her car, she has no claim against GCAC under 408.554 or 408.555 arising out of a Right to Cure Notice that the law says she is not entitled to receive. *See Mayhugh v. Bill Allen Chevrolet*, 371 F. Supp. 1, 6 (W.D. Mo. 1973) (purchaser of vehicle waived any claim to damages for alleged wrongful repossession when it voluntarily abandoned and returned the vehicle).

2. Weatherspoon was not entitled to a "Right to Cure" Notice because she had previously defaulted on the same credit transaction for the same collateral.

Section 408.555.3 expressly provides that no "right to cure" notice needs to be sent if the debtor has defaulted previously, because such a defaulting debtor has no right to cure:

> "No lender is bound by the provisions of subsection 1 of this section if default by the same borrower in connection with the same credit transaction with the same lender has occurred twice notwithstanding the cure of such defaults…."

As Weatherspoon admits (A72-73) Weatherspoon defaulted twice, and therefore had no right to cure, and was entitled to no right to cure notice, compliant with 408.554's wording or otherwise.

3. Weatherspoon was not entitled to a "Right to Cure" Notice because her default was not "solely by reason of a failure to pay," but was also because she had not maintained insurance on the vehicle.

Section 408.555.1 expressly requires that a Right to Cure Notice be sent only "after a default consisting only of the borrower's failure to make a required payment." Weatherspoon's default was not based solely upon her failure to make a required payment on her loan. On March 19, 2012 – a month before she stopped making payments on April 17, 2012 – Weatherspoon defaulted for her failure to maintain insurance on her vehicle, thus imperiling GCAC's collateral. (A440) and (A437) (Weatherspoon dep tr. 134:13 to 136:21). Weatherspoon's retail installment contract expressly states that failure to maintain insurance constitutes a default, (A329) (Weatherspoon Dep. Ex. 2, Par. F.), and Weatherspoon understood this requirement. (A424) (Weatherspoon dep.tr. 69:13-23).

By the plain terms of 408.555, then, Weatherspoon was not entitled to receive a Right to Cure Notice, has no Right to Cure Notice claim, is not within the class definition ("persons … who had the possession of their collateral taken by GCAC involuntarily") and cannot represent a class of such claimants.

4. Weatherspoon has no claim under section 408 because she admits she had no intention to cure her default and never attempted to do so.

Weatherspoon's pleadings and the evidence adduced on class certification establish that she had no intention to cure and never made attempt to do so. Unlike the consumer provisions of the UCC, violation of 408.554 and 408.555 results only in liability for "actual damages." R.S. Mo. 408.562 ("Damages recoverable for violation"). The Missouri Appellate Court has held that plaintiff debtor had no claim for actual damages under section 408.555 where the alleged deficiencies in the default notice did not prejudice plaintiff, as plaintiff in default made no attempt to pay off any part of the amounts due. *Burrill v. First Nat. Bank of Shawnee Mission, N.A.*, 668 S.W.2d 116, 117-18 (Mo. App. W.D. 1984) (defect in notice "was not a material error such as to mislead plaintiffs…. Plaintiffs make no attempt to show any prejudice to them (they did not pay off the indebtedness or any part thereof) by any claimed deficiencies in the notice of default."). Weatherspoon has admitted under oath that she stopped making payments, and that she had no intention to redeem after her default (A1083-84) (Weatherspoon Dep. tr. 120:11 to 121:3). As a matter of law, then, Weatherspoon has no claim for actual damages from any purported deficiency in the language of GCAC's Right to Cure Notice, and is not part of the Right to Cure Class.

Finally, as shown above, at Point III, and as her Notice states on its face, Weatherspoon received her Notice from Car Credit Acceptance Company, a non-party to this action. She has no claim against GCAC. She is not a member of the class, as she possesses no active claims, and so she fails to meet the basic requirements of 52.08(3) and

(4) as a matter of law. It was therefore an abuse of discretion to certify the Right to Cure Class (Class 2) with Weatherspoon as its sole representative.

> "To act as a class representative, a named plaintiff must be a member of the class [she] seeks to represent. If the named plaintiff fails to satisfy this threshold requirement, then a certifiable class does not exist."

Jameson v. State Farm Mut. Auto. Ins. Co., 871 F. Supp.2d 862, 872 (W.D. Mo. 2012) (plaintiff without an active claim cannot represent a certifiable class); *Harris*, 766 S.W.2d at 86 (Mo. banc 1989) ("[O]ne who cannot assert a claim individually cannot personally assert the same claim on behalf of the class."); *Chorosevic v. MetLife Choices*, 600 F.3d 934, 948 (8th Cir. 2010) ("[w]ithout a class representative, the putative class cannot be certified.").

VI. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, because the Court Abused its Discretion in Certifying Any Claims Against GCAC in that Weatherspoon, the Sole Class Representative, can neither win nor lose a dollar, is moot, and so has no stake or interest in the outcome of the litigation.

A. Standard of Review.

As more fully stated in the Standard of Review to Point I, which is incorporated herein, a class certification order is reviewed under an abuse of discretion standard. *Vandyne*, 242 S.W.3d at 697. "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for

certifying the class." *McKeage*, 357 S.W.3d at 601. Legal errors are reviewed by this Court *de novo*. *Lucas*, 524 S.W.3d at 131.

B. Weatherspoon Has No Stake or Interest in the Outcome of the Case.

In deciding whether class certification is warranted, this Court is required to determine whether Weatherspoon is in fact a member of the class she seeks to represent. Rule 52.08(a)(3). A class representative "must be part of the class and possess the same interest and suffer the same injury as the class members…. [O]ne who cannot assert a claim individually cannot personally assert the same claim on behalf of the class." *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 86 (Mo. banc 1989); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011).

Weatherspoon does not possess the same interest as the class, as her own action is moot, in that it makes no difference whatever whether she wins or loses her claims. Either way, not a penny will change hands between GCAC and Weatherspoon. "A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." *Humane Society of United States v. State*, 405 S.W.3d 532, 538 (Mo. banc 2013). As Weatherspoon has no actual stake in the outcome of this lawsuit, she is ineligible to be class representative. *Harris*, 766 S.W.2d at 86.

First, GCAC is not be entitled to collect an affirmative damage award against Weatherspoon. GCAC has no prior judgment against Weatherspoon, and its claim against her for a deficiency is time-barred, having lapsed on April 27, 2016, four years after Weatherspoon was declared to be in default. *D.A.N. Joint Venture, III v. Clark*, 218 S.W.3d

455, 458-60 (Mo. App. W.D. 2006) ("[A] deficiency action . . . is properly governed by the four-year period of limitation set out in section 400.2–275." And the four year period began to run …when the loan was first declared in default by the finance company that subsequently repossessed the car."). So Weatherspoon can lose nothing.

Nor can she win anything. The maximum amount that Weatherspoon could recover if successful on her claims is exceeded by the amount of debt owing by Weatherspoon to GCAC and available for set-off or recoupment against her damages. As GCAC's forensic accounting expert showed without contradiction, under UCC 9-625(c)(2), the statutory damages (derived from (1) the total finance charge and (2) the cash price of the vehicle, which are both on the face of her contract), which are possibly available to Weatherspoon if successful on the merits, is $9,688. Another $500 for a possible violation of 9-616 might be obtainable. But the debt she owes GCAC is more than $28,137, and it continues to grow at the contract rate of interest. (A456-57 and A688-704).

Assuming for argument's sake that Weatherspoon could prevail on one or more of her claims and be entitled to statutory damages (which may only be awarded once)[5], her claim would be reduced to zero by Offset and/or Recoupment of the debt she owes to GCAC.

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[5]The UCC, 400.9-628(d), makes clear "[a] secured party is not liable under section 400.9-625(c)(2) more than once with respect to any one secured obligation." The Official Comment to UCC 9-625, enacted by Missouri along with the section, also makes clear that statutory damages under 9-625(c)(2) can only be levied once, no matter how many violations: "A secured party is not liable for statutory damages under this subsection ["Minimum Damages in Consumer-Goods Transactions. Subsection (c)(2)"] more than once with respect to any one secured obligation." (400.9-625, Official Comment 4).

The reason for this is that, under well-settled Missouri law, GCAC is entitled to offset the debt owing to it against those damages. This is the case even though Missouri's absolute bar rule prevents the affirmative collection of a deficiency judgment when the creditor fails to comply with the UCC notice provisions. *Chemical Sales Co., Inc. v. Diamond Chemical Co., Inc.*, 766 F.2d 364, 369-70 (8th Cir. 1985) (under Missouri law creditor is entitled to offset debtor's deficiency against damages claimed against the creditor by debtor for improper notice and disposition of the collateral, notwithstanding the absolute bar rule); *Russell v. Empire Storage & Ice Co*., 59 S.W.2d 1061, 1066-67 (Mo. 1933) (determining that the creditor could offset the debtor's loan balance against damages that the debtor was claiming for the creditor's alleged conversion of the collateral). *Victory Hills Ltd. Partnership I v. NationsBank, N.A.*, 28 S.W.3d 322, 331-32 (Mo. App. W.D. 2000) (Missouri's "no notice - no deficiency" rule bars only an action for a deficiency; it does not extinguish the debt).

In addition, under Missouri law a creditor is entitled to an offset in the nature of recoupment against a class member even though its affirmative claim for a deficiency judgment may be barred:

> The federal authorities are split on the issue of whether a counterclaim for recoupment can be asserted after the statute of limitation has run. However, under Missouri law, the doctrine of recoupment -- whether called a counterclaim or an affirmative defense -- is solely a matter of defense. *Schroeder v. Prince Charles, Inc.*, 427 S.W.2d 414, 419 (Mo. 1968). It is not a method for obtaining affirmative relief, but "is available only to reduce or satisfy a plaintiff's claim and permits no affirmative judgment." *Id*. Under the Uniform Commercial Code, claims of recoupment are treated the same as defenses. Section 400.3–305, RSMo 2000.

Boone Nat. Sav. & Loan Ass'n, F.A. v. Crouch, 47 S.W.3d 371, 374 (Mo. 2001) (defense of offset or recoupment is available, even when an affirmative claim of the same sort is barred).

If recoupment were not available to GCAC, then Weatherspoon could not obtain any statutory damages or other damages as a matter of law, because she would then be obtaining a double recovery: cancellation of the remaining debt, plus an award of damages. This is not permitted by either Missouri common law or the UCC. "It is fundamental in our law that a plaintiff is entitled to one recovery for any wrong done to him." *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 87 (Mo. 1989); *U.J.S. Sec., Inc. v. Command Sec. Servs*., 101 S.W.3d 1, 17 (Mo. App. W.D. 2003) ("It is true that a party may pursue multiple theories of liability, however, a party may not recover duplicative damages for the same wrong. While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of double recovery, which is a species of unjust enrichment and is governed by the same principles of preventive justice,"); *Chrysler Fin. Co. v. Flynn*, 88 S.W.3d 142, 153 (Mo. App. S.D. 2002) ("Missouri has a rule against double compensation for the same injury.").

> Damages for violation of the requirements of this Article ... are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred … and principles of tort law supplement this subsection..... *However, to the extent that damages in tort compensate the debtor for the same loss dealt with by this Article, the debtor should be entitled to only one recovery.*"

UCC § 9-625. Official Comment 3 ("Damages for Noncompliance with This Article") (emphasis added) (citations omitted); *Carlund Corp. v. Crown Center Redevelopment*, 849 S.W.2d 647, 653 (Mo. App. W.D. 1993) ("[T]he UCC Comments … provide persuasive assistance in interpreting UCC provisions.").

Weatherspoon argued below, and the trial court apparently accepted, that mootness depends on impermissible merits determinations. But a dismissal for mootness is not a decision on the merits of a claim. It is a recognition that, assuming the plaintiff prevails on its claim, nothing will happen. *Ishmon v. St. Louis Bd. of Police Com'rs*, 415 S.W.3d 144, 149 (Mo. App. E.D. 2013) (noting that dismissal for mootness is distinct from dismissal "on the merits"). How an inquiry into mootness can be improper, when the court is charged on class certification with assessing whether the named plaintiff has an interest in the case, was unexplained.

As Weatherspoon can neither win nor lose, she has no actual stake in the outcome, her claims are moot, and she is ineligible to be class representative in this lawsuit. Moreover, as she is the only class representative, the trial court clearly erred and abused its discretion in granting certification. *Koehr v. Emmons*, 55 S.W.3d 859, 864 (Mo. App. E.D. 2001) (dismissing class action where sole representative had no live claim).

VII. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because the Court Abused its Discretion in Certifying Claims Against GCAC in that Weatherspoon, the Sole Class Representative, is Barred from Proceeding Here on All Claims Except the Right to Cure Notice Claim by the Preclusive Effect of the Unappealed Involuntary Dismissal of Her Claims During Her Participation as a Named Party in the Prior, *Deaver*, Class Action.

A. Standard of Review.

As more fully stated in the Standard of Review to Point I, which is incorporated herein, a class certification order is reviewed under an abuse of discretion standard. *Vandyne*, 242 S.W.3d at 697. "A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *McKeage*, 357 S.W.3d at 601. Legal errors are reviewed by this Court *de novo*. *Lucas*, 524 S.W.3d at 131.

B. Weatherspoon is Precluded from Bringing the Claims Here, Except for the Right to Cure Claims under Sections 408.554 and 408.555, Which Arguably were Expressly Reserved for Litigation Elsewhere in the *Deaver* Order of Dismissal.

In accordance with well-settled Missouri law, the prior involuntary dismissal of Weatherspoon's individual claims without prejudice in the *Deaver* case became a final, appealable order when Deaver voluntarily dismissed his own remaining claims – but not "the action" – without prejudice. *Stewart v. Liberty Mut. Fire Ins. Co.*, 349 S.W.3d 381, 384 (Mo. App. W.D. 2011) (a previously entered interlocutory order dismissing one count became a final judgment when the plaintiff voluntarily dismissed his remaining counts); *Williams v. Southern Union Co.*, 364 S.W.3d 228, 234 n.5 (Mo. App. W.D. 2011) (voluntary dismissal of remaining claims, but not the entire action, does not preserve the prior dismissed claims for relitigation in another action).

1. Weatherspoon was a named, individual party in the *Deaver* class action.

Weatherspoon was a named, individual party to the *Deaver* class action against GCAC, where she moved for leave to file, was granted leave to file and did file a counterclaim, had her counterclaim subsequently stricken for failure to obey the Court's

order, filed a motion to reconsider in her own name, which motion was denied, and was directed by the Court to file a joinder in Deaver's original counterclaim, which order she again failed to obey. She remained a party until class certification was denied and her co-plaintiff, Deaver, dismissed his claim.

Weatherspoon denies this or seeks to avoid its effect: "Plaintiff was not a party to *GCAC v. Deaver*, No. 11SL-AC28887-02 ("*Deaver*") when Deaver moved for class certification or voluntarily dismissed his case." (Answer at 2). Weatherspoon even suggests that she was never a party in *Deaver*: "Despite being granted leave to join the *Deaver* counterclaim as a named party, Weatherspoon didn't join." (Answer, ¶ 11). "The fact Weatherspoon was not a party to the *Deaver* case…." (Answer, ¶ 13) "Plaintiff Helena Weatherspoon was not a party to *Deaver*. She was not a party when Deaver moved for class certification. She was not a party when Deaver voluntarily dismissed his case." (Answer, at 9).

These assertions are incorrect. The record shows beyond dispute that Weatherspoon became a party when Deaver's motion to amend, seeking "to add an additional plaintiff" – Weatherspoon – was granted on March 16, 2014. (A264-66). On that day she became a party. *Matter of Adoption of E.N.C.*, 458 S.W.3d 387, 398 (Mo. App. E.D. 2014); *Wieners v. Doe*, 165 S.W.3d 520, 522 (Mo. App. S.D. 2005) ("In order to be a party, a person must either be named as a party in the original pleadings, or be later added as a party by appropriate trial court orders."). In her account of the Deaver proceedings (Answer, at cites above) Weatherspoon fails to give significance to the fact that the motion to add herself as a party *was granted*.

In 2014, after discovery, and in the middle of class certification briefing, Deaver, joined by Weatherspoon, filed a motion for leave to amend: (1) to permit Weatherspoon to intervene as an additional named class claimant, (2) to add to the UCC claim a claim for violation of the presale notice provisions of the Motor Vehicle Times Sales Act Vehicle Time Sales Act ("MVTSA"), R. S. Mo. ¶¶ 365.145 and 365.150.2 (which act expressly incorporates those same UCC provisions), and (3) to plead additional prayers for relief seeking the return of deficiency judgments, interest and collection charges. (A1020-22).

On March 6, 2014, the *Deaver* court granted this Proposed Amendment, based on the representation by Deaver's and Weatherspoon's counsel that the amendment involved only the pre-sale notices, and that granting it would cause no additional document discovery and only one additional deposition – that of Weatherspoon. (A1057) (Motion Hearing tr. 27:20 – 28:6). The Court also ordered Deaver and Weatherspoon to rewrite the Proposed Amendment, as the Court found its organization confusing. (A264-66).

Pursuant to the March 16, 2014 Court Order, on April 7, 2014 Weatherspoon and Deaver filed an amended counterclaim, naming each of them as individual claimants: "Counterclaimants David Deaver ("Deaver") and Helena Weatherspoon ("Weatherspoon"), by their attorneys . . . bring their first amended counterclaim." (A1023-42). A counterclaimant is, of course, a party.

This Counterclaim, however, also contained additional claims, for violation of Missouri statute sections 408.554 and 408.555, regulating a default (or "Right to Cure") notice, and additional prayers for relief based on them. These claims had not been previously

disclosed to the Court by Deaver and Weatherspoon and were not part of the Proposed Amendment that was to be rewritten.

GCAC moved to strike Deaver and Weatherspoon's purported amended counterclaim, contending that Deaver and Weatherspoon had presented a modest amendment with their Proposed Amendment, and then surreptitiously replacing it with a more extensive, unauthorized, amendment once their motion had been granted. (A1041-1049). On April 24, 2014, the *Deaver* court granted GCAC's motion, striking not only Deaver's and Weatherspoon's purported rewritten Amended Counterclaim, but also the previously permitted Proposed Amendment, leaving the original, 2012, Counterclaim (directed at the pre-sale notices and for UCC statutory damages only) as the operative pleading. (A1050).

That striking of Weatherspoon's pleading was certainly an involuntary dismissal, in an interlocutory order. *Williams v. Southern Union Co.*, 364 S.W.3d 228, 232 (Mo. App. W.D. 2011). If Weatherspoon contends she somehow stopped being a party upon that dismissal, then preclusion would equally apply to her unappealed involuntary dismissal from the *Deaver* case after *that* Order. *P.R. v. R.S.*, 950 S.W.2d 255, 257 (Mo. App. E.D. 1997) (circuit court's sanction order became final judgment when plaintiff voluntarily dismissed). Weatherspoon cannot escape the reality that she was a party to *Deaver*, and that certain consequences, outlined by the unchallenged Missouri law cited below, flow from that fact.[6]

[6] Weatherspoon suggests (Answer at 11-12) that her counterclaim was not stricken as a sanction. To be clear, GCAC moved to strike the Deaver-Weatherspoon counterclaim as a

Thereafter, on April 28, 2014 a Motion to Reconsider was filed by "Counterclaimants David Deaver ("Deaver") and Helena Weatherspoon ("Weatherspoon")." (A267-269) On the same date Deaver and Weatherspoon also filed in both their names a Motion to Shorten Time and a Notice of Hearing of that motion.

After hearing, Deaver's and Weatherspoon's motion to reconsider was denied in the main by the court (A270), except that the court agreed Weatherspoon was in the case:

> THE COURT: You've still got her claim. What's her name?
> MR. DAESCH: Helena Weatherspoon.
> THE COURT: Okay. Weatherspoon is there, but her claim is limited to the same claim as was alleged before [by Deaver].

(A1057, Hearing transcript, at 28:19-24). Weatherspoon was directed to file a joinder in Deaver's original counterclaim, as the counterclaim filed by her and naming her as counterclaimant had been stricken. (A270) That she – again – failed to obey a court order and subsequently did nothing does not erase her status as a party whose counterclaim was filed with leave and later dismissed.

A party remains a party unless and until dismissed out of the case. "A person is a party to the lawsuit until the plaintiff takes action to remove him from the lawsuit, *KAS Enterprises, Inc. v. City of St. Louis*, 121 S.W.3d 262, 264 (Mo. App. E.D. 2003), or until the circuit court makes a disposition regarding his status in the lawsuit." *Ameriquest Mortg.*

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sanction, for their playing "bait and switch" – seeking a modest amendment at the motion hearing and then filing "a greatly expanded Amended Counterclaim . . . different from the one approved by this Court at that hearing." (A1043). The *Deaver* Court granted this motion. (A1050). *Boulevard Bank v. Malott*, 397 S.W.3d 458, 462 (Mo. App. W.D. 2013) (where the court gave no reasons for its dismissal court will "presume that the trial court acted for the reasons stated in the motion to dismiss").

Co. v. Gehrig, 245 S.W.3d 239, 241 (Mo. App. W.D. 2007). This is a basic, bright-line rule, necessary in order to determine who has standing, who is subject to the court's jurisdiction, who is entitled to notice and to be heard, who has the right to appeal, who is liable for and bound by a judgment, etc. There is no rule or recognized principle by which a party can cease to be a party except by a dismissal out of the case. A party cannot "fade away" out of a case. To be permitted to do so would also make a nonsense of 514.170, providing for the mandatory assessment of costs upon the dismissal of a plaintiff's suit, and of Missouri Supreme Court Rule 67.02, prohibiting voluntary dismissal a second time without court order and payment of costs.

Thereafter Weatherspoon took no action, but never dismissed herself out of the *Deaver* case. (On May 14, 2014, Weatherspoon filed the instant action in this Court, purporting to reassert here all the claims in the *Deaver* lawsuit, including those additional claims stricken by the *Deaver* Court. (A1059-73). GCAC filed a motion to abate this case, seeking to dismiss (without prejudice), or in the alternative to stay, Weatherspoon's duplicative claims, on the grounds of the pendency of the prior-filed *Deaver* action. (A1074-76). On August 27, 2014, the Respondent court's predecessor, Judge Cohen, granted that motion in part: "To the extent that this lawsuit contains a claim now pending in Division 38 [the *Deaver* case] that claim will be dismissed as duplicative to pending litigation. (A1077-78). The instant case then lay inactive for years while *Deaver* continued. Eventually, Weatherspoon was allowed to proceed here, subject to all defenses and arguments GCAC might have based on her participation in *Deaver*. (A1172-73).

The *Deaver* litigation continued. After fact and expert discovery and extensive briefing, a two-day evidentiary hearing on the class certification motion in *Deaver* was held on March 28 and 29, 2016. (A334-86). Post-hearing briefs were filed by the parties simultaneously, on April 12. 2016. Three weeks later the circuit court entered its order denying class certification in its entirety, on May 3, 2016. (A1079).

After briefing, on June 9, 2016, the Missouri Court of Appeals, Eastern Division denied plaintiffs' petition for permission to appeal the denial of class certification. (A1080). On August 23, 2016, after briefing the Missouri Supreme Court denied the plaintiffs' petition for a writ of prohibition seeking reversal of the denial of class certification. (A1081).

Thereafter, plaintiffs' counsel voluntarily dismissed the only remaining claim, Deaver's own individual counterclaim, without prejudice: "Counterclaimant David Deaver dismisses his counterclaim without prejudice." (A1082).

Weatherspoon was, and remained, a party in the *Deaver* case until the day that case was closed, when Deaver voluntarily dismissed his own counterclaim. (A1082) She did not – because a party cannot – somehow "fade away" out of the case through inaction.

2. The involuntary dismissal of Weatherspoon's individual claims in the *Deaver* case became a final, appealable order when Deaver subsequently voluntarily dismissed his own claims, but not "the action."

Weatherspoon contends that a dismissal of her claims *with prejudice* in the *Deaver* action was required for the application of *res judicata* here. This is incorrect, as explained by this Court.

> Rule 67.01 provides that a dismissal "without prejudice"—the order granted by the trial court when the Kestermans moved for voluntarily dismissal of the portion of their action based on the "phantom driver"—allows the dismissing party "to bring another civil action for the same cause, unless the civil action is otherwise barred." Notwithstanding a dismissal "without prejudice," the common law doctrine of claim preclusion may present an instance where the civil action is "otherwise barred."

Kesterson v. State Farm Fire & Cas. Co., 242 S.W.3d 712, 716 (Mo. banc 2008).

Weatherspoon's claim is "otherwise barred" by the common law doctrine of claim preclusion, which provides that an involuntary dismissal of one claim without prejudice will bar the reassertion of that claim if, after that dismissal, the plaintiff(s) voluntarily dismiss the remaining claims without prejudice. This is a black letter tenet of Missouri law enunciated in case after case. *E.g.*, *Stewart v. Liberty Mut. Fire Ins. Co.*, 349 S.W.3d 381, 384 (Mo. App. W.D. 2011) (a previously entered partial summary judgment on one count became a final judgment when the plaintiff voluntarily dismissed his remaining counts); *Magee v. Blue Ridge Prof'l Bldg. Co., Inc.*, 821 S.W.2d 839, 842 (Mo. banc 1991) (interlocutory order dismissing plaintiff's claim against one party for failure to state a claim became a final judgment when plaintiff voluntary dismissed without prejudice claims against the remaining the remaining parties); *Bailey v. Innovative Management & Inv., Inc.*, 890 S.W.2d 648, 649-50 (Mo. banc 1994) (same); *Mattes v. Black & Veatch*, 828 S.W.2d 903, 906 n. 4 (Mo. App. W.D. 1992) (summary judgment granted to one defendant; claims against other defendants dismissed without prejudice; final judgment exists); *Partney v. Reed*, 839 S.W.2d 694 (Mo. App. S.D. 1992) (same).

This rule does not apply only where the plaintiff voluntarily dismisses the entire action, rather than just the remaining claim(s). Whether the plaintiff has done so is

determined by examining the language used in the voluntary dismissal. "[I]n determining the preclusive effect of a voluntary dismissal, courts must examine whether the voluntary dismissal was of the entire action following the court's adverse ruling or whether the voluntary dismissal was of the remaining claims following the court's adverse ruling." *Williams v. Southern Union Co.*, 364 S.W.3d 228, 234 n.5 (Mo. App. W.D. 2011) ("The language of Williams's voluntary dismissal leaves no doubt as to [her] intent to 'dismiss this action without prejudice.' There is no mention of specific individual counts or claims, only the action as a whole. Thus, Williams's voluntary dismissal was to the action as a whole."); *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. App. S.D. 2009) (same).

By contrast, here Deaver's dismissal was not of the whole action, but only of his counterclaim: "David Deaver dismisses his counterclaim without prejudice." (Deaver's dismissal, Ex. J CITE). Therefore the rule does apply, and Deaver's dismissal of his own claims made the prior, interlocutory dismissal of Weatherspoon's claims a final order.

The scenario outlined in these cases is precisely what happened in *Deaver*. Weatherspoon suffered the involuntary dismissal of her claims, following which Deaver voluntarily dismissed his own remaining claim – but not "the action" -- making the earlier dismissal of Weatherspoon's claims a final order. Weatherspoon never appealed from that final order. She is precluded by *res judicata* and the final judgment rule from relitigating the UCC and MVTSA claims based on the pre-sale notice here.

The only claim by Weatherspoon not barred by claim preclusion is her Right to Cure Notice claim under sections 408.554 and 408.555, because the right to maintain a second action on that claim alone was arguably "expressly reserved" by words appearing in the

Deaver Court's Order of May 1, 2014, denying her motion to reconsider the striking of her pleading, which words expressly identify: "R.S. Mo. 408 for damages relating to Right to Cure Notices." (A270). "One such exception [to the doctrine of claim preclusion] exists when the court in the first action has expressly reserved the plaintiff's right to maintain the second action." *Kesterson*, 242 S.W.3d at 717. The reservation must be "expressed in the judgment itself." *Id.*

By her participation as a party in *Deaver*, Weatherspoon is precluded from bringing all of the claims she asserts here, except for the Right to Cure Notice claims under 408.554 and 408.555.

VIII. Relator Is Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Order Granting Plaintiff's Motion for Class Certification, and Directing Respondent to Deny Said Motion, Because Class Certification Based on Erroneous Rulings and Dubious Legal Theories for an Overbroad Class Involves Multiple Abuses of Discretion that Will Unfairly Pressure Relator to Settle Without Regard to the Merits of the Case.

An order making the preliminary writ of prohibition permanent is warranted because class certification was based on a series of clearly erroneous rulings in which the trial court abused its discretion. In addition, the cumulative effect of these rulings is to impose a "mirror-image of the death knell" situation: "grant of class status" puts "substantial pressure on the defendant to settle without regard to the merits of the case." No legal relief is available.

The policy behind early review of class certification orders is instructive. The words of Rule 52.08(f) echo almost verbatim those establishing interlocutory review of class certification under Federal Rule 23(f), which was amended in 1998 to permit such review. "[S]everal concerns justify expansion of present opportunities to appeal…. An order granting certification …may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues." Comment to Rule 23(f).

Cases under Rule 23(f) describe this "mirror image of the death-knell situation," where class certification based on erroneous rulings or an untested and dubious legal theory for an unduly large class will likely extract a settlement without regard to the merits of the case. *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98, 102 (D.C. Cir. 2002) (granting interlocutory appeal because "the grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (interlocutory review should be granted where there is "considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."). These cases recognize that the "'greater the likelihood that it will escape effective disposition at the end of the case,' the more appropriate the appeal." *In re Lorazepam*, 289 F.3d at 103 (quoting Blair, at *id.*). As the U.S. Supreme Court noted earlier this year: "class actions can enhance enforcement by spreading the costs of litigation, it's also well known that they can unfairly place pressure

on the defendant to settle even unmeritorious claims." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (citations omitted).

This Court has also understood the problem:

> The impact of certification of a lawsuit as a class action is readily apparent…. The potential increase in exposure to the defendant and the additional increase in the burden and cost of litigation to all parties may well overwhelm the substantive merits of the dispute.

Beatty v. Metro St. Louis Sewer District, 914 S.W.2d 791, 794-95 (Mo. banc 1995).

By virtue of the trial court's clearly erroneous rulings discussed above, the "mirror image of a death knell" exists here. GCAC is being sued by a class, the vast majority of which have already had their claims against GCAC extinguished in state or federal court; GCAC is being sued for Right to Cure Notices when it sent no such notices and is the wrong defendant; GCAC is being sued under a baseless interest theory that makes all the compliant Pre-Sale and Post-Sale Notices it sent violate Missouri law and the UCC, even if the notices follow the forms promulgated by GCAC's statutory regulator, the Missouri Division of Finance; and GCAC is being sued, for the second time, by a class representative without any live claims or prospect of recovery, and who is precluded from proceeding here by her unappealed dismissal in the *Deaver* case.

The court below has approved a form of Class Notice, and the erroneously certified class action will proceed, with thousands of putative class members being made parties upon notice and a failure to opt out, unless the Preliminary Writ of Prohibition issued by this Court is made permanent.

As shown above and in GCAC's Writ Petition and accompanying Suggestions, under this Court's precedents the issuance of a permanent writ of prohibition is warranted. While the decision is entirely within this Court's discretion, this Court previously has found that making a Preliminary Writ of Prohibition permanent has been warranted where a certified class is overbroad, and contains large numbers of persons without injury or a claim, *Nixon*, at 249 S.W.3d at 862, 864; where the trial court has certified a class by making an erroneous application of law, *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 599-601 (Mo. banc 2012); where the court below has misapplied the statute of limitations, *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 584 (Mo. banc 2018); or where the errors below are such that it is "fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation." *State ex rel. Church & Dwight Co., Inc. v. Collins*, 543 S.W.3d 22, 25-6 (Mo. banc 2018). In addition, "[a]n attempt to exercise jurisdiction in a case barred under the doctrine of *res judicata* is subject to restraint by means of a writ of prohibition." *State ex rel. Shea v. Bossola*, 827 S.W.2d 722, 724 (Mo. App. E.D. 1992). As shown above, the trial court made erroneous rulings constituting an abuse of discretion in each of these ways.

CONCLUSION

For the reasons set forth above, Relator General Credit Acceptance Company LLC Company respectfully requests this Court to make permanent the Preliminary Writ of Prohibition prohibiting Respondent from doing anything other than vacating his order of March 12, 2018 granting Plaintiff's motion for class certification, and directing Respondent to deny said motion.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06(c)

I, Timothy J. Wolf, an attorney, hereby certify that the foregoing brief contains the information required by Rule 55.03 and complies with the limitations contained in Mo. Sup. Ct. R. 84.06(b).

Relator's Brief contains 28,245 words.

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. GENERAL CREDIT ACCEPTANCE COMPANY, LLC,	)	
RELATOR,	)	
v.	)	NO. SC 97175
THE HONORABLE DAVID L. VINCENT III, CIRCUIT JUDGE, DIVISION 9, CIRCUIT COURT, TWENTY-FIRST JUDICIAL CIRCUIT ST. LOUIS COUNTY, MISSOURI,	)	
RESPONDENT.	)	

PROOF OF SERVICE

The undersigned, certifies that copies of the:

1. Brief of Relator;
2. Appendix of Relator; and
3. This Proof of Service.

were served via the Court's electronic filing system, to be served upon all attorneys of record and via electronic mail to the following:

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